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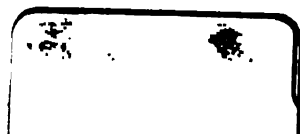
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THE
LAW JOURNAL REPORTS

FOR
THE YEAR 1882:

COMPRISING
REPORTS OF CASES

IN
The House of Lords and in the Privy Council,
IN
**The Court of Appeal, the Court for Crown Cases Reserved,
and the Court of Bankruptcy;**

AND IN
THE HIGH COURT OF JUSTICE

VIZ.
**Chancery; Queen's Bench; and Probate, Divorce and
Admiralty, Divisions.**

MICHAELMAS 1881 TO MICHAELMAS 1882.

The Appellate Cases, in the House of Lords, and in the Court of Appeal, are with the Reports of Cases in the respective Divisions and Courts from which the Appeals come. These Cases form five distinct Volumes, having separate Indexes of Subjects and Tables of Cases; viz., the Privy Council Volume; the Chancery and Bankruptcy Volume; the Queen's Bench or Common Law Volumes; the Probate, Divorces and Admiralty Volume; and the Magistrates' Cases.

THE CASES RELATING TO THE POOR LAW, THE CRIMINAL LAW, AND OTHER SUBJECTS CHIEFLY CONNECTED WITH THE DUTIES AND OFFICE OF MAGISTRATES, ARE SEPARATELY ARRANGED, AND FORM A DISTINCT VOLUME OF REPORTS, VIZ. THE MAGISTRATES' CASES.

THE PRIVY COUNCIL CASES HAVE THEIR OWN INDEX AND TABLE OF CASES, AND FORM A DISTINCT VOLUME OF REPORTS.

THE REPORTS ARE EDITED BY
**MONTAGU CHAMBERS, Esq., ONE OF HER MAJESTY'S COUNSEL,
FREDERICK HOARE COLT, Esq.,**
AND
JOHN GEORGE WITT, Esq., BARRISTERS-AT-LAW.



QUEEN'S BENCH DIVISION, VOL. LI.

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MDCCCLXXXII.

CASES
ARGUED AND DETERMINED
IN THE
Queen's Bench Division
OF THE
HIGH COURT OF JUSTICE,

REPORTED BY
W. DECIMUS I. FOULKES, J. H. ETHERINGTON SMITH,
GILBERT GEORGE KENNEDY, RICHARD HOLMDEN AMPHLETT,
FRANCIS PARKER AND EDWARD BENNETT CALVERT,
BARRISTERS-AT-LAW;

AND ON APPEAL THEREFROM

IN
Her Majesty's Court of Appeal,

REPORTED BY
ARTHUR CLEMENT EDDIS, H. LACY FRASER,
ROBERT BRUCE RUSSELL AND WILLIAM EDWARD GORDON,
BARRISTERS-AT-LAW,



AND IN
The House of Lords,

REPORTED BY
LIONEL LANCELOT SHADWELL,
BARRISTER-AT-LAW.

MICHAELMAS 1861 to MICHAELMAS 1882.

SUPREME COURT OF JUDICATURE.

CASES ARGUED AND DETERMINED

IN

The Queen's Bench Division

OF

THE HIGH COURT OF JUSTICE,

AND ON APPEAL THEREFROM

IN THE

COURT OF APPEAL AND HOUSE OF LORDS.

LAW JOURNAL REPORTS, VOL. LI.

MICHAELMAS, 1881, to MICHAELMAS, 1882.

45 *Victoria*.

[IN THE COURT OF APPEAL.]

1881. }
Nov. 12, 14. } **CLARKE v. BRADLAUGH.***

Writ of Summons—Issue of, not a Judicial Act—Time from which it dates—Fractions of Day—Parliamentary Oaths Act, 1866 (29 Vict. c. 19)—Promissory Oaths Act, 1868 (31 & 32 Vict. c. 72)—Statute Law Revision Act, 1875 (38 & 39 Vict. c. 66).

The issuing of a writ of summons is not a judicial act, but an act of the party, and the Courts can therefore enquire into the time of day at which it was issued.

A statement of claim alleged that the cause of action accrued on the 2nd of July and before the issuing of the writ, which as a fact was issued the same day:—

Held, that the doctrine that a writ being a judicial act must be taken to date from the earliest moment of the day, and therefore to have been issued before the cause of action accrued, did not apply to a writ of summons, and that the plaintiff was entitled to shew that the cause of action accrued before the issuing of the writ.

* *Coram* Lord Coleridge, C.J.; Baggallay, L.J.; and Brett, L.J.

VOL. 51.—Q.B.

By the Promissory Oaths Act, 1868 (31 & 32 Vict. c. 72), s. 8, the oath of allegiance prescribed by that Act is substituted for the oath prescribed by the Parliamentary Oaths Act, 1866 (29 Vict. c. 19), s. 1, but "all the provisions of the said Act shall apply to the oath substituted by this section, in the same manner as if the form of oath were actually inserted" in the said Act "in the place of the oath for which it is substituted." The Statute Law Revision Act, 1875 (38 & 39 Vict. c. 66), s. 1 and schedule, repealed section 1 of the Act of 1866, "as to the form of oath thereby prescribed":—Held, first, that the oath prescribed by the Act of 1868 was substituted for the oath prescribed by the Act of 1866, and that all the penalties imposed by the Act of 1866 applied to the oath so substituted; secondly, that the operation of the Act of 1868 was not affected by the Act of 1875.

Appeal from a judgment of the Queen's Bench Division (reported 50 Law J. Rep. Q.B. 678), overruling a demurrer to a re-amended statement of claim.

The statement of claim alleged that the defendant, who was a member of the

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House of Commons for the borough of Northampton, on the 2nd day of July, 1880, and before the issuing of the writ in this action, but on the same day, sat and voted in the House of Commons after the Speaker had been chosen, without having made and subscribed the oath appointed to be taken by members of the House of Commons, according to the Parliamentary Oaths Act, 1866, as altered by the Promissory Oaths Act, 1868. The plaintiff sued the defendant for the sum of 500*l*.

Demurrer thereto, on the ground that the statement disclosed no cause of action, inasmuch as it alleged that the defendant sat and voted in the House of Commons on the day on which the writ was issued, and upon other grounds sufficient in law to sustain the demurrer.

The *Defendant*, in person, in support of the demurrer.—The vote in respect of which this action is brought was given on the same day as that on which the writ of summons was issued. The issuing the writ was a judicial act, and judicial acts date back to the earliest hour of the day on which they are done, so that this writ was issued before the cause of action arose. A writ is not issued for the purpose of keeping a person within the jurisdiction of the Court, in this respect differing from a criminal warrant; consequently, no injustice can result from a strict application of a recognised principle of law, which in a penal action ought to be construed strictly in favour of the defendant. Unless *Wright v. Mills* (1) and *The Queen v. Edwards* (2) are to be overruled, the doctrine which is clearly laid down as applying to writs of execution must be held to apply to all writs. All writs are now issued under the Judicature Acts. By Order II. rule 1 of the Rules of Court, 1875, "every action in the High Court shall be commenced by a writ of summons," and by rule 3, "the writ of summons for the commencement of an action" shall be in a given form. It is thus clear that the writ begins the action. By rule 4

no writ of summons for service out of the jurisdiction is to be issued without the leave of a Court or Judge, so that the Court has power over a writ before it is issued.

[LORD COLERIDGE, C.J.—Only over a certain class of writs which could not be issued at all but for certain enabling statutes.]

Before the Uniformity of Process Act (2 Will. 4. c. 39) actions were not begun by writs; but since that time the form of a writ shews that the Court actually issues it (3). This presupposes a power to withhold and supervise; for it is the act of the Court, and not the act of the party. There is a marked distinction between a writ with the command of the sovereign, the *teste* of the Lord Chancellor, the seal of the Court or division, and the issuing by an appointed officer, and between a statement of claim; for the latter requires no concurrence of the Court, whereas the former does. In *Bacon's Abridgment* (4) it is stated that before the division of the Courts, the Court of Chancery issued all original writs, and that all writs were issued by the authority of the Chancellor. In *Wharton's Law Lexicon* (p. 1026) a writ is said to be a judicial process; and judicial writs are defined as writs issuing from the Court, and are distinguished from original writs issued from Chancery (5). The cases of *Lord Porchester v. Petrie* (6) and *Combe v. Pitt* (7) are not in point, for they were decided at a time when an action was commenced by a bill which preceded the *latitat*. This has been altered by 2 Will. 4. c. 39; and *Alston v. Underhill* (8) shews that what was formerly the act of the party has become the act of the Court.

[LORD COLERIDGE, C.J.—*Lord Porchester's Case* (6) shews there is a distinction between writs of execution and writs sued out by a party. Blackstone, in his *Commentaries* (9) says that all original writs are issued *ex debito justitiæ*; and in *Jacob's Law Dictionary* (tit. "Writ") it is stated that writs in civil actions are either original or judicial.]

(3) 3 Broom and Hadley's Commentaries, 311.

(4) Vol. ii. (ed. 7), 448.

(5) Wharton's Law Lexicon, 511.

(6) 3 Dougl. 261, 273.

(7) 3 Burr. 1423.

(8) 1 Cr. & M. 492.

(9) Vol. iii. p. 49.

(1) 4 Hurl. & N. 488; 28 Law J. Rep. Exch. 223.

(2) 9 Exch. Rep. 32, 628; 23 Law J. Rep. Exch. 42, 165.

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All writs, whether original or judicial, had their authority from Acts of Parliament (10), and a distinction is clearly drawn by statute between the act of the party and the process of the Court (11). The Common Law Procedure Act, 1852 (12), for instance, directed all writs in personal actions to be issued by the officer of the Court, and by section 6 every writ was to be indorsed in a particular way by the attorney in whose name it was taken out.

Under the Judicature Acts a writ can only be issued against a party who is out of the jurisdiction by the leave of the Court or a Judge, and this is the act of the Court—see the language of Kelly, C.B., in *Westman v. Aktiebolaget Ekman's Mekaniska Snickerifabrik* (13). But the issuing of a writ is none the less the act of the Court, because a party is entitled by statute to have it issued. The old practice as to procedure in a common recovery required that it should be commenced by taking out an original writ, otherwise it was a nullity (14); and these writs were not only issued and sealed by the officers of the Court, but were actually prepared by the Masters of the Court, and were therefore the acts of the Court.

He also referred to *Shelley's Case* (15), *Estwicke v. Cooke* (16), *Castrique v. Bernabo* (17), *Danson v. Le Capelain* (18), *Storr v. Bowles* (19), *Finnie v. Montague* (20), *Co. Lit.* s. 300 (191a), *Pye v. Coke* (21).

Further, this is an action to recover a penalty for not taking the oath appointed by the Parliamentary Oaths Act, 1866 (29 Vict. c. 19), as altered by the Promissory Oaths Act, 1868 (31 & 32 Vict. c. 72).

(10) *Co. Lit.* s. 67 (54b), s. 101 (73b); 27 Hen. 8. c. 24. s. 3.

(11) 13 Car. 2. st. 2. c. 2. s. 2.

(12) 15 & 16 Vict. c. 76. ss. 1-5 inclusive.

(13) 45 Law J. Rep. Exch. 327; Law Rep. 2 Ex. D. 237.

(14) *Co. Lit.* s. 183 (121a).

(15) 1 Rep. 93; Moo. 136.

(16) 2 Ld. Raym. 1557.

(17) 6 Q.B. Rep. 498; 14 Law J. Rep. Q.B. 3.

(18) 7 Exch. Rep. 667; 21 Law J. Rep. Exch. 219.

(19) 4 B. & Ad. 112.

(20) 5 Ibid. 877.

(21) Moo. 864; Hob. 128.

The Act of 1868 gives in section 2 a form of oath to be taken, and in section 8 provides that that oath shall be subject to all the provisions of the Act of 1866 as though it were actually inserted in that Act. The Statute Law Revision Act, 1875 (38 & 39 Vict. c. 66), repeals the Act of 1866 in part, namely, section 1 as to the form of oath thereby prescribed, so that the form from the Act of 1868, which has been inserted into the Act of 1866, is now repealed. The Act of 1868 contains no provisions as to penalties, and this action for a penalty therefore fails.

Sir H. Giffard, Q.C., and *Kydd*, for the plaintiff.—The technical rule contended for by the defendant applies only to judicial acts in the strict sense of the term, and it is clearly laid down in all the cases that, where justice and truth require it, the Courts will enquire into the real facts. Original and judicial writs, moreover, are not identical, and the statutes draw a distinction between them; nor is the issuing of an original writ a judicial act within the meaning of the rule. In *The Queen v. Edwards* (2) the doctrine that judicial acts are to be taken always to date from the earliest minute of the day in which they are done was applied by Coleridge, J., to a writ of extent, which, like a judgment, is the act of the Court. In *Shelley's Case* (15), where a party who suffered a recovery died early in the morning before judgment was given, it was held the recovery was well suffered, "because the record is to be understood of the whole day, and relates without division to the first instant of the day."

The question both in *Combe v. Pitt* (7) and *Lord Porchester v. Petris* (6) was the priority of the commencement of the suit which is the act of the party, and not the priority of a judgment which is the act of the Court. In the former case Lord Mansfield said that though the law does not in general allow of it, yet fractions of a day or the very hour may be shewn where it is necessary to do so. Where, however, the fiction of law relied on by the defendant tends to justice the Courts will uphold it—*Shelley's Case* (15) and *Wright v. Mills* (1). In the present case the issuing of the writ is clearly the act of the party, and not a judicial act in the

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sense in which that term is used in the authorities on the subject—see also *Johnson v. Smith* (22).

The point as to the effect of the Statute Law Revision Act, 1875, upon the Parliamentary Oaths Act, 1866, and the Promissory Oaths Act, 1868, was not argued.

The Defendant replied.

LORD COLERIDGE, C.J.—I am of opinion that this demurrer must be overruled and that the judgment of the Court below is correct. The defendant has contended that, according to certain principles of law, for which he has cited several authorities, it is an inflexible rule of law that no enquiry can be made as to fractions or portions of a day; that all writs, being judicial acts and acts of the Court, must be considered to have been issued at the first moment of the day on which they are taken out; that this writ is such a writ, and that, although the statement of claim alleges the writ to have been issued at a time of day subsequent to that at which the act for which this action is brought took place, yet it is plain that the voting in respect of which a penalty is sought to be recovered must, according to that rule, have been after the writ was issued, and consequently the writ was issued before the cause of action arose and before any penalty was incurred by the defendant. That is the first point, and the one on which the judgment of the Court below was taken. I am of opinion, regard being had to the authorities and the reasons there given, that a distinction has, from the very beginning, been taken between the various writs issued to commence an action and those issued after an action has been commenced. This distinction is as old and has the same authority as the rule itself. It is not necessary to give any opinion whether the Courts would, if it were necessary to do so, enquire in the case of judicial writs as to which of them has priority, but there are certain passages in the judgments of Lord Mansfield which shew that the Courts would so enquire—*Pye v. Coke* (21). The ground on which I desire to put my judgment is that from the earliest times a distinction has been taken between writs issued for the purpose of commencing an

(22) 2 Burr. 950.

action and writs issued after an action has been commenced. The passage in Jacob's *Law Dictionary* to which I directed the attention of the defendant, lays down that "the writs in civil actions are either original or judicial: original writs are issued in the Court of Chancery, for the summoning a defendant to appear, and are granted before the suit is begun, to begin the same; and judicial writs issue out of the Court where the original writ is returned, after the suit is begun." I find the same distinction taken in *Co. Lit.* s. 101 (73b), where almost the same words are used. I also find that Lord Mansfield draws a distinction in his judgments in respect of the power to enquire between original and judicial writs, and especially in *Lord Porchester's Case* (6), where he says the question, in all the cases cited, "was the priority of the commencement of the suit which is the act of the party, while the judgment is the act of the Court;" and he lays down in an earlier part of the case, by way of interpolation, that as a general rule fractions of a day cannot be enquired into in the case of acts of the Court. That is the rule laid down by the Judges and text-books of great authority, but it has invariably received this qualification, that the Courts will enquire into the time at which acts of the party have been done. In my opinion, the issuing of the writ in this case was the act of the party. It is in the same position with regard to a suit in the High Court of Justice as was a writ in the days of Lord Mansfield. The Uniformity of Process Act (2 Will. 4. c. 39) did away with the various kinds of writs which had to be issued in the different Courts according as such Courts had jurisdiction over the subject-matter, and provided one writ of summons for the commencement of an action. Now, by the Judicature Acts every action is to be commenced by a writ of summons, and it was admitted by the defendant that prior to the issuing of the writ the Court had no jurisdiction over the parties, and could not itself issue a writ. The issuing of the writ is therefore both in point of fact and law the act of the party, and the rules relating to ancient writs are applicable to a writ of summons. The Court can therefore enquire into parts of a day to see at what time it was issued.

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The second point taken by the defendant is founded upon particular expressions in three Acts of Parliament. The Parliamentary Oaths Act, 1866, prescribed a form of oath to be taken by members of Parliament on taking their seat in the House of Commons, and also attached certain penalties for voting without having taken that oath. The Promissory Oaths Act, 1868, s. 8, altered this form of oath and substituted another in this way: "The form of the oath of allegiance provided by this Act shall be deemed to be substituted . . . in the case of the Parliamentary Oaths Act, 1866, for the form of the oath thereby prescribed to be taken and subscribed by members of Parliament on taking their seats; and all the provisions of the said Act shall apply to the oath substituted by this section in the same manner as if that form of oath were actually inserted . . . in the said Act in the place of the oath for which it is substituted." The section is not very happily expressed, but the substance and sense of it is that the form of words prescribed by the Act of 1868 is to be substituted for the form given by the Act of 1866, but that all the provisions of the Act of 1866 relating to penalties are to be applied to the oath prescribed by the Act of 1868. If that be the true construction of these Acts, the argument of the defendant fails, because the Statute Law Revision Act, 1875, has merely repealed the section of the Act of 1866 which contains the form of oath, but it has left untouched the words of the Act of 1868, which substituted a new form of oath and attached to that oath all the penalties contained in the Act of 1866. It seems to me that on neither of these two grounds can the defendant succeed on this appeal. The demurrer must therefore be overruled, and the judgment of the Court below must be affirmed.

BAGGALLAY, L.J.—I am of the same opinion. The statement of claim alleged that the defendant, before the writ was issued, but on the same day, sat and voted in the House of Commons without having taken the oath, and upon demurrer the facts so alleged must be taken to be admitted. We are asked, however, to hold that, notwithstanding

such statement, the contrary is to be assumed because of a rule of law that the writ was issued at the earliest moment of the day, and therefore before the cause of action accrued. A variety of cases have been cited, but it is not necessary to revert to them in detail, because they establish that as a general rule judicial acts are referred to the earliest moment of the day on which the particular act has been done. But this rule of law has been relaxed in the case of acts of the party. In the present case I am affected by the judgment of Lord Mansfield in *Combe v. Pitt* (7). There, to an action to recover a penalty for bribery the defendant pleaded in abatement that another bill had been exhibited against him in the same term and for the same cause; but the plea was held to be bad, and Lord Mansfield at the close of his judgment (p. 1434) said, "A case was cited—*Pye v. Coke* (21)—to prove that where two informations are exhibited on the same day the defendant needs not to answer either, and Mr. Yates seemed to concede that if both were in fact brought upon the very same day one might be pleaded to the other. But though the law does not in general allow of the fraction of a day, yet it admits it in cases where it is necessary to distinguish. And I do not see why the very hour may not be so too where it is necessary and can be done; for it is not like a mathematical point which cannot be divided. . . . Upon the whole, we think the plea bad on the authority of the two cases in *Levinz and Strange*." The first of those two cases was *Hutchinson v. Thomas* (23), in which the defendant pleaded to an information for usury that the same term another person had exhibited an information for the same usury and had obtained judgment against him. The informer demurred and had judgment, "for both informations as there pleaded refer to the first instant of the same term, but if another information was exhibited before this same term he should have pleaded that this information was exhibited such a day of the term, and that at another day before and in the same term another information was exhibited and judgment thereupon obtained." The

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other case of *Jackson v. Gisleng* (24) was exactly the same. The Courts will therefore, where necessary for the administration of justice, consider at what time an act was done. I cannot see any distinction between those cases and the present one.

As regards the second point, the effect of the Act of 1868 seems to be to give a new form of oath and to apply to that oath all the penalties imposed by the Act of 1866. But the mere fact that section 1 of the Act of 1866, which has already been repealed, is again repealed by the Act of 1875 does not affect the operation of the Act of 1868. I am of opinion that this demurrer must be overruled.

BRETT, L.J.—The argument on the part of the defendant is that the Court will not for any purpose enquire at what time the writ was issued, because it was said that the issuing of the writ was an act of the Court, and therefore within the rule of law as to judicial acts. It was admitted that the rule, as laid down in *The Queen v. Edwards* (2) may be stated thus: that the Court will enquire at what time an act was done if it is the act of the party, but that it will not do so where it is a judicial act; and that rule must be followed. But one question here is whether the issuing of a writ of summons is an act of the party within the meaning of that rule. The case of *Combe v. Pitt* (7) was cited in support of that doctrine, which, to my mind, is not applicable to the present case. There, two actions were commenced in the same term to recover a penalty for bribery, but inasmuch as the penalty could only be recovered by the person who first issued the writ, it became necessary to enquire which of the two had done so first. The question here is not as to which of two acts was done first, but as to the time of day at which a particular act was done. The issuing of the writ of summons is undoubtedly the act of the Court, but is it a judicial act within the rule already referred to? With regard to the rule itself I know of no principle of ethics upon which it can be founded. It is an artificial rule which has, for many years, been declared

to be part of the common law of England as to procedure, and it must be accepted as at first declared. A distinction has been taken between acts of the party and acts of the Court, and the question is whether those who declared the rule have said that the issuing of the writ of summons is the act of the party or the act of the Court. It seems to me that from the very beginning it has been declared to be the act of the party. The reason why is not far to see. The writ by which an action is commenced can only be issued on the application of the party, and on such application it cannot be refused; it is quite within the control of the party, and the Court has nothing to do with it. The passage cited from Jacob's *Law Dictionary* draws a distinction between original and judicial writs, and contains a positive declaration that an original writ is not a judicial writ, and that the original writ is granted before the suit is begun to begin the same.

In *Lord Porchester's Case* (6), in which Lord Mansfield said that the cases there cited were not applicable, the question was the priority of the commencement of the suit which is the act of the party, and that statement is applicable to the present writ of summons. The writ of summons which has been substituted for original writs is within the rule laid down by Lord Mansfield. I think therefore that we can enquire into the time of day at which it was issued.

Next as to the point upon the statute. It is an ingenious one, and comes to this, that the Act of 1866 gave a form of oath and contained a section which said that anybody who voted before taking such oath should be subject to a penalty; that the Act of 1868 got rid of the oath in the Act of 1866 and substituted another form which is to be read into the Act of 1866, and that the Legislature, having repealed the section of the Act of 1866 as to the form of oath, has therefore repealed the oath which was read into that section.

I think that this argument, which has obtained some colour from the unusual way in which the Act of 1868 has been drawn, fails both in substance and in form. It cannot be contended that the Act of 1866 stands and that the Act of 1868

(24) 2 Strange, 1169.

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would grammatically preserve the application of the penalty sections to the oath prescribed in the Act of 1866; but it is admitted that the oath prescribed by the Act of 1868 stands, and then section 8 of that Act says that "all the provisions of the said Act shall apply to the oath . . . substituted by this section in the same manner as if that form of oath was actually inserted in each of the said Acts in the place of the oath for which it is substituted." It is a rule of law that the repeal of a former Act does not of itself repeal provisions which have been incorporated into a subsequent Act, and it is the Act of 1868 and not the Act of 1866 which ought to have been repealed. But section 1 of the Act of 1866 is repealed by the Act of 1868; and then comes this work of supererogation, namely, the Act of 1875 repeals that section as to the form of oath thereby prescribed—that is, the form of oath prescribed by the Act of 1866. I think it was unnecessary to repeal that section, for that had been done already by the Act of 1868; but the operation of the Act of 1868 is not affected by this subsequent repeal. The judgment of the Divisional Court ought therefore to be affirmed, but not upon quite the same line of argument as that used in the Court below.

Appeal dismissed.

Solicitors—W. G. Stuart, for plaintiff; Lewis & Lewis, for defendant.

[IN THE COURT OF APPEAL.]

1881. }
Nov. 17. } MORTON v. PALMER.*

Lodger or Under-tenant—Lodgers' Protection Act, 1871 (34 & 35 Vict. c. 79).

To constitute a person a lodger so as to entitle him to the protection of the Lodgers' Protection Act, 1871, against a levy on his goods for rent due from his immediate landlord to the superior landlord, there

* *Coram* Brett, L.J.; Cotton, L.J.; and Lindley, L.J.

must be evidence of the retention by the immediate landlord, by himself or his servants, of some such dominion and power over the house which he sub-lets, as the master of a house let in lodgings usually has; although it is not absolutely necessary that the immediate landlord should himself reside on the premises so sub-let by him:—
So held by the Court of Appeal.

Action for illegal distress.

It appeared at the trial before Huddleston, B., that the plaintiff took, in 1874, apartments consisting of nine unfurnished rooms from a man called Brooke at 65*l.* per annum, payable quarterly, Brooke paying rates and taxes. Brooke at that time occupied the ground floor as a shop, over which his name was painted, and also the basement, in which he slept. In 1878, about two years before this action was brought, Brooke ceased to live in the house, and let the shop and basement to a man called Jacques, whose name was painted over the shop as well as that of Brooke. The plaintiff paid his rent regularly to Brooke and took receipts from him, and he stated that Brooke was often seen in the shop. The plaintiff paid, on the 30th of September, 1880, to Brooke's agent a quarter's rent then due. Brooke was himself lessee of the house in question, and on the 4th of October, 1880, the defendant, as agent for Brooke's landlord, distrained upon the plaintiff's goods for one year's rent due from Brooke to his landlord, and it was in respect of this distress that the action was brought.

The plaintiff thereupon duly made a declaration under the Lodgers' Goods Protection Act, 1871 (1), that the goods so seized

(1) 34 & 35 Vict. c. 79. s. 1, enacts that, "If any superior landlord shall levy or authorise to be levied a distress on any furniture, goods or chattels of any lodger for arrears of rent due to such superior landlord by his immediate tenant, such lodger may serve such superior landlord, or the bailiff or other person employed by him to levy such distress, with a declaration in writing made by such lodger, setting forth that such immediate tenant has no right of property or beneficial interest in the furniture, goods or chattels so distrained or threatened to be distrained upon, and that such furniture, goods or chattels are the property or in the lawful possession of such lodger; and also setting forth whether any and what rent is due, and for what

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were his property and that he did not owe Brooke any rent; but the magistrate declined to interfere, and the goods were carried away and sold. The learned Judge left it to the jury to say whether the plaintiff was a lodger or not. The jury found that he was, and judgment was given for him.

The defendant then obtained in the Court of Appeal, after refusal by the Divisional Court, a rule *nisi* for a new trial, on the ground that the learned Judge did not direct the jury that the plaintiff was not a lodger within the meaning of 34 & 35 Vict. c. 79, and that he should have directed the jury what was the meaning of the word "lodger" as used in that statute; and on the ground that the verdict was against the weight of evidence.

Safford, for the plaintiff, now shewed cause.—The jury having found that the

period, from such lodger to his immediate landlord; and such lodger may pay to the superior landlord or to the bailiff or other person employed by him as aforesaid the rent (if any) so due as last aforesaid, or so much thereof as shall be sufficient to discharge the claim of such superior landlord. And to such declaration shall be annexed a correct inventory, subscribed by the lodger, of the furniture, goods and chattels referred to in the declaration; and if any lodger shall make or subscribe such declaration and inventory, knowing the same or either of them to be untrue in any material particular, he shall be deemed guilty of a misdemeanour."

"If any superior landlord, or any bailiff or other person employed by him, shall, after being served with the before-mentioned declaration and inventory, and after the lodger shall have paid or tendered to such superior landlord, bailiff or other person the rent (if any) which by the last preceding section such lodger is authorised to pay, levy or proceed with a distress on the furniture, goods or chattels of the lodger, such superior landlord, bailiff or other person shall be deemed guilty of an illegal distress, and the lodger may apply to a Justice of the peace for an order for the restoration to him of such goods; and such application shall be heard before a stipendiary magistrate, or before two Justices in places where there is no stipendiary magistrate, and such magistrate or Justices shall enquire into the truth of such declaration and inventory, and shall make such order for the recovery of the goods or otherwise as to him or them may seem just, and the superior landlord shall also be liable to an action at law at the suit of the lodger, in which action the truth of the declaration and inventory may likewise be enquired into."

plaintiff was a lodger, it is submitted that he is thereby entitled to the protection of the Lodgers' Protection Act, 1871 (1). The tests given in the registration cases do not assist in the construction of this statute, for in those cases the object always was to shew that there was a separate holding. *Phillips v. Henson* (2) shews that the mere fact of a person being an under-tenant is not sufficient to prevent his being a lodger within the meaning of this Act. Dr. Johnson defines a lodger as "one who lives in rooms hired in the house of another."

[BRETT, L.J.—In *Phillips v. Henson* (2) the intermediate landlord resided on the premises.]

It is not necessary that the landlord should live in the house, for he may have more than one house; and although he can himself reside but in one, still all those to whom he lets rooms are his lodgers. The plaintiff became a lodger under Brooke in 1874, and he has done nothing to alter his position, nor could his landlord alter the position of the plaintiff without his knowledge or consent; and his position as one entitled to the protection of the statute cannot be affected without notice to him.

[BRETT, L.J.—That may be so as between the plaintiff and Brooke, but it cannot affect the superior landlord.]

To make a person an under-tenant it is necessary that the landlord should part with the legal possession of the whole house. *Doe d. Pitt v. Laming* (3) shews that letting to a lodger would not be a breach of a covenant not to under-let.

W. Harrison and Forster, for the defendant, in support.—It is not necessary to impugn *Phillips v. Henson* (2), but the view of Grove, J., that there is no distinction between an under-tenant and a lodger cannot be supported. The statute (1) provides for the case of a lodger but does not mention under-tenants. The word "lodger" implies residence or control by the landlord, whereas for two years the plaintiff and Jacques have been the only two persons occupying the house; a lodger may be described as one who has a temporary residence. Maule, J., defined a lodger in *Toms v.*

(2) 47 Law J. Rep. C.P. 273; Law Rep. 3 C.P. D. 26.

(3) 4 Campb. 73.

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Luckett (4), and the plaintiff does not come within that definition. There is no reason why the nature of the plaintiff's occupation may not have changed.

[BRETT, L.J., referred to *Allan v. The Overseers of Liverpool* (5).]

The definition of Blackburn, J., there is against the plaintiff, who became an under-tenant when his landlord gave up all control over the house, since he neither resided there himself nor did he send his servants in. *Thompson v. Ward* (6), *Brewer v. McGowan* (7), *Smith v. Lancaster* (8), *Monks v. Dykes* (9), *Cook v. Hunter* (10) and *Stamper v. The Overseers of Sunderland* (11) were also cited.

BRETT, L.J.—I am of opinion that this rule for a new trial must be made absolute. I think so on more than one ground. I think that the direction of the learned Judge substantially left to the jury the construction of the statute; and this he could not do, for he was bound to undertake the difficult task of deciding this moot question of what constitutes a lodger; that is to say, he was bound to do so to the extent of telling the jury that if they took one view of the facts he should then direct them that the plaintiff was not a lodger, and that if they took another view of the facts he should then rule that the plaintiff was a lodger. I think that this was not merely a non-direction, but a non-direction which misled the jury.

Nor do I think that the verdict was satisfactory on the evidence; and I think that there must be a new trial, because I cannot say that all the facts are so clearly before us as to enable us to enter judgment under rule 10 of Order XL.

The question is whether the goods of the

plaintiff were protected against seizure by reason of the provisions of the statute (1). The statute gives protection to the goods of some under-tenants, but not of all under-tenants. At common law a landlord is entitled, if rent is due, to seize goods on the premises, whosoever those goods may be. Now the plaintiff says that his goods are protected. It seems to me that the plaintiff vouches the protection of the statute, and that the *onus* of proof is entirely on the plaintiff, who asserts that he is a lodger. The statute 34 & 35 Vict. c. 79 provides that "if any superior landlord shall levy or authorise to be levied a distress on any furniture, goods or chattels of any lodger" certain steps may be taken by the lodger. The question, therefore, is whether the levy is of goods which are goods of any lodger at the time of the levy and seizure, and unless a person in the position of the plaintiff proves that he was at that moment a lodger he fails to bring himself within the protection of the statute. The statute does not give any definition of a lodger; but I am of opinion that the word "lodger" must be taken to mean a lodger according to the understanding of that word by the majority of persons conversant with the modes of letting and occupying houses in this country to lodgers and under-tenants. The Courts have at various times given some tests which help to decide whether a person is a lodger or an under-tenant. I do not think it is necessary to give now an exhaustive definition of the word "lodger," but it is clear that if certain circumstances exist, then a person cannot be held to be a lodger. I will refer to two tests which have been given. The first, given by Mr. Justice Maule, in *Toms v. Luckett* (4), contains the fundamental proposition, which is as follows: "Where the owner of a house takes in a person to reside in a part of it, though such person has the exclusive possession of the rooms appropriated to him, and the uncontrolled right of ingress and egress, yet, if the owner retains his character of master of the house, the individual so occupying part of it occupies as a lodger only."

It is clear, therefore, that if all that has been done is for the owner or lessee of a house to give a man the house to live in on certain terms, that man may be a

(4) 5 Com. B. Rep. 23; 17 Law J. Rep. C.P. 27.
(5) 43 Law J. Rep. M.C. 69; Law Rep. 9 Q.B. 180.

(6) 40 Law J. Rep. C.P. 169; Law Rep. 6 C.P. 327.

(7) 39 Law J. Rep. C.P. 30; Law Rep. 5 C.P. 239.

(8) 39 Law J. Rep. C.P. 33; Law Rep. 5 C.P. 246.

(9) 4 Mee. & W. 567; 8 Law J. Rep. Exch. 73.

(10) 11 Com. B. Rep. N.S. 33; 31 Law J. Rep. C.P. 73.

(11) 32 Law J. Rep. M.C. 137; Law Rep. 3 C.P. 388.

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tenant or an under-tenant; but it cannot be said that the lessor has taken him in to lodge with him. It does not follow that a man who has been taken in to lodge with another should live at the table or sleep in the room of that other. He may very well have the exclusive use of part of the house. A further test was given by Mr. Justice Blackburn, in *Allan v. The Overseers of Liverpool* (5), where he said, "A lodger in a house, although he has the exclusive use of rooms in the house in the sense that nobody else is to be there, and though his goods are stowed there"—by which I understand him to mean that the rooms may be unfurnished—"yet he is not in exclusive occupation in that sense, because the landlord is there, for the purpose of being able, as landlords commonly do in the case of lodgings, to have his own servants to look after the house and the furniture, and has retained to himself the occupation"—that is, of the house—"though he has agreed to give the exclusive occupation"—that is, of the rooms—"to the lodger." It follows, as it seems to me, that the person who takes in another to lodge must retain power in and dominion over the house, as the master of a house usually does in this country. It is not absolutely necessary that he should live in or sleep in the house: he may live elsewhere, and yet reserve power in and dominion over the house, such as a master of a house does in this country usually have. If, however, he goes away, if he gives up all power of dealing with the house as master, then I do not think it is possible to say that he takes another person in to lodge with him. The question here is whether, at the moment of the seizure, the plaintiff was, within such definitions as these, a lodger lodging with Brooke; for he certainly never was a lodger with any other person. I will assume for the present that the plaintiff did at one time lodge with Brooke, and that as far as the plaintiff is concerned he did nothing to put an end to that relation between him and Brooke; but without doubt there is evidence that two years before this distress was levied something took place without the consent, or perhaps the knowledge, of the plaintiff, which altered his position with regard to

the house; and it seems to me that if Brooke did, when he effected that alteration, give up to Jacques exclusive possession of every part of the house, and all the dominion over it, so that he could have as against Jacques no power, and none of the authority of a master over the house, then a jury ought to be directed that the plaintiff was not at the time of the seizure a lodger under Brooke. For even if what took place was done without the consent of the plaintiff, still the effect is the same: it may be his misfortune, but still he would not be a lodger under Brooke. If, as between Jacques and Brooke, what was done did not amount to a resignation of power or dominion such as I have indicated, then I am of opinion that although Brooke was no longer living in the house, still the plaintiff would be his lodger. It is my distinct opinion that it is not enough for the plaintiff to shew that Jacques and Brooke were partners in a business, if Brooke gave up to Jacques all the possession of and control over the house. The question is as to the rights which were reserved by Brooke. Now these questions were not left to the jury, and the question which was left was, I think, so left as to lead the jury away from the facts of the case, and to invite them to interpret the statute, which it was not their province to interpret.

At first it did strike one as hard on the plaintiff that his position should thus be altered by reason of the acts of other persons, over whom he could have no control. I think, however, that he had some means of knowledge, and that he could, when he found that the use of the shop at all events was being changed and the name altered, have said to Brooke that the contract between them was being broken, that dominion over the house was being given to some other person, that such had not been the arrangement between them when he took the rooms, and that he should not remain. He was entitled to say that he contracted to live there as a lodger, and that Brooke himself was preventing him from remaining as a lodger. The plaintiff, however, remained, so that the hardship does not appear to be great, and having so remained, he now vouches the statute as his protection

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against the common law right of the superior landlord. I am of opinion that the direction to the jury should be such as I have stated; and if in such a case a jury should on such a direction give a verdict in opposition to proved facts, and the case should come to this Court again, then, if the evidence were clear and complete, we should be able to give, and should give, judgment according to law, and pursuant to the power given to this Court by Order XL. rule 10.

COTTON, L.J.—I agree that this verdict cannot stand. The statute which is under discussion points out what a person in the position of a lodger must do at the time of the distress being levied: he must make out that he is at the time of the seizure a lodger. It is difficult to give an exhaustive definition of a lodger, but I think that a lodger is a man living in a house owned by or leased by another person, and to some extent living there with that other person. Can it be said that the plaintiff was living with Brooke? The definition of Mr. Justice Maule, already cited, shews that the person who takes in a lodger must retain dominion over the house in some sense as master of the house. But there was no evidence that there was in this case the relation of a lodger at the time of the levying of the distress; there was no evidence that Brooke retained control over the house as master of it at the time of the seizure. The other members of the Court think that there should be a new trial. If I were sitting alone, and had to decide this case, I should think that we ought to give judgment for the defendant, pursuant to the provisions of Order XL. rule 10, on the ground that the plaintiff had not given evidence which would bring him within the protection of the statute; for that statute deprives the superior landlord of his common law right, and it is for the plaintiff to prove that he comes within the statute. As, however, there will be a new trial, I agree with Lord Justice Brett, that the plaintiff must shew that Brooke retained dominion over the house; and I must add that I do not think that will be shewn by merely shewing that some rights under the lease still remained in him. He must go further, and shew that at the time of

the levy there was in Brooke a present right to interfere as master of the house, and not merely some future right not existing at the time in question. I will assume that the plaintiff was originally a lodger under Brooke, but I do not decide that now. One other point may be adverted to, and that is the hardship alleged to be imposed on the plaintiff. We ought, however, to consider not only the position of the plaintiff, but that also of the landlord; and I am of opinion that the plaintiff has no cause of complaint against the superior landlord unless he is a lodger. Now the question whether he is or is not a lodger depends not only on the contract between him and Brooke, but also on the particular facts of the case, and on the proof that his immediate landlord retained control over the house as a master. For if the contract between the plaintiff and Brooke were that the plaintiff was to be a lodger under Brooke, still if Brooke has done something which has altered that relation, it does not follow that the plaintiff has a right to protection against the superior landlord; he may, for aught I know, have a right against Brooke, but that does not shew that he is protected against the right of the superior landlord to distrain. I therefore think that this rule must be made absolute.

LINDLEY, L.J.—I agree that there must be a new trial in this case. I do not think the facts are sufficiently clear to enable us to give judgment under Order XL. rule 10. To entitle the plaintiff to the protection claimed, he must shew that he was a lodger at the time of the seizure, and the *onus* of this lies on him. The statute has not defined "a lodger," it has assumed that the word has an understood meaning, and yet the word is so indefinite that differences of opinion may well arise, and difficulties not easy to adjust may occur; for some cases come so near the line that this must be so. The phrase "a lodger" denotes a personal relation of some one lodging somewhere with somebody; a lodger differs from a tenant in many ways, and different rights may well arise in the case of each. I think that the jury was not in this case sufficiently guided as to the meaning of the

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phrase, and I agree with Lord Justice Cotton that the question as to whether the plaintiff was a lodger must depend both on the contract between him and Brooke, and also on the facts proved in the case. He may have once been and yet have ceased to be a lodger—Brooke may have ceased to have that dominion and control over the house which he once had, and, if so, the necessary personal relation may have ceased, and the plaintiff may have been converted from being a lodger into a tenant; but as we do not know the facts as to that, I agree that this rule must be made absolute.

Rule absolute.

Solicitors—A. J. Bristow, for plaintiff; Indermaur and Clark, for defendant.

[IN THE COURT OF APPEAL.]

1881. }
Nov. 24. } HARTMONT v. FOSTER.*

Practice—Appeal—Interpleader—Appeal on Costs—Judicature Act, 1873, s. 49—Rules of Court, Order I. rule 2.

The provision in section 49 of the Judicature Act, 1873, that no order of the Court or of any Judge thereof as to costs only shall be subject to any appeal, except by leave, applies to orders made in interpleader proceedings as well as to orders in other proceedings in the High Court:—So held by the Court of Appeal.

Interpleader.

At the trial of an interpleader issue, in which Hartmont the claimant was the plaintiff, and Foster the execution creditor was the defendant, Hawkins, J., directed a verdict for the plaintiff. The defendant afterwards took out a summons at chambers calling on the plaintiff to shew cause why he should not pay to the defendant his costs. This summons came on before Cave, J., and was by him referred to Hawkins, J. The parties accordingly ap-

* *Coram* Brett, L.J.; Cotton, L.J.; and Lindley, L.J.

peared before Hawkins, J., at Westminster, when the learned Judge made an order directing the successful plaintiff to pay to the defendant all his costs, and also to the sheriff all his costs.

The plaintiff appealed to the Queen's Bench Division, where his appeal was dismissed, on the ground that the Court had no jurisdiction to entertain the appeal. No leave to appeal was given.

The plaintiff appealed.

Cock, for the appellant.—The Divisional Court considered that as this was an order relating to costs only, there was no jurisdiction to hear any appeal from it; but it is submitted that proceedings in interpleader are not subject to the provisions of section 49 of the Judicature Act, 1873 (1), which enacts that no appeal shall be allowed on questions of costs only, for *Hamlyn v. Betteley* (2) shews that proceedings in interpleader, and all the incidents thereof, are excepted by the effect of the Rules of Court, Order I. rule 2 (3), from the operation of the Judicature Act, and costs are one of the incidents of an interpleader. The Judicature Act has not affected proceedings in interpleader at all—*Dodds v. Shepherd* (4); so that the old practice remains, and by that there was an appeal on questions of costs in interpleader—*Teggin v. Langford* (5).

[BRETT, L.J.—The enactment in sec-

(1) The Judicature Act, 1873, s. 49: "No order made by the High Court of Justice or any Judge thereof, by the consent of parties or as to costs only, which by law are left to the discretion of the Court, shall be subject to any appeal except by leave of the Court or Judge making such order."

(2) 50 Law J. Rep. C.P. 1; Law Rep. 6 Q.B.D. 63.

(3) Rules of Court, Order I. rule 2: "With respect to interpleader the procedure and practice now used by Courts of common law under the Interpleader Acts (1 & 2 Will. 4. c. 58, and 23 & 24 Vict. c. 126) shall apply to all actions and all the divisions of the High Court of Justice, and the application by a defendant shall be made at any time after being served with a writ of summons, and before delivering a defence."

(4) 45 Law J. Rep. Exch. 457; Law Rep. 1 Ex. D. 75.

(5) 10 Mee. & W. 556; 12 Law J. Rep. Exch. 76.

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tion 49 of the Judicature Act is express : can the rule limit it ?]

The rules were made under the Act, and have the force of a statute. Section 50 of the Judicature Act is as general as section 49, and gives expressly an appeal from all orders made at chambers ; and yet section 50 has been held not to apply to interpleader—*Dodds v. Shepherd* (4).

[BRETT, L.J.—In *Teggin v. Langford* (5) the order as to costs was not made against one of the parties.]

That does not appear to be the ground of the decision, nor was that point taken.

[BRETT, L.J.—*Dodds v. Shepherd* (4) shews that section 50 of the Judicature Act, 1873, does not repeal section 17 of the Common Law Procedure Act, 1860. Does it do more ? COTTON, L.J.—Is there any authority that orders as to costs in cases in which a Judge had a discretion were ever the subject of an appeal ?]

Teggin v. Langford (5) is such a case ; and if there was a right to appeal on costs in interpleader before the Judicature Act, then that right has been preserved, for the effect of *Hamlyn v. Betteley* (2) is that proceedings in interpleader are altogether outside the Judicature Act, so that as the Interpleader Statute gave an appeal from an order made by a single Judge, and as this is such an order, this appeal still lies.

[BRETT, L.J.—Does not an independent general statute forbid such an appeal ?]

Further, Hawkins, J., had no jurisdiction to make this order ; the interpleader issue was directed at chambers by another learned Judge, and Hawkins, J., sitting elsewhere than at chambers, could not make any order in the matter ; the summons was brought before Cave, J., and he could not refer it to Hawkins, J., without the consent of the parties.

[BRETT, L.J.—Did not Hawkins, J., take it as at chambers ?]

The respondent did not appear.

BRETT, L.J.—I am of opinion that this appeal must be dismissed. I will first consider the question whether Hawkins, J., had jurisdiction to make this order. I am of opinion that when he made it he was sitting not as a Judge sitting in Court, but as a Judge sitting to hear and deter-

mine summonses, such as are heard before a Judge at chambers ; and the phrase “a Judge at chambers” does not mean a Judge sitting in a particular room, but a Judge sitting, not necessarily in open Court, as Judges generally sit, to take certain kinds of applications in a certain recognised way. This summons was taken out in the regular way, and came before the Judge at chambers ; it was then in fact and substance referred by him to Hawkins, J., and having been so referred, it was taken before that learned Judge as before a Judge at chambers, although he happened to be sitting at Westminster. The summons is headed before him “at chambers,” and he made the order as a Judge at chambers, so that he had jurisdiction to make it.

The order so made is an order in an interpleader proceeding, and relates to the costs of that interpleader as between the parties to it. From this order an appeal was brought to the Divisional Court, and that Court decided that no appeal could be brought in such a case. Now it has been admitted that if the order had been an order as to costs in any proceeding except an interpleader no appeal could be brought ; but it is said that because these proceedings are proceedings in interpleader therefore there is a right of appeal. It is said that this is so by virtue of Order I. rule 2 of the Rules of Court (3). That Order provides that “with respect to interpleader the procedure and practice now used by Courts of common law under the Interpleader Acts (1 & 2 Will. 4. c. 58, and 23 & 24 Vict. c. 126) shall apply to all actions and all the divisions of the High Court of Justice, and the application by a defendant shall be made at any time after being served with a writ of summons, and before delivering a defence.”

It is therefore urged that this rule enables the Divisional Courts to hear an appeal from an order of a Judge at chambers made in interpleader proceedings, where that order relates only to a question of costs. It is clearly for the party who alleges that this is so to shew that it was the practice and procedure at common law before the passing of the Judicature Act to entertain an appeal from chambers in

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interpleader proceedings in cases in which the order, the subject of the appeal, dealt with the question of costs alone. It is urged that the case of *Teggin v. Langford* (5) shews that the practice was to entertain such appeals; but although we asked for a case in which, prior to the Judicature Acts, the Court had entertained an appeal from an order made at chambers as to the costs between the parties in interpleader proceedings, no such case could be cited to us. To hear such an appeal would be contrary to the general practice of the Court in matters other than interpleader, so that it is certain that the case would have been found in the books if any such authority had existed. If the point had been decided in *Teggin v. Langford* (5), still that decision would be subject to review in this Court; and I may add that one case cannot be said to establish a practice. But I am further of opinion that that case does not support the contention of the appellant. There was there an appeal from an order made with regard to interpleader proceedings; but the appeal did not depend on the interpleader proceedings or on the Statute of Interpleader: it was an appeal as to the way in which the jurisdiction of the Court over an attorney—that is, over one of its officers—had been exercised, so that an appeal would lie, for the case in no way fell within the rule as to appeals not being allowed on a question of costs only; so that case does not support the proposition for which it was cited. I am therefore of opinion that the provisions of Order I. rule 2 (3) do not enable the Court to hear the appeal in this case; but even if that rule did appear to have the effect of enabling us to do so, I think we ought not to construe it so as to contradict the express enactment of section 49 of the Judicature Act, 1873 (1), which expressly provides that no order as to costs only shall without leave be subject to appeal. It seems to me that to hold that an order as to costs in interpleader proceedings may be the subject of an appeal, would be to contradict this provision in one instance, and that as the words of the section include all cases—those in interpleader proceedings as well as all other cases—therefore the principle that no order as to costs only is to be the subject of an appeal must

cover and include an order in interpleader proceedings. I think it would be strange if this were not so, for it would be strange if an appeal as to costs lay in interpleader proceedings, where the costs are generally small and did not lie in other cases where the costs are often very large. I would add that the case of *Hamlyn v. Betteley* (2) does not interfere with our judgment in this case; that was an appeal on a question of procedure under the Interpleader Statute, and the judgment dealt with what was allowed by that statute and the order made thereunder, whereas the present case is in no way concerned with that statute, but is simply an appeal from an order as to costs only.

COTTON, L.J.—I agree with Lord Justice Brett on both points, and am of opinion that this appeal must fail. I would only add that *Dodds v. Shepherd* (4) does not conflict with this judgment, nor is it inconsistent with it. In that case there was a special previous enactment, and a general rule; and in the case before us there is a particular rule of practice which cannot be allowed to repeal the previous express enactment that no appeal shall be allowed on costs only. I also agree that there is no authority to shew that orders as to costs only were ever the subject of an appeal.

LINDLEY, L.J.—I am of the same opinion. If there were any inconsistency between the rule and the Act, then the rule must yield. As to the jurisdiction of Mr. Justice Hawkins to make this order, I would say that it would be very inconvenient if one Judge at chambers could not refer cases to another Judge; we all know it is constantly done, and no objection to the jurisdiction of the Judge can arise from such a practice.

Appeal dismissed.

Solicitors—Lumley & Lumley, for the appellant.

[IN THE COURT OF APPEAL.]

1881. { ROBERTS v. DEATH. CASTLE
Nov. 18. { (garnishee) ; WELLS AND
WIFE (claimants).*

Practice—Attachment of Debt—Trust Money—Absence of Suggestion by Garnishee—Equitable Jurisdiction of Judge—Order XLV. rules 6 and 7.

Where, in garnishee proceedings, there is reasonable suspicion that money sought to be attached does not belong to the judgment debtor, but is trust money, the Judge has jurisdiction over the matter (even though no suggestion has been made by the garnishee under Order XLV. rule 6, that the money belongs to some third person), and can order an issue to be tried whether or not the money is trust money.

The Judge also has power, under Order XLV. rule 7, to make such an order. (Per COTTON, L.J., and LINDLEY, L.J.)

Appeal from the decision of a Master refusing to direct a sum of 40*l.* 6*s.*, which had been paid by Castle to the judgment creditor, Roberts, under a garnishee order, to be paid into Court to abide the event of an issue whether that sum belonged to Death, the judgment debtor, or was trust money to which the claimants were entitled.

The following facts were stated in the affidavits used in support of the appeal:—

In May, 1879, Roberts obtained judgment against Death personally for a sum of 57*l.* 14*s.* 6*d.* In April, 1881, Death, in his own name, but really, as it was suggested, as trustee for Mrs. Wells under a deed of settlement drawn up by Castle, who was a solicitor, recovered judgment against him for a sum of 40*l.* 6*s.* debt and costs. On the 23rd of May, 1881, a garnishee order *nisi* was taken out by Roberts to attach all debts due from Castle to Death. The Master made the order absolute, in the absence of any suggestion by Castle, under Order XLV. rule 6 (1), that the money sought to be

attached belonged to a trust fund, although notice of Mrs. Wells' claim had been given both to Roberts and Castle.

The claimants then took out a summons before the Master to rescind or vary the order so made by directing the money to be paid into Court to abide the event of an issue whether it was trust money or not; but this was dismissed, and subsequently the Judge at chambers and the Divisional Court affirmed that decision.

The claimants appealed.

Horne Payne, for the claimants.—This money is trust money, and cannot, therefore, be attached. Even if the case is not within rule 6, in the absence of any suggestion by the garnishee that the sum sought to be attached belongs to some third person, yet it is within rule 7 (2); and the Court has a right at any time to hear a person who comes forward and makes such a claim as the present one. The *cestui que trust* was entitled to have been heard by the Master in the first instance.

Cyril Dodd, for the judgment creditor.—Rule 6 does not apply here, for the suggestion was not made by the garnishee but by some other person who had not been made a party to the garnishee proceedings. The words in rule 7—"After hearing the allegations of such third person under such order"—refer only to the person who, at the suggestion of the garnishee, has been brought in by an order made under rule 6; and the Master had no power under rule 7 to vary the order.

Hammond-Chambers, for the garnishee.

person, or that any third person has a lien or charge upon it, the Court or Judge may order such third person to appear and state the nature and particulars of his claim upon such debt."

(2) By rule 7, "After hearing the allegations of such third person under such order, and of any other person whom by the same or any subsequent order the Court or Judge may order to appear, . . . the Court or Judge may order execution to issue to levy the amount due from such garnishee, or any issue or question to be tried or determined according to the preceding rules of this Order, and may bar the claim of such third person, or make such other order as such Court or the Judge shall think fit. . . ."

* *Coram* Brett, L.J.; Cotton, L.J.; and Lindley, L.J.

(1) By Order XLV. rule 6, "Whenever in proceedings to obtain an attachment of debts it is suggested by the garnishee that the debt sought to be attached belongs to some third

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BRETT, L.J.—The sum in dispute is so small that I would not have interfered if the question of law and practice raised were not one of general importance that might have the greatest possible consequences in other cases. We must, therefore, decide the point of law. The case stands thus: Roberts obtains judgment against Death and becomes his judgment creditor. Death—as nominal plaintiff, but in reality, as it has been suggested (and there is some plausible ground for that suggestion), as trustee for Mrs. Wells—obtains judgment in his own name against Castle. Roberts then takes out a garnishee order to attach the judgment debt due from Castle to Death. Under these circumstances it seems to me that Castle might have made the suggestion contained in Order XLV. rule 6, but he did not do so. The order is made absolute with, as it seems to me, the knowledge of both Castle and Roberts that there was a claim made by Mrs. Wells that the judgment was obtained by Death as trustee for her. No such suggestion having been made, the Master held that the case was not brought within rule 6, and that he had no power to prevent the order being made absolute. I agree with the Master that the case was not brought within rule 6; and I further agree that it was not within rule 7, because no order had been made that the third party should appear. The question therefore is, whether, these premises being granted, the Master was right in thinking that he could not prevent the order being made under some other rule of law or practice. In my opinion he could. The order sought to be obtained under the garnishee proceedings was an order that a man who had obtained judgment really as trustee should pay over money so obtained to a creditor who had really no right to it. The money is the money of the *cestui que trust*; but it is said that, as the garnishee made no suggestion to that effect, the *cestui que trust* cannot make it, and that such an injustice is to be perpetrated by order of the Court. I cannot believe that such is the law. The rules are copied from sections 29 and 30 of the Common Law Procedure Act, 1860 (23 & 24 Vict. c. 136), passed at a time when

the common law Courts could not give a remedy, although the Courts of equity could. This order would, under the garnishee proceedings, be made absolute by a Master acting for a Judge sitting in a Court of equity. He would, therefore, have an equitable jurisdiction, and a Court of equity would never have made an order that money belonging to a *cestui que trust* should be paid away to a person not entitled to it. The Court will not be a party to such an injustice, although the suggestion cannot be made by the *cestui que trust* under rules 6 and 7. It seems to me that the Court would listen to a party coming forward either upon the issue of the garnishee order or upon a summons subsequently taken out in time, and would order the money to be paid over to the claimant if the fact was clear that it was trust money, and would decline to make the garnishee order absolute if the facts as to whether the money was trust money or not were in dispute. If there were no colour for the suggestion that it was trust money, the garnishee order ought not to be interfered with; but if there is colour, as it seems to me there is in this case, then the only reasonable order to be made is one substantially in the terms of the summons taken out on behalf of Mrs. Wells—that Roberts, to whom this money was paid with full notice of this claim, must pay it into Court to abide the event of the enquiry whether it is trust money or not; for the *cestui que trust* has a right to have that question determined. The point of law and practice, therefore, is that, where in garnishee proceedings the money is trust money, or there is a reasonable suspicion that it is trust money, the *cestui que trust* has a right under equitable procedure to come forward, provided he does so in time, and to object to an order absolute being made; and he is not to be damaged by such an order merely because the garnishee will not act.

COTTON, L.J.—I am of the same opinion. The question really is, whether the Judge ought not to withhold his hand and to refuse to make an order to attach money where he is informed that it is not money proper to be taken to satisfy the

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judgment debt. The money here is trust money, and there is obviously an equity, as in the case where goods in the hands of a trustee are not allowed by the Court to be taken in execution. It is said there was a difficulty in calling upon the Judge not to make the order, because no suggestion had been made by the garnishee in accordance with rule 6. I do not think the case is within that rule, which applies only where the garnishee, for his own protection, suggests that a third person shall be cited. I am not satisfied it is not within the words of rule 7—"and of any other person whom, by the same or any subsequent order, the Court or Judge may order to appear"—which clearly seem to give the Court or Judge power to cite any other person, although the garnishee has made no suggestion. I do not, however, rely on that; but I say that the Judge ought not to make such an order as the present one, where it is shewn before it is made that it ought not to be made.

Under the circumstances, and independently of these rules, this money ought to have been paid into Court to abide the event of the question whether it is trust money or not; for it was conceded there was a *prima facie* case shewing the money is trust money; and the claim of Mrs. Wells ought, therefore, to be investigated.

LINDLEY, L.J.—I am of the same opinion. But I will make a few observations, because the point of practice is new. It seems that Roberts obtained judgment against Death, and that Death obtained judgment against Castle; but it so happened that the judgment obtained by Death against Castle was obtained by him as the trustee of Mrs. Wells, so that the money did not belong to him. There would have been no difficulty under the old practice, which was to file a bill and to claim an injunction; but now that injunctions have gone, there is some difficulty in seeing what is to be done. It would be putting a narrow construction upon rules 6 and 7 to say that, because information does not come from the right person to the Judge or Master, the Court is therefore to shut its eyes to

the real facts. Notice of this claim was, however, given in the present case to Roberts and all concerned. What we are asked to do is to order the money, which has been obtained by Roberts with full notice of this claim, to be repaid subject to an enquiry. The Court ought, in my opinion, to make an order under rule 7 that the money be paid into Court to abide the event of the enquiry whether it is trust money or not.

Appeal allowed.

Solicitors—Yorke & Wharton, for claimants;
W. T. Boydell, for judgment creditor; Castle,
for garnishee.

[IN THE COURT OF APPEAL.]

1881. { ILES (*appellant*) v. THE
Nov. 10, 11. { ASSESSMENT COMMITTEE OF
WEST HAM UNION AND AN-
OTHER (*respondents*).*

Poor-rate — Rating of Owner or immediate Lessor instead of Occupier — House let at Rent or Rate not exceeding 20l. a year—Weekly Tenancies—Construction of 59 Geo. 3. c. 12. s. 19.

By 59 Geo. 3. c. 12. s. 19, the vestry of any parish are empowered to resolve and direct that "the owner or owners of all houses, apartments or dwellings in such parishes, being the immediate lessor or lessors of the actual occupier or occupiers, which shall respectively be let to the occupiers thereof at any rent or rate not exceeding 20l. nor less than 6l. by the year, or for any less term than one year on any agreement by which the rent shall be reserved or made payable at any shorter period than three months, shall be assessed to the rates for the relief of the poor, for and in respect of such houses, apartments or dwellings," instead of the actual occupiers; and the vestry are also authorised from time to time to rescind, renew, vary and amend every such resolution and direction as they shall see occasion, "so as no such resolution or direction shall extend

* *Coram* Lord Coleridge, C.J.; Baggallay, L.J.; and Brett, L.J.

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to assess or charge the owner of any house, apartment or dwelling which shall be let at a greater rent than 20l. or less than 6l. as aforesaid :”—Held (by LORD COLERIDGE, C.J., and BRETT, L.J.—BAGGALLAY, L.J., dissenting—reversing the judgment of HUDDLESTON, B., but affirming that of HAWKINS, J.), that this section was limited in its application to houses let at a rent not exceeding 20l. nor less than 6l. a year ; and consequently that the owner of houses let to weekly tenants at a rent exceeding 20l. a year was not liable to be assessed to the poor-rate instead of the actual occupiers.

Appeal from a judgment of the Queen's Bench Division upon a Special Case, from which the following material facts appeared :—

The appellant is the owner and immediate lessor of certain houses entered in the rate book for the parish of West Ham. The houses in question were let to tenants at a rent exceeding 20l. a year, namely, at 8s. a week and upwards, the tenancy in each case being determinable by a week's notice.

The appellant, who was bound, as between himself and his tenants, to pay and discharge all parochial rates and taxes, and the water-rate, realised after such payments, a net sum of less than 20l. a year from some of the houses, and a net sum of more than 20l. from the other houses.

On the 23rd of April, 1846, the inhabitants of West Ham in vestry assembled, resolved under the authority of 59 Geo. 3. c. 12. s. 19 (1) “that the church-

(1) 59 Geo. 3. c. 12. s. 19: “Whereas in many parishes, and more especially in large and populous towns, the payment of the poor's rates is greatly evaded, by reason that great numbers of houses within such parishes are let out in lodgings, or in separate apartments, or for short terms, or are let to tenants who quit their residences or become insolvent before the rates charged on them can be collected ; and it hath been found that in many instances the persons letting such houses do actually charge and receive much higher rents for the same, upon the ground and expectation that the occupiers thereof cannot be effectually assessed to the poor's rates, and will not be charged with, or required to pay such rates, and do thus obtain an undue advantage to themselves, and by means of the premises the other inhabitants of such parishes are unjustly compelled to pay

wardens and overseers of the poor of this parish assess the owner or owners of all houses, apartments or dwellings and curtilages thereof to the rates for the relief of the poor, instead of the actual occupier or occupiers, whenever the said houses, apartments and curtilages thereof shall be let at any rent not exceeding 20l. nor less than 6l. by the year for any less term than one year or on any agreement by which the rent shall be reserved or made payable at any shorter period than three months.”

In April, 1879, the appellant in pursuance of this resolution was, by a rate or assessment made by the churchwardens and overseers, assessed to the poor-rate in respect of the above-mentioned houses, and the question for the opinion of the Court was whether he was liable to be so assessed.

At the hearing of the Special Case in the Queen's Bench Division, the following judgments were (on June 3, 1881) delivered :—

HUDDLESTON, B.—This is a Special Case of some importance, because Mr. White has intimated to us that if we take a different view to that for which he has been contending, the system of rating in parishes which has existed since 1819 (59 Geo. 3. c. 12) will thereby be upset.

much more than their fair and due proportions of the charges of relieving and maintaining the poor:” For remedy thereof, be it enacted, that from and after the 1st day of January, 1820, it shall be lawful for the inhabitants of any parish in vestry assembled, and they are hereby empowered, to resolve and direct, that the owner or owners of all houses, apartments or dwellings in such parishes, being the immediate lessor or lessors of the actual occupier or occupiers, which shall respectively be let to the occupiers thereof at any rent or rate not exceeding 20l. nor less than 6l. by the year, for any less term than one year, or on any agreement by which the rent shall be reserved or made payable at any shorter period than three months, shall be assessed to the rates for the relief of the poor, for or in respect of such houses, apartments or dwellings, and the out-houses and curtilages thereof, instead of the actual occupiers ; and the inhabitants so assembled in vestry may, and they are hereby authorised, from time to time to rescind, renew, vary and amend every such resolution and direction as they shall see occasion, so as no such resolution or direction shall extend to assess or charge the owner of any house, apartment or dwelling which shall, with the out-houses and curtilages thereof, be let at a greater rent than 20l. or less than 6l. as aforesaid. . . .

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Now the facts lie in the smallest compass. In the parish of West Ham, the appellant has a large number of small houses, all of which are let out weekly at the rate of more than 20*l.* a year, and the vestry of the parish have, under the provisions of the statute referred to, passed a resolution that the appellant shall be rated, as the owner of all this class of property, at a certain sum which is about one-half the ordinary value. It is said that the vestry are restricted in their resolution whereby they can make the owner liable to be rated, to premises of a value between 20*l.* and 6*l.*, and that there is no power to rate the owner where the value of the premises to be rated is over 20*l.*; and where the tenement is let for a less time than a year or for less than three months. That leads us to consider what is the power given to the vestry by section 19 of 59 Geo. 3. c. 12. The words of that section might have been clearer, and no doubt give rise to a great deal of difficulty, but I confess when I read them carefully and accurately that in my opinion their meaning is perfectly intelligible. The evil to be cured is stated in the preamble, and then for remedy thereof it is enacted that the vestry of any parish may resolve and direct that "the owner or owners of all houses, apartments or dwellings in such parishes, being the immediate lessor or lessors of the actual occupier or occupiers which shall respectively be let to the occupiers thereof at any rent or rate not exceeding 20*l.* nor less than 6*l.* by the year for any less term than one year," shall be assessed to the poor-rate. That part of the section appears to be clear, namely, that where the house, apartment or dwelling is let at a rent or rate not exceeding 20*l.* nor less than 6*l.* by the year, but for any term less than a year, then the owner may be assessed to the poor-rate instead of the occupier. Now follows the passage which gives rise to the difficulty, "or on any agreement by which the rent shall be reserved or made payable at any shorter period than three months." It was contended by the appellant that these words are governed by the previous portion of the section which fixes the value of the property as between 20*l.* and 6*l.*, and that therefore where the holding is for less than

three months, but the value is more than 20*l.*, the owner is not liable to be rated. If that view of the section is correct, the vestry have no power in such a case to resolve and direct that the appellant shall be rated instead of the occupier. At first I was inclined to think that that was the true construction of the section, in consequence of the proviso to which I shall presently refer. But after careful consideration I have come to the conclusion that the meaning of the section is in substance this: The vestry may resolve and direct that the owner shall be assessed in two classes of cases: one, where the occupation of the tenement is for a term less than a year, and for a rent between 20*l.* and 6*l.* by the year; the other where the tenement is held under an agreement whereby the rent is made payable at shorter periods than three months; and I must go the whole length of saying that even if the tenement were let at a rate of 1,000*l.* a year for a term less than three months, the owner may under the provisions of this section be rated instead of the occupier. One main consideration which has induced me to arrive at this conclusion is that, if the intention of the Legislature were, as has been contended by the appellant, that the powers of the vestry should be limited to the sum of 20*l.* and 6*l.*, and to premises let for a less period than a year, the introduction of the words "or on any agreement," &c., would be useless and mere surplusage. Some meaning must, however, be given to them, and the meaning would clearly seem to be this: here is a great evil in the parish, a number of premises are let for short periods to persons who go away so that the parish never get the benefit of the rates from them; now be it enacted that for the future the parish may resolve and direct that the owner shall be rated instead of the occupier, where the premises are let for a less period than a year, the rent being between 20*l.* and 6*l.* by the year, and also where the premises are let by agreement for a shorter period than three months, no matter what the rent it may be. The reason is obvious, because a man who takes chambers or lodgings for a period of six or eight weeks would escape altogether where the rates are made every three months, and the

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landlord would always be able to recoup himself.

The only difficulty that arises is with reference to the proviso that the vestry may from time to time rescind, renew, vary and amend every resolution as they may see occasion, "so as no such resolution shall extend to assess or charge the owner of any house, apartment or dwelling which shall . . . be let at a greater rent than 20*l.* or less than 6*l.* as aforesaid." At first sight this proviso might appear to mean that the vestry may make a resolution of this description; but it shall only apply to cases where the rent is between 20*l.* and 6*l.* But a complete answer is given to that by Mr. White, who says the proviso merely applies to the case of houses let for less than a year, where the rent is between 20*l.* and 6*l.* by the year, because the vestry may, if they choose, vary the amount, and make the owner instead of the occupier liable where the rent is 19*l.*, 16*l.* or 7*l.*; but shall not, in any case where that rule is applied in reference to houses between 20*l.* and 6*l.*, go beyond 20*l.* or below 6*l.* But the other cases comprised within the words "or in any agreement by which the rent shall be reserved or made payable at any shorter period than three months," whatever the amount, come within the power of the parish to pass a resolution to make the owner liable to be rated instead of the occupier. I was very much inclined at first to think that from the year 1819 to the present day the parishes have been doing what was wrong; but I have now come to the conclusion that they have not. As the case is one of great difficulty, and as my learned brother entertains some doubt, we think the appellant, if he shall be so advised, shall be at liberty to appeal.

HAWKINS, J.—I confess I have not been able to come to the same conclusion as that arrived at by my learned brother. I read section 19 as limiting the powers of the vestry to deal with cases where the rents are not exceeding 20*l.* nor less than 6*l.* There is not to be found in a single text-book any discussion at all upon this section; no explanation how the section came to be passed, or why the limits were fixed between 20*l.* and 6*l.* The language of the Act of Parliament itself must therefore be considered. The section ap-

plies to owners of houses which are let at a rent or rate not exceeding 20*l.* nor less than 6*l.* by the year. It does not apply to all houses which are let at a rent not exceeding 20*l.* nor less than 6*l.*, but only to such houses as are let for a less term than one year, or on an agreement, not for the letting for a less period than three months, but on an agreement by which the rent shall be reserved or made payable at a shorter period than three months. According to my reading, therefore, of this section, it applies to houses which are let at rents between 20*l.* and 6*l.*, and not to all houses let between those rents, but only to such houses between those rents as are let for shorter periods than a year, or if let for longer periods than a year, where the rent reserved is payable at shorter periods than three months. It does not apply to the letting for a period of three months, but to cases where the rent is reserved or made payable at periods less than three months. It is contended that the words "for any less term than one year" are governed by the amount of rent at which the houses are let, and that the subsequent matter, "or on any agreement by which the rent shall be reserved or made payable at any shorter period than three months," applies to any case in which any premises, no matter what their value, what the amount of rent reserved, or what the term for which these premises are let may be, provided only that the rent is made payable at periods less than three months. I confess I cannot come to that conclusion. I think the character of the houses which were to be assessed to the landlord instead of to the occupier is described by being houses between 20*l.* and 6*l.* a year; and those houses are again limited by these two considerations: either houses which are let for a less period than a year, or houses which are let at rents which are reserved and made payable at periods less than three months. I think this construction is confirmed by the subsequent part of the section, which gives power to the vestry to alter the resolutions, and which I read as giving them power to make any alteration they like, provided always that such alteration does not extend to houses let at a greater rent than 20*l.* or a less rent than 6*l.* "as aforesaid," which, of course, means

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"as above mentioned." The section, therefore, is confined in its application altogether to houses where the rents reserved are between 20*l.* and 6*l.* a year, and for that reason I think these premises are improperly rated. I assent, but only formally, to the view expressed by my brother Huddleston, and so give power to the parties to appeal.

Formal judgment was entered for the parish, and *Iles* appealed.

A. Wills, Q.C., and Tindal Atkinson, for the appellant.—The question is, whether the owner or whether the occupiers of houses the rent of which, although above 20*l.*, is reserved and made payable at a shorter period than three months, ought to be assessed to the poor-rate under 59 Geo. 3. c. 12. s. 19. It is contended that the rent being above 20*l.* is decisive that the occupier ought to be rated, even though the tenancy be weekly. If the first part of the clause were ambiguous, still the proviso would make it clear, and the analogy to be drawn from acts such as those relating to compound householders supports this view.

[*BAGGALLAY, L.J.*—Does not the section contemplate two classes of tenancies; first, where the rent is below 20*l.*; and, secondly, where the tenancy is for less than three months, whatever the rent may be?]

It is submitted not, because the only criterion is the rental, and the words "as aforesaid" in the proviso do not bring into the proviso any of the conditions as to short tenancies.

Meadows White, Q.C., and Mugliston, for the churchwardens and overseers.—Tenancies wherein the rent is reserved for a period less than three months are within the provisions of section 19, which enable the rating authority to assess the owner instead of the occupier, and it is immaterial in such cases what the amount of rent may be. The rent of a house let at a large rental is so rarely reserved at a shorter period than three months, that such a case would not be in the mind of the Legislature. The operation of the section would be very much limited if the contention of the appellant were to prevail, as lodgers are not within the purview of the statute,

and any rent exceeding eight shillings a week would exonerate the owner from liability to be rated. The object of the statute would thus be defeated, and the rating authority would still suffer from fugitive and often-changing occupiers. The provisions of the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 211, seem to support this view.

[*LORD COLERIDGE, C.J.*—The main provision in the clause is "let to occupiers at any rent or rate." Does not that point to a distinction?]

It is submitted that the words are synonymous, and are in fact tautologous, for the word "rate" is not to be found in the proviso which incorporates all the conditions of the earlier part of the section by the words "as aforesaid;" and one of those conditions is that the rent must not be reserved at a less period than three months. The preamble to the section clearly shews that this was the intention of the Legislature.

Woollett, who appeared for the assessment committee, did not argue.

Atkinson replied.

LORD COLERIDGE, C.J.—I am of opinion, upon the best consideration that I can give to the case, that the formal judgment of the Court below, which was the judgment of my brother Huddleston, because my brother Hawkins withdrew his judgment for the purpose of allowing an appeal, must be reversed. This section, which in itself is a short Act of Parliament, because it begins with a preamble, is complete in itself, and states what is the grievance that Parliament wished to redress, and then proceeds in the section elaborately to redress it, must be taken with reference to the known existing state of the law at that time. I am unable at this moment to say how the law stood prior to 43 Eliz. c. 2; but we know from history that the rating of inhabitants was very early, as a matter of fact, given up from the extreme difficulty of getting at the inhabitants other than the occupier; and practically, the second set of persons named in the statute, namely, the occupiers, have from the time of that statute to the present time been the persons upon whom the rates have been made.

The general law, therefore, is, at all

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events since the end of the reign of Elizabeth, that the occupiers of lands and houses, amongst other things, should be the persons to be assessed and charged and pay the rates. And then this Act, called Sturges Bourne's Act, proceeds to graft upon the general law this exception, and gives a reason for it. The subject-matter dealt with in the first instance is houses let out in lodgings for short terms. Lodgers properly so called within the old legal definition of a lodger, both before and since this Act, would never be assessed or pay poor-rates. The holders of separate apartments were, both before and since this Act, considered occupiers within the meaning of the Act of Elizabeth, and have been subject to rating. Of course, if the holders of the short term could be got at, there is nothing in the mere existence of the term which would prevent the occupier of it from being an occupier while he holds.

The matter sought to be remedied is the fact that houses are let either to lodgers in separate apartments or for short terms, or practically to insolvent tenants, so that the rates cannot be collected. The overseers cannot get at the occupiers of those portions of the houses which are described as "lodgings or separate apartments" for the purpose of assessing them, and therefore they do not charge them, "and by reason of the premises the other inhabitants of such parishes are unjustly compelled to pay much more than their fair and due proportion of the charges of relieving the poor." I may say, in passing, that I suppose the term "inhabitants" is there meant to include both the classes of persons mentioned in the statute of Elizabeth—both inhabitants if they can be got at, which practically they cannot, and also the occupiers. Now, the very first branch of the enactment goes beyond the words of the preamble, which says that the owners of houses get an unfair advantage, and speaks of the general subject-matter as "houses" divided into "lodgings or separate apartments;" but when the enacting clause comes it does not follow strictly the words of the preamble, but goes on to say that "the owners of all houses, apartments"—which I suppose by the way must mean separate apartments as construed by the preamble—"or dwellings in such parishes,

being the immediate lessor or lessors of the actual occupier or occupiers, which shall respectively be let to the occupiers thereof at any rent or rate not exceeding 20*l.* nor less than 6*l.* by the year, for any less term than one year, or on any agreement by which the rent shall be reserved or made payable for any shorter period than three months, shall be assessed to the rates." I confess that without the proviso I should have said, regard being had to the preamble, to the ordinary rules of grammatical construction, and also to the rule that a general law is not to be carried further than the words of the particular statute, or clause of the statute creating it, that the rent or rate not exceeding 20*l.* nor less than 6*l.* overrides the whole of that enacting part, and that the reasonable construction is, that where the whole of a house is let at a rate which will bring in to the owner not more than 20*l.* a year, either on a letting for less than a year or on a demise for more than a year, provided that the rent is reserved for a shorter period than three months, still in either case the rate of the whole not being more than 20*l.*, the vestry may make the owner pay the poor-rate instead of the actual occupiers. The construction which I have arrived at appears to me to be very much strengthened by the second part of the section: "And the inhabitants so assembled in vestry may and they are hereby authorised from time to time to rescind, renew, vary and amend every such resolution and direction as they shall see occasion." Now that might be, but for the words which follow, an extension of their powers beyond the limit of 20*l.* But the general power is limited by the proviso, "so as no such resolution or direction"—which, in my opinion, means the original resolution or direction, or the rescinded, renewed, varied or amended resolution or direction—"shall extend to assess or charge the owner of any house, apartment or dwelling, which shall . . . be let at a greater rent than 20*l.* or less than 6*l.* as aforesaid." This proviso, when put by the side of the enacting clause, would seem to be intended to cover the whole of the resolution which the vestry are empowered to vary. If that be so, then, unless the vestry have power by the resolution to affect houses the rental of

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which is beyond 20*l.*, it seems to me to follow that the proviso must be made equal in extent to the enacting power; and as the enacting power, for the reasons I have already given, has been limited to houses not exceeding 20*l.*, so the proviso and the amendment varying, rescinding or renewing of the resolution, must also be limited in the same way to houses that are not let at a greater rent than 20*l.* It has been said, and it is the only argument that has pressed upon my mind from the beginning, that the words, "let at a greater rent than 20*l.* or less than 6*l.* as aforesaid," are attached to words which, so to speak, stop short of the two classes of demise which are referred to in the enacting section. Now the enacting section says, "not exceeding 20*l.* nor less than 6*l.* by the year for any less term than one year, or on any agreement by which the rent shall be reserved or made payable at any shorter period than three months;" and the proviso says, "20*l.* or less than 6*l.* as aforesaid." If "as aforesaid" is to be limited to the words "not exceeding 20*l.* nor less than 6*l.* by the year," then, according to the true construction, it excludes a term less than a year, or a term more than a year in which the rent is reserved at periods of less than three months; but if, as I think, it is to be extended to the whole enacting part, then it extends to houses let at a rate not exceeding 20*l.*, whether for a term of less than a year, or whether for a term of more than a year with the rent reserved at shorter periods than three months. That seems to me to be the true grammatical construction, and to give an intelligible meaning to the Act of Parliament. I apprehend that, according to the true rules of construction, the exemption is limited to the words "creating the exemption," and I see no reason for being astute to introduce difficulties into an Act of Parliament which, when read simply, according to the ordinary rules of construction, is free from them. The formal judgment of the Court below must therefore be reversed.

BAGGALLAY, L.J.—The other members of the Court entertain a very strong opinion that this appeal should be allowed, but I regret I am unable to take the same

view. It appears to me that if full effect is given to the proviso in the way contended for by the appellant, it will be simply tantamount to striking out the alternative form in the enacting part of the section. It is with great hesitation that I am unable to concur in the opinion of the other members of the Court.

BRETT, L.J.—I am of opinion that this appeal must be allowed. I should hesitate much more if I thought my brother Huddleston, who has had great experience in these matters, had had a firm opinion upon this; but it appears to me that his mind almost went the way I think this Act of Parliament must be construed. He gives only one reason why, with the strong feeling he had that the words must carry him in the opposite direction he does not follow those words. Upon examination, I think the one reason which he gives, and which is the foundation of the whole of his judgment, and without which he would have gone the other way, is untenable. Construing this Act of Parliament according to the ordinary grammatical construction of the English language, and according to the ordinary meaning of the words used, it seems to me that the limitation of this enactment to "rent or rate not exceeding 20*l.* nor less than 6*l.* by the year" governs both the subsequent branches of the enactment. The Legislature has distinguished, as it seems to me, if you construe this language according to its ordinary meaning, between the "term" and the "rent or rate" and "reservation of rent." The two phrases in the section, houses "which shall be let to the occupiers for any less term than one year, or on any agreement by which the rent shall be reserved or made payable at any shorter period than three months," both deal with the letting, the letting being the term or the length of the term. But if that be so, the first letting is "for any less term than one year;" and the other "or on any agreement." If that deals with the "term," it is impossible to say that it is confined to a letting of less than a year; it must be a letting for more than a year, or "on any agreement." Then the section leaves the term and deals with the reservation of

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rent, because it would be "or on any agreement," and you must introduce "or on any agreement which lets for a term of more than a year, by which the rent shall be reserved or made payable." Now, that is the reservation of the rent, or mode in which it is to be paid or made payable at any shorter period than three months. Then, turning back again, you will see there is a dealing with the amount of rent before—"which respectively shall be let to the occupiers for any less term than one year at any rent or rate not exceeding 20l. nor less than 6l. by the year." With regard to the term for less than one year, there cannot be a term of less than a year, with a rent by the year; but you can have the rent at a rate which, if the letting were for a year, would be within the limits fixed by the section. Therefore, "at any rent or rate" must mean at any rent which is at a rate not exceeding 20l. a year. If that be applicable to the payment of the rent, it seems to me to follow that that governs not only the words "for any less term than one year," but also applies to the next alternative term, which is "on any agreement." The word "agreement" shews that the section is going to deal with a letting which may be for more than a year or less than three years, because "agreement" would not properly apply to a lease for more than three years, which must be by deed. The section would then read "or on any agreement that is for more than a year and less than three years by which the rent shall be reserved or made payable at any shorter period than three months." I agree with Lord Coleridge that if the enactment had stopped there, this reading—according to its grammatical construction, and dealing with the words and differences of phraseology which are well known in the ordinary English language as applied to lettings—would shew that two different terms are mentioned, but that there is a limitation of the amount of rent which is applicable to both of them.

The proviso contained in the subsequent part of the section deals with an alteration or variation of the original resolution. That power of varying is in general terms, but it requires to be limited. One would think the limitation of the variation

would be equal with the subject-matter of the first resolution. Here the force of this proviso in this part seems to me to be this, that it gives a description of the subject-matter of the first resolution which may be varied—namely, rent between 20l. and 6l., and that shews more completely, if possible, that the first resolution was to be confined to rents which in amount were between 20l. and 6l.

The sole reason given by my brother Huddleston for the opinion he finally came to is to be found in the passage where he says, "And also where the premises are let by agreement for a shorter period than three months, no matter what the rent may be. The reason is obvious, because a man who takes chambers or lodgings for a period of six or eight weeks would escape altogether where the rates are made every three months, and the landlord would always be able to recoup himself." In other words, he reads the stipulation "or on any agreement by which the rent shall be reserved or made payable at any shorter period than three months," as if it were a term of a shorter period than three months. If the term is for a shorter period than three months it is within the first branch, and the second branch is not required at all. It seems to me, therefore, that the only reason which induced him to come to the conclusion which he did, cannot be supported.

I will only say, further, that it seems to me that Mr. Atkinson has given not only a plausible but the true reason of the introduction of the second paragraph—namely, that the owners would have evaded the first branch by making the term more than a year; but they would have made the rent payable weekly or at a shorter period than three months, with a power to take possession if it was not paid; so that it would not be worth while to rate the occupiers. The old mischief would have continued and the remedy of the Act would have been evaded; and, consequently, the subsequent stipulation was put into the section to prevent owners from thus evading the first branch. I think, therefore, that the reason given by my brother Huddleston is untenable; and that our construction, which is according to the ordinary grammatical construction

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of the English language, and, according to the ordinary meaning of the terms with regard to letting and rent, is the right one. The judgment of the Court below ought, therefore, to be reversed.

Appeal allowed.

Solicitors—Seaton F. Taylor, for appellant;
G. A. Sedgwick, for the West Ham Union;
Hilleary & Taylor, for the overseers.

[IN THE COURT OF APPEAL AND HOUSE
OF LORDS.]

1881. }
April 12. } *In re THE REV. S. F. GREEN.**
Aug. 1, 2. }

Ecclesiastical Court — Contumacious Clerk—Writ de Contumace Capiendo—Jurisdiction of Lord Penzance—Issue of Significavit—Transmission of Court to County Palatine—Public Worship Regulation Act, 1874 (37 & 38 Vict. c. 85), ss. 8, 9, 13, 16—53 Geo. 3. c. 127. s. 1—5 Eliz. c. 23. s. 11—Rules and Orders—Costs on Habeas Corpus.

The “matter of a representation” transmitted to the Judge appointed under the Public Worship Regulation Act is a cause cognizable by an Ecclesiastical Court within the meaning of 53 Geo. 3. c. 127, and any orders made in such a cause are enforceable by significavit and writ de contumace capiendo.

The direction to the Judge, under the 9th section of the Public Worship Regulation Act, “to hear the matter of the representation,” empowers him “to hear, determine and dispose of” the whole proceedings of the ecclesiastical matter from beginning to end, including all incidental and consequential applications, whether as regards costs, suspension or enforcement of monition, or punishment for disobedience—in other words, the whole proceedings until the will of the Court be finally executed—at

* *Coram* James, L.J.; Brett, L.J.; and Cotton, L.J.

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any place mentioned by the Archbishop in the requisition sent to him, even though such place be outside the province, as Official Principal of which he is acting.

Where G., a clerk in the diocese of Manchester, in the province of York, having been found guilty of illegal practices, had disobeyed both the monition and also the inhibition issued against him,—Held, that Lord Penzance was empowered, under a requisition from the Archbishop, “to hear the matter of the representation at any place in London or Westminster, or within the province of York, or within the diocese of Manchester, as you may deem fit,” to direct a significavit to issue of the contempt committed by G., while his Lordship was sitting at Westminster, and that he need not go into the province of York for that purpose.

As regards the transmission of the writ de contumace capiendo to the County Palatine, the method of procedure to be followed is that provided by the 11th section of 5 Eliz. c. 23; 53 Geo. 3. c. 127. s. 1, incorporating into the proceedings with regard to the writ de contumace capiendo all that was contained in the Act of Elizabeth with regard to the writ de excommunicato capiendo.

Therefore, where the clerk resides within the jurisdiction of the County Palatine of Lancaster, instead of the writ de contumace capiendo being issued directly from the Petty Bag Office, that office transmits the tenor of the significavit by mittimus to the Chancellor of the County Palatine, or his deputy, who, on receiving the mittimus, may direct the writ de contumace capiendo to issue, without any further hearing of the parties, and such writ may be issued by the Vice-Chancellor when sitting out of the local limits of the County Palatine.

The mittimus is not such a writ as by Order II. rule 8 of the Rules under the Judicature Acts is required to be tested in the name of the Lord Chancellor, but is properly tested in the name of the Queen as usual before the Judicature Acts were passed.

The Rev. Sidney Faithorne Green was the rector of the parish of St. John the Evangelist, Miles Platting, in the County

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Palatine of Lancaster, the diocese of Manchester, and the province of York.

On the 21st of November, 1878, a representation was made to the Bishop of Manchester by three parishioners, that Mr. Green had been guilty of certain illegal ritualistic practices.

This representation was transmitted by the Bishop of Manchester to the Archbishop of York. The Archbishop, on the 18th of February, 1879, issued a requisition to Lord Penzance, as Judge of the Provincial Court of York, whereby, after reciting the transmission of the representation, and reciting that the said Bishop of Manchester had signified that the parties had not, within the time prescribed by the Public Worship Regulation Act, 1874, stated their willingness to submit to his directions touching the matter of the representation, the Archbishop required Lord Penzance, "the Judge aforesaid, to hear and determine the matter of the said representation at any place in London or Westminster, or within the said province of York, or within the said diocese of Manchester, as you may deem fit."

On the 10th day of June, 1879, Lord Penzance, sitting in his room at the House of Lords, Westminster, as Official Principal of the Chancery of the province of York, heard and determined the matter of the representation, and decreed a monition in respect of all or some of the ritualistic practices complained of.

On the 27th of June, 1879, the monition in writing was issued by Lord Penzance.

Mr. Green having disobeyed the monition, Lord Penzance, on the 16th day of August, 1879, issued his inhibition against Mr. Green, ordering that for such disobedience he should be inhibited for a term of three months from the time of the publication of the monition, and thereafter until the same should have been duly relaxed, from performing any service of the Church, or otherwise exercising "the cure of souls within the diocese of Manchester."

This inhibition was served on the 17th of August, 1879. On the 17th of July, 1880, Mr. Green was served with a notice, intitled "In the matter of the representation of [the three parishioners], made in

pursuance of the Public Worship Regulation Act, 1874, bearing date the 21st day of November, 1878," &c., that "the Court at its sittings in Lord Penzance's room in the House of Lords at Westminster, on Thursday, the 5th day of August, 1880, at twelve of the clock, noon, will be moved that you, the respondent, may be pronounced guilty of contempt of Court, by reason of your disobedience to the inhibition served on you in the above case of *Dean and Others v. Green*, in respect of your having performed divine service," &c., "and that you be punished accordingly."

Mr. Green did not attend the hearing of the motion.

About the 9th of August, 1880, he was served with another notice of motion to be made at the same place, that he might be pronounced guilty of contempt, and punished accordingly.

About the 9th of November Mr. Green received notice from the promoters' proctors, that the last-named motion had been partly heard at the time and place mentioned in the notice of motion, and adjourned till the 20th of November, when such motion would come on for hearing at Lord Penzance's room in the House of Lords at Westminster, at 11 A.M. But Mr. Green did not, on that occasion, appear in person or by counsel.

On the 20th of November Lord Penzance, sitting at the place mentioned in the last notice, pronounced Mr. Green guilty of contempt, and directed a *significavit* to be issued.

On the 25th of November a *significavit* under the archiepiscopal seal of the Chancery Court of York was issued in the name of Lord Penzance, "the Judge appointed under the Public Worship Regulation Act, 1874, and Official Principal or Auditor of the Chancery Court of York," to Her Majesty in the Chancery Division, whereby he signified the disobedience and contempt of Mr. Green in the form provided by the Act 53 Geo. 3. c. 127. sched. A.

On the 26th of November a *mittimus* was issued out of the Petty Bag Office in the following form:—

"Victoria," &c. "To our Chancellor of our Court Palatine of Lancaster, or to his

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deputy there, greeting. We send to you, enclosed in these presents, the transcript of certain letters patent of James Plaisted Baron Penzance, the Judge appointed under the Public Worship Regulation Act, 1874, and the Official Principal Auditor of the Chancery Court of York, which he has sent to us under his seal into our Chancery, signifying one the Reverend Sidney Faithorne Green, of the rectory of St. John the Evangelist, Miles Platting, in the city of Manchester, in the county of Lancaster, clerk, rector of the parish and of the parish church of St. John the Evangelist, in the diocese of Manchester, to be contumacious, commanding you that, inspecting the transcript of the aforesaid letters patent, you cause further to be done therein as of right and according to the form of the statute in this case provided may be meet to be done. Witness ourself at Westminster, the 26th of November, in the forty-fourth year of our reign.

"Jessel.

"Murray."

In February, 1881, Mr. Green was served with notice that H. Fox Bristowe, Esq., Vice-Chancellor of the County Palatine of Lancaster, at his chambers, Lincoln's Inn, would be moved by counsel on behalf of the promoters to direct process to issue to the officer of the County Palatine for the arrest of Mr. Green, in accordance with the *significavit* and *mittimus*.

Mr. Green did not attend in person or by counsel on the day named, and the Vice-Chancellor then and there directed a writ to be issued. Such writ was in the following form:—

"Victoria," &c. "To the sheriff of the county of Lancaster, greeting. The Right Honourable James Plaisted Baron Penzance, the Judge appointed under the Public Worship Regulation Act, 1874, and Official Principal and Auditor of the Chancery Court of York, lawfully constituted, hath by certain letters patent, being, and being hereinafter called, a *significavit*, duly signified to us in our High Court of Justice, Chancery Division, that one the Reverend Sidney Faithorne Green," &c. [reciting the matter stated in the *significavit*], "nor will he submit to the ecclesi-

astical jurisdiction. And the said *significavit* has been duly made of record in our High Court of Justice, Chancery Division. And the tenor of such *significavit* has been duly sent by *mittimus* to the Chancellor of our County Palatine; but forasmuch as the royal power ought not to be wanting to enforce such ecclesiastical jurisdiction, we command you that you attach the said Sidney Faithorne Green by his body until he shall have made satisfaction for the said contempt, and how you shall execute this our precept notify unto our Justices at Lancaster the first day of the next general session of assizes then to be holden, and in no way omit this, and have you there this writ. Witness ourself, at Lancaster, the 9th day of March, 1881, and in the forty-fourth year of our reign.

(L.S.) "Bristowe."

The sheriff, on receipt of this writ, issued his warrant, whereon, on the 18th of March, Mr. Green was arrested and lodged in the gaol of Lancaster Castle.

On the 6th of April a motion was made on behalf of Mr. Green, upon an affidavit setting out the facts, to the Queen's Bench Division, for a rule for a *habeas corpus*, to be directed to the keeper of Her Majesty's prison at Lancaster Castle, to bring up Mr. Green, with a view to his discharge.

The rule was, however, refused by Grove, J., and Lindley, J.

On the 8th of April an application was made to the Court of Appeal to grant a rule for a writ of *habeas corpus*. The Court granted a rule *nisi*, returnable on the 12th of April, on which day cause was shewn against making the rule absolute.

The Attorney-General (Sir H. James, Q.C.), The Solicitor-General (Sir F. Herschell, Q.C.) and A. L. Smith, for Lord Penzance and the gaoler.—Had Lord Penzance jurisdiction, sitting at Westminster, to issue a *significavit*? He, as the Judge of the Court appointed by the Public Worship Regulation Act, 1874, is to have all the powers of the Court of Record. The Court is a new Court—

[Corron, L.J.—No. It is an old Court.] or, if not a new Court, it has increased powers under the Acts.

The Judge was required by the Arch-

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bishop to hear the matter of the representation at Westminster. The Archbishop fixes the venue. The question is, What is the matter of the representation? It must mean the whole of the proceedings from the first step to the very last, and include every proceeding which is necessary for the enforcement of the law. He can issue the monition at Westminster, but it cannot be assumed that he is bound to travel down to York for all incidental matters.

The general rules and forms which were framed under the Act, and laid before Parliament, were the work of Lords Cairns and Penzance, and Cockburn, C.J., and shew at least the construction put on the words "matter of representation" by those eminent men. See, for instance, Forms 20, 21, 22, 26, 28, in several of which the proceedings referred to are subsequent to the hearing (1). These rules form part of the Act, and are of statutory authority—*In re Dale*; *In re Enraght* (2), *Ex parte Wier* (3).

They say that the authority to cite a clerk out of the diocese was only for the "hearing." But what is to be heard? Not merely the statement, but all applications, motions and other proceedings rendered necessary by the original proceeding. The Judge is by section 9 to pronounce judgment on the matter of the representation. It would be a ridiculous construction of the Act to hold that he could only pronounce judgment in London, but that to make any order as to costs, or to suspend the application of his monition pending the appeal, he is to go down to York.

Jeune (A. Wills, Q.C., with him), for the complainants.—The Public Worship Act is an Act *in pari materia* with the Church Discipline Act (3 & 4 Vict. c. 86), which by s. 13 empowers the bishop of any diocese "to send the case by letters of request to the Court of Appeal of the province, to be there heard and determined according to the law and practice of such Court." No one has ever denied that under that section the Judge

had power from first to last throughout the whole proceedings. The expression "matter of representation" is equivalent to the word "case" in that section.

Then there are the words in the 7th section of the Public Worship Regulation Act, that all proceedings taken before the Judge (after he has become *ex officio* Principal or Auditor of the Chancery Court of York), "in relation to matters arising within the province of York, shall be deemed to be taken in the Chancery Court of York." The whole argument of the applicant is that Lord Penzance heard this case as Official Principal of the York Chancery Court.

The very words on which reliance must be placed as shewing that the Judge must exercise his jurisdiction in the province are followed by words which shew that wherever the proceedings are taken they are to be deemed to be taken in the York Chancery Court.

He is bound to hear the matter—the whole matter—in the place mentioned in the Archbishop's requisition.

I go further, and say that he should not sit at York—*Hudson v. Tooth* (4).

Then the next point is as to the jurisdiction of the Palatine Court. That turns on the construction of the 53 Geo. 3.

The Judge having found Green in contempt, the process followed was that declared by the 53 Geo. 3, the statute discontinuing excommunication. The Judge pronounced him contumacious and in contempt, and as the clerk was in the County Palatine of Lancaster, in pursuance of the regular practice under the provisions of 5 Eliz. c. 25. s. 6 (which regulates the process against offenders in the exempt jurisdictions), which provisions are saved by 53 Geo. 3. c. 127. s. 1, the tenor of the *significavit* was, with a document called *mittimus*, transmitted by the official of the Petty Bag Office to the Chancellor of the duchy, who acts by his proper officers in issuing the writ. This has been and is the regular practice.

Then it is said that the Vice-Chancellor had no jurisdiction sitting in chambers to issue the writ. But it was a purely

(4) 47 Law J. Rep. Q.B. 18; Law Rep. 3 Q.B. D. 146.

(1) 49 Law J. Rep. P., D. & A. Orders, 9; Law Rep. 4 P. D. 250.

(2) 50 Law J. Rep. Q.B. 234.

(3) 41 Law J. Rep. Bankr. 14; Law Rep. 6 Chanc. 875.

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ministerial, even if not an unnecessary act.

The question was referred, in the first place, by the cursitor of Preston to Little, V.C., who was prepared to issue the writ, but died before doing so, when the matter was referred to Bristowe, V.C., who gave notice to the other side, who did not appear, and then he directed the cursitor to issue it, but there was no necessity for any hearing. When the Vice-Chancellor, representing the Chancellor of the duchy, gets the *mittimus* he is henceforth to cause like process to be issued. There is no bringing the writ into open Court, he is only to read the *mittimus* in the same way as the Judges of the Queen's Bench Division read the writ *de contumace capiendo*, and in so doing his duty was ministerial only—in fact, the same as that of a sheriff.

[BRETT, L.J.—Is not the Vice-Chancellor to read the *mittimus* to see whether it is proper? We thought that the reason why the writ is sent into the Queen's Bench Division is to see that it is a proper writ.]

Whatever may be the case in the Queen's Bench Division, the County Palatine is under a different law. In the case of an ordinary writ out of the Chancery Division, it would go to the Chancellor, and he would hand it over to the sheriff, and there would be no hearing; the Chancellor's duties in that case would be purely ministerial, and so the Chancellor of the County Palatine does, by his officers, precisely what the Chancellor of England does by his.

If then the act of the Vice-Chancellor was purely ministerial, it need not be done within the limits of his jurisdiction.

If not ministerial, but judicial, the act comes within 13 & 14 Vict. c. 43. s. 13. This is a "motion," or at any rate a matter for facilitating the progress of business pending in the Palatine Court.

Arthur Charles, Q.C., and W. G. Phillimore (*Poland* with them), for the Rev. S. F. Green.—As to the jurisdiction of Lord Penzance to issue the *significavit* out of Westminster, that depends upon the meaning of the words "hear" and the "matter of the representation." "Hearing" must mean the judicial hearing, in-

cluding the pronouncing of judgment. When that was done the power of the Judge under the requisition ceased. The form of the requisition (Form 14) shews the meaning of the word.

Then what the Judge is to "hear" are the matters of the representation—that is, only the matters disclosed by the thing which is called a representation, which is transmitted to the Bishop by the complainants—see section 8 and schedule B. Disobedience to an order of the Court is not one of the matters covered by the representation. It is not really within the Public Worship Act at all, but the 53 Geo. 3. c. 127. Then the direction to the Judge to give twenty-eight days' notice seems to limit the meaning of the words, as does the former clause in section 9, providing for a hearing before the Bishop by consent of the parties.

The requisition (Form 14) which is to give power to the provincial Judge to sit outside his province must be strictly followed. He is obliged to rely on the Act to sit outside his province, and unless he finds words enabling him to exercise the powers of the 53 Geo. 3. c. 127 when sitting outside his province, he has exceeded his powers.

If, when judgment has been pronounced by the Judge on the matter of the representation, his order is disobeyed, provision is made for further proceedings, which are to be taken by direction of the Judge (section 10)—a new process analogous to an action on a judgment.

Section 16 is very different from section 9. In the former the words used are "all matters therein arising in relation to such representation," and the present proceedings would fall within this description.

There would be no difficulty if the Judge had elected to sit within his province, as he could have done. He has not been ordered to sit at Westminster. The actual trial is of course to be fixed in the place which the Archbishop considers most convenient—if of fact, in the province, if of law, probably in London; but any subsequent proceedings would be taken under his common law jurisdiction in the province. This is an attempt to derogate from a common law right, and for that clear words are necessary. He

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has no jurisdiction in the absence of clear words, as Official Principal of York, to sit and act outside the province.

On the question whether the writ was properly issued out of the offices of the County Palatine, the writ *de contumace capiendo* is, by the 2 & 3 Will. 4. c. 93, to be issued from the High Court of Chancery in England; and when once you get the writ issued out of the proper place, then by the same statute all the rules and regulations of the Act of Elizabeth applicable to the writ *de excommunicato capiendo* shall apply to the proceedings following upon the writ; and the 11th section of that Act, providing for things which precede the writ, is not by the Act of Will. 4 applicable here. Under the 2nd section of the Act of Will. 4 the goods of Green could have been sequestered under the sequestration issued out of the High Court of Chancery (not the County Palatine). The statute of Will. 4 creates a statutory writ issued out of the Court of Chancery, and although a common law writ may not run into the County Palatine, there is no authority for saying that a statutory writ does not.

The Vice-Chancellor in issuing the writ is either filling an office like that of the Chancellor, or else he must have discretion, in which case he is in a similar position to the Court of Queen's Bench with regard to the writ. This duty is more than ministerial—it is judicial—and he must perform it within the jurisdiction of his province.

JAMES, L.J.—I am of opinion that the rule must be discharged on all the points that have been raised. The first and most important point probably is that which is raised as to the jurisdiction of Lord Penance to hear the application sitting in his room at Westminster, being a place in which he was authorised to sit for hearing the matter originally. No doubt the statute is not altogether very easy to construe. There may be some difficulties in the language found in different parts of it which may puzzle us a little, but we must construe it as a whole, and see what was the object of the statute and what was intended to be done by it. We must construe it with reference to that object and

intention as we gather them from the statute itself, because we have no right to look at anything else.

Now I am of opinion that the words "to hear the subject-matter of the representation" cannot be limited, as has been said, to merely sitting there and hearing the thing read. Then it is not merely hearing what is contained in the subject-matter of the representation. The word, therefore, must have a meaning, something more than the mere sitting there and listening. It is to "hear and determine." Now, to "hear and determine," it is conceded, must mean to "hear and determine and pronounce judgment" upon it. It appears to me that it goes further than that. The plain meaning of the Act of Parliament is, that the subject-matter of the representation—as you say the ecclesiastical cause or matter which is the subject-matter of the representation, the charge against the clerk supposed to be offending—is to be dealt with judicially by the Judge, if he be so required by the Archbishop who has power to direct him in certain cases to hear it. It is to be dealt with by him as a Judge; the thing itself is annexed to his jurisdiction, and he is to hear it and determine it and deal with it. The word "determination" which is introduced into the form referred to (Form 14), seems to me to imply that it is a fair and reasonable construction of the statute to say that it means the "hearing, dealing with and disposing of the whole thing," and that includes every proceeding pending the hearing and every proceeding subsequent to the hearing, but being part and parcel of the thing or cause which was so attached to the Judge. I think that is the meaning of the 9th section of the Act of Parliament, and every convenience would seem to point to that being the proper meaning, and we must always in these cases have regard, in construing somewhat ambiguous expressions, to what would be the convenient and inconvenient results arising from any particular construction. One thing certainly startled me in the first instance, seeing I have never got any answer by the applicants in this case—that is, the clause at the end of the 9th section which Lord Justice Brett pointed out very early in the

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argument—namely, as to the suspending of the application of the monition; where is that to be done? Is it conceivable—is it consistent with anything like a sensible interpretation—that, after the Judge has determined the case and pronounced his sentence ending in a monition, that then, if the party is minded to do, what he can do—namely, to appeal from that as from any other judicial sentence of that Judge—the Judge himself cannot hear any application to suspend his own sentence—to suspend his monition, pending that appeal—in the place where he pronounced it, where they are giving notice of appeal—that is, in his room at Westminster. If the clerk did not go the next day to the same Judge to apply for a suspension of the monition, he would be utterly remediless until the Judge should find himself, if he ever did find himself, absolutely within the limits of his province, in this case of York. That would be a very startling result, and so startling that we should endeavour to get over it by saying that such an application is to be considered as being incident to it. It shews to me that the power of the Judge does not end when he has simply declared whether the man has been guilty or not guilty of the offence, and when he has said, “And for that I admonish him.”

Again, it would seem to me to be very inconvenient to hold that every application with regard to the costs of the proceedings required that the Judge should leave the place where he has heard the case, and go for all these incidental matters all the way to York, or, if he did not go down there, that the parties should be left entirely without remedy. It appears to me that if we give the plain meaning of the word “hear” as meaning “to hear, determine and dispose of,” then it follows that every incident of the case and every consequence of the case is to be done by the same Judge in the same place in which he has authority originally to hear it, and therefore that the ground for the objection on that score fails.

Then with respect to the other matters with regard to the County Palatine, the point arising out of the transmission of the writ to the County Palatine, certainly the result would be very startling if we

could be asked to upset a practice which has prevailed ever since the statute, and probably long before the statute of Geo. 3, without attending very plainly indeed to the practice which has been in accordance with the previous practice for centuries; and when you come to look at the Act of Geo. 3, it does appear to me, as it did to both the learned Judges in the first instance in this case, that all the provisions of the statute of Elizabeth are really preserved in the statute of Geo. 3, and made applicable to the new writ *de contumace capiendo*, as they were previously applicable to the writ *de excommunicato capiendo*, and that, amongst other things, a part which is preserved is that clause of the statute of Elizabeth which refers in terms to the exempt jurisdiction and to the fact that the writ does not run there; and it provides the whole machinery for dealing with the case of those exempt jurisdictions, especially the case of the great Counties Palatine.

Now if the only change that was intended to be made was to substitute the word *contumace* for the word *excommunicato* in the new writ to be issued, it would be very strange indeed if the whole system of law, the whole relation between the Counties Palatine and the Court of the Counties Palatine and the offices of the Counties Palatine, on the one hand, and those Courts which sit at Westminster on the other, were changed without any reference at all to it—without there being anything to call attention to it. Therefore, when we find that there is no apparent intention to alter the privileges of the County Palatine—when we find that in terms the provisions of the statute of Elizabeth are preserved—it seems to me they are preserved so as to preserve that 11th section, and that we must read the statute of Geo. 3 in exactly the same way as if there had been a proviso in so many terms put in the statute of Geo. 3, of course *reddendo singula singulis*, with the proper language arising from the fact that there was to be a writ *de contumace capiendo* instead of a writ *de excommunicato capiendo*. If that clause is to be read as if it were introduced into the statute of Geo. 3, it appears to me that the practice which has prevailed is

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well authorised by the statute, and that the objection on that head ought to fail.

In respect to what was supposed to be some excess of jurisdiction on the part of the Vice-Chancellor in hearing the application, it appears to me that was a mere work of supererogation. The Vice-Chancellor was really not called upon to do anything more than give his advice. As being a member of the Chancellor's staff he was called upon by one of the less distinguished and eminent members of that staff to advise him as to whether he could issue the writ. That was advice that he might give sitting in London quite as much as sitting in the County Palatine of Lancaster. What the Chancellor has to do in issuing his writ on receiving the *mittimus* certainly is not a judicial act. Nobody supposes that he was sitting to hear anybody; nobody was to be summoned before him. It is not a judicial act, it is not a ministerial act. He is not a servant of the Chancery Division in England, but he is a great officer of State of the Queen, and the Queen sends to him from the Chancery of England a direction giving effect to the process that has been issued. Of course he does not do that personally, for nobody ever supposed that the Chancellor of the duchy would personally deal with anything of that kind any more than the Lord High Chancellor deals with the issue of attachments or other writs in this Court. He would deal with it not by himself, but by the proper officers, whom he has at the proper place to open and read the thing that is sent to him by the *mittimus*, and to issue the proper instrument which is to be issued in consequence of that. The Chancellor is doing all that is required to be done by the Queen, and you consider that he has done it, when he has done it by his proper officer. The Judge of the Chancery Division does many things through his clerk, to which necessarily his own judicial mind would not be applied, and in this case the Chancellor was acting through the proper officer, which proper officer prepared the writ and transmitted it originally.

BRETT, L.J.—I am of the same opinion. It seems to me that the whole of the first question depends solely and entirely on

what is the proper construction of the 9th section of the Public Worship Regulation Act. In order to construe that Act I cannot accept what was suggested by the Attorney-General, if we understood him rightly, that any new Court of any kind is constituted by this Act. At all events, I adhere absolutely and entirely to what was said in the former judgment, that there is no new Court whatever; there is no new Judge whatever; that the Judge is not a Judge appointed by the statutes; that there are the two Courts of the province of Canterbury and York still existing as they were before; that the mode of appointing the Judge is altered, but that the Judge is actually appointed by the same persons; that all his power is derived from the appointment by the very same persons who appointed him before, only the statute says that these persons must appoint jointly, and must appoint the same person to be the Judge of the two Courts. There are still two Courts, the same Courts that they were before. Now with regard to the construction of this 9th section, if Mr. Charles's argument was right, the logical result of it must be that all the Judge could hear at the place required by either of the Archbishops was that which is contained in the representation, and that every other step in the case must be decided by him in the province. I think that construction was felt to be so practically absurd that it was not insisted upon; and it was admitted that the words, "the matter of the representation," must go somewhat further than that. If they go further than that I can see no step short of saying that they mean that the whole cause, the whole matter of complaint, from the beginning to the end, must be, or at all events, I would rather say, may be, heard at the place required by the Archbishop; and that the whole proceedings and every part of the proceedings, from the beginning until the will of the Court is finally executed, are contained in the words "the matter of the representation" in the last part of the 9th section.

It was said that that could not be so with regard to the former part of the 9th section, where the same phraseology is used with regard to a hearing before the Bishop

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by the consent of the parties. In my opinion, if the powers of the Bishop to hear the matter by consent of the parties, as conferred by the words of the 9th section, had remained unrestricted, then the Bishop would have had the power to carry on the matter to the very end, and he would have had power to do that which at the end of the 13th section it is said that the Judge alone can do. I think if it had not been for the restrictive words at the end of the 13th section, the Bishop, by reason of the words in the 9th section, would have had the power of enforcing his judgment to the end; that is to say, in other words, that the primary meaning of the phrase to "hear the matter of the representation" would have carried the whole matter from beginning to end even before the Bishop, if it had not been for the restrictive words at the end of the 13th section, which took away a part of the power from the Bishop and gave it only to the Judge. Then I cannot help thinking that the high authority (for that is the way it must be used) of those eminent persons who drew the rules under this Act may be cited in order to support our construction of the 9th section; for it seems to me that in drawing the rules and using the phraseology which they have used in those rules, namely, "in the matter of the representation," they have shewn conclusively that they considered the construction of the 9th section to be as we say it is. On the first point, therefore, it seems to me, on the construction of the 9th section, the learned Judge, when he is required to hear the matter of the representation at Westminster, may hear the whole matter and determine the whole matter from beginning to end at Westminster. It does not at all follow that he may not hear some part of it in the province, although he is required to hear it in Westminster, but that he may hear it at either place. I do not determine that other point.

As to what took place with regard to transmitting this matter to the County Palatine, I confess about that I have no doubt whatever. It seems to me clear that the words of the statute of Geo. 3 incorporated into the whole proceedings, with regard to the writ *de contumace capiēdo*,

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all that was contained in the statute of Elizabeth with regard to the writ therein mentioned, and it is just the same as if the 11th section of the Act of Elizabeth had been written in the Act of Geo. 3. If so, where the matter does not affect the County Palatine there is one course of procedure; where the matter does affect the County Palatine there is another, and that is the procedure which has been followed in this case, and which I take it has been followed with regard to all these writs and similar writs ever since the passing of the statute of Geo. 3. That, I confess, to me seems to be a perfectly plain point. With regard to the question of the Vice-Chancellor sitting at his chambers, in the first place I think he was merely giving advice: he was not acting within the statute at all, or within any legal competency. As regards the question whether the Vice-Chancellor ought so to act, I think it is impossible to say that the Vice-Chancellor acting in these matters is acting as a Judge of any Court at all, and if he is not it is not a judicial proceeding. I do not think that the Vice-Chancellor is a mere conduit pipe, or that what he is to do is what is merely called ministerial. I think he is a high executive officer who has a discretion, but I think that where there is such a person with such a discretion, that does not come within the rule of its being a judicial discretion, and that he may exercise that authority not only in a place which is called within his jurisdiction, but in any place where he may be.

COTTON, L.J.—I agree in the opinion at which the other Lords Justices have arrived, and I so entirely agree with the reasons which they have given that I should add nothing, but that the case is one of very great importance, and therefore I think it right to the parties that I should give my opinion and not merely make a sign of assent. Before I give my reasons for disposing of this present application I would say a word about what was attempted to be argued by the Attorney-General. Whether we misunderstood him or not, he seemed to raise this contention, that Lord Penzance sitting here was not sitting as the Official Principal of the province of York, but as a

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new Court of Record constituted by the Act of Parliament.

Now that, according to my opinion, is entirely contrary to the decision we gave in the previous cases which came before us, to which I entirely adhere, that Lord Penzance, although at one time he was one only of the Judges of those Courts, yet now is the Judge of the Court of the province of York, and that it is as a Judge of an Ecclesiastical Court, and of that Ecclesiastical Court only, that he has acted. The first point one has to consider is this—and it is one which I say frankly, having regard to the terms of the Act of Parliament, is not without difficulty—namely, whether Lord Penzance had power to pronounce Mr. Green contumacious when sitting out of the province.

Of course, unless the Act of Parliament gives him on its clear construction power so to sit, he had no jurisdiction as Official Principal of the Court of the province of York to sit out of the province. Now had he by the Act of Parliament power given to him to sit at Westminster? He sat at the place pointed out by the request of the Archbishop, and the whole point really turns on that portion of the 9th section; of course this construction being aided or hindered by other portions of the Act of Parliament. "The Archbishop shall forthwith require the Judge to hear the matter of the representation at any place within the diocese or province or in London or Westminster." Now if that stood alone, I should certainly without hesitation arrive at the conclusion that those words required the Judge to hear the matter of the representation, including dealing with the whole case, and contest in these matters ecclesiastical from beginning to end—not only originally to hear it, but to deal with those matters which might arise before the actual hearing, and also to go on and deal with everything that was incident to the matter being before him. He has power given him to order the production of documents; an order which probably would be made on application before the hearing as in other cases. That, in my opinion, was a matter which the Archbishop would have requested him to deal with, by his request to "hear the matter of the representation."

Then, again, the Judge can suspend the issue of any judgment or monition which he may direct to be issued pending an appeal. If he can suspend it sitting at that place, in my opinion he can go on and fix any directions which may be necessary for the purpose of enforcing any order which he may have made in the matter. It is said (and I will deal with it) that it may apply to all matters in which he is acting under the powers given him by the Act of Parliament, but here he is dealing with a matter as to which there is no reference whatever in the Act of Parliament. He is simply acting as an ecclesiastical Judge, the Official Principal of the Court of the province of York, and exercising the powers which he has as such Judge independently of the Act of Parliament.

No doubt that was so, but in my opinion he was there acting, though under power in other respects given to him by the Act of Parliament, as the Official Principal of that Court, and he had the power which he exercised, without any Act of Parliament to declare Mr. Green contumacious.

He was the same Judge of the same Court, though acting as regards powers not specially mentioned or given to him by the Act of Parliament, and that I think disposes of that difficulty which certainly was an argument which deserved attention. But the greater difficulty arises from this, that no doubt one does in some parts of this Act of Parliament, particularly in section 9, find the words, "hear the matter of the representation," where it appears from the Act of Parliament that that was not to go beyond the original hearing and decision, and the issuing of a monition, and hearing and determining whether that monition had been obeyed.

I think that is the true interpretation, and the result is that those words in the other part of the 9th section when referring to what was to be done by the Archbishop are cut down of necessity by the subsequent portions of the Act of Parliament from including what they otherwise would have done. If there is no such limitation as regards what is to be done by the Judge, the words of re-

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ference to him may fairly include the having a jurisdiction to hear and dispose of the entire matter arising out of and contained in the representation outside the province of York, where alone he would have jurisdiction.

It is said that what immediately follows—the power of the Archbishop to require the Judge to hear the matter—bears against the construction which I put upon those words. It is this, that the Judge shall not give less than twenty-eight days' notice of the time and place at which he will proceed to hear the matter of the said representation.

No doubt that twenty-eight days' notice does not apply to all proceedings which he had jurisdiction to hear out of the province in consequence of the request, but then that is simply by construing that fairly.

There it refers to the original hearing, and to that only; but still in my opinion it is not sufficient ground for cutting down the previous words when we should arrive from that at what is possibly an absurd conclusion, that although he has jurisdiction given to him to entertain the original hearing out of the jurisdiction, and has also powers given to him incidentally and for the purpose of dealing with the original hearing, one is to be in Westminster, and the other of necessity in the province. I think, therefore, on the true construction of this Act of Parliament, that the requisition of the Archbishop did give Lord Penzance power to dispose of the whole matter arising on this representation out of the province, and at Westminster, being one of the places mentioned in that requisition.

Another question was, whether this "*significavit*" was properly sent by the "*mittimus*" to the Chancellor of the County Palatine. I think that the true construction of the Act of Geo. 3 was that which I pointed out during the argument—that it did away for this present purpose entirely with the writ *de excommunicato capiendo* and substituted for it power for a Judge to declare the party contumacious, and then provided that there should be a *significavit* and a writ *de contumace capiendo*. But the words of the Act of Geo. 3, fairly con-

strued, do, I think, go to this: you must read the Act of Elizabeth as if, instead of the old writ *de excommunicato capiendo*, therein referred to, a writ which has now been created—a writ *de contumace capiendo*—had been enacted in terms; and construing the Act so, the Act of Elizabeth will apply, and the proper proceeding has been taken in this case subject to the only remaining point by sending a copy of the *significavit* by *mittimus* to the Chancellor of the County Palatine and requesting him to act under the 11th section.

The only other point put to us was this—whether the Vice-Chancellor had power to deal with the matter before him in Lincoln's Inn. There is nothing in the Act of Elizabeth which requires the Chancellor of the County Palatine to hear the parties, or to have any motion made before him, or to make any order before the writ *de contumace* is issued by him; and in my opinion what was done by the Vice-Chancellor was unnecessary, and merely, as I presume, because, before giving any direction to the officer of the County Palatine, he thought it right that the party in so important a matter should have an opportunity, if he thought fit, of coming before him and stating his objections. In my opinion, that was a mere gratuitous act on his part, not in any way required by the statute.

However, the objection has been taken and ought to be dealt with. Then if the Vice-Chancellor was not required to act in hearing a matter brought before him, the Chancellor or his officers, I suppose, in directing this writ to issue could only act within the County Palatine. I by no means say that the Act of the Vice-Chancellor is a purely ministerial one. I think it was not; but it was not a judicial one; and, in my opinion, even although he had, as I think he had, a discretion to be exercised under the Act of Elizabeth, if any difficulty or question arose, yet I can see no reason why he should not exercise that discretion, not in his judicial capacity, but as the head of the executive of the County Palatine in London or elsewhere out of the County Palatine.

In my opinion, therefore, the objections in this case all fail, and the rule must be discharged.

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Upon the question of costs the parties agreed to take the decision of Cotton, L.J., the other Lords Justices having left Court.

Charles asked that the rule might be discharged without costs. In accordance with the practice of the office the rule was directed.

COTTON, L.J.—The complainants will have their costs, but I think there must be an apportionment of the costs of the gaoler and Attorney-General, because I cannot see why the gaoler should have instructed counsel. I think Mr. Green must pay Lord Penzance's costs here. Mr. Green had had one decision against him and he appealed to this Court, and therefore, although Lord Penzance was not in the Court below, when he would not get his costs probably, according to the ordinary course, yet when Mr. Green comes here attacking his jurisdiction to sit under the Act at Westminster, I think he reasonably appeared, and Mr. Green must pay his costs.

As regards the Vice-Chancellor, I understand that he took the same view which we took when he summoned Mr. Green before him or gave notice to him to appear, that he was merely giving him an opportunity to appear to say what he thought fit, and therefore I think there was no reason on that ground for his appearing. I do not think it was the Vice-Chancellor who issued the writ—it was a writ issued out of the office of the County Palatine; but I do not think the Vice-Chancellor need have appeared to argue that point, which certainly would have been sufficiently argued by the parties, and therefore I think the Vice-Chancellor ought not to have his costs.

From this decision Green appealed to the House of Lords.

Sir J. Holker, Q.C., and *Charles, Q.C.* (*Phillimore*, with them), for the appellants.

Sir H. James, Q.C. (*Attorney-General*), and *Sir F. Herschell, Q.C.* (*Solicitor-General*) (*Danckwerts* with them), for Lord Penzance; and

Jeune, for the promoters, were not called upon.

THE LORD CHANCELLOR (LORD SELBORNE).—I can never regard the zeal and ingenuity of counsel as at all misplaced when they are exerted for the defence of personal liberty. When that is the object in view, it is quite right that all points which seem in the judgment of counsel to be at all worthy of argument should be taken; and your Lordships, I feel sure, would not allow yourselves to be biassed one way or the other by any consideration either of the technical character or the minuteness or apparent insignificance of any points which might be raised, if it appeared to you that the requirements of the law in a case affecting liberty had not been complied with. But it is your Lordships' duty to hold an even hand, and to remember that you are bound by the law, and that you are not at liberty to place strained constructions upon it, even from any feelings of indulgence which you may entertain towards those whose liberty is in danger.

With that preface, I will address myself immediately to the several points which have been argued in this case, and I will take them in the inverse order to that in which they have been presented to your Lordships.

The last point which was mentioned was this, that the *mittimus* was wrongly tested as in the name of the Queen, the Master of the Rolls undersigning it, and that it should have been in the name of the Lord Chancellor under certain rules made by virtue of the Judicature Acts (Order II. rule 8). It is enough to say, that I consider those rules to be applicable exclusively to judicial writs issued for the purpose of judicial proceedings, either in the High Court or in the Court of Appeal, and that this proceeding belongs to neither of those categories. Being tested in what had been the usual manner before the Judicature Acts were passed, I conceive that the *mittimus* is properly tested, and that that objection may be at once dismissed.

The next objection was that the *mittimus*, supposing it could be issued, should have been presented to the Justices of Lancashire under the Act 5 Eliz. c. 23, incorporated into the Act 53 Geo. 3. c. 127, in order that they might open it in Court,

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and do with it whatever might have been done by the Court of Queen's Bench in the case of a writ *de contumace capiend*o returnable into that Court. That argument appears to me to fail on the most evident grounds. When a *mittimus* takes place at all, it is under the 11th section of the statute of Elizabeth, and that section does not say either that it is to be sent at all to the Justices before whom it is returnable, or that it is to be opened by them; but, on the contrary, it says that the local authorities to whom the *mittimus* is directed are at once to issue a writ upon it returnable before the Justices. Whatever, therefore, may have been the motive or purpose of the direction applicable to the Court of Queen's Bench in the Act of Elizabeth, that the writ *de excommunicato capiend*o should be opened in that Court to which it was returnable, there is no trace of any similar direction as to the local authorities when the writ was not returnable in the Court of Queen's Bench; and, in my opinion, it cannot be by any implication interpolated into the 11th section of that statute.

Then came an objection of a more substantial character. Your Lordships will understand that these objections, however minute, ought, in my opinion, to prevail if they are well founded in law, and if the legal requisites of a writ ending in imprisonment have not been fulfilled. The objection which I have described as more substantial is this, that under the statute of 53 Geo. 3, which substituted ordinary imprisonment under a writ *de contumace capiend*o for excommunication, nothing could be done unless the writ issued in and from the Court of Chancery. The whole object of that statute being evidently to substitute, as one of the Lords Justices said, the word "*contumace*" for the word "*excommunicato*," and in other respects to retain the old mode of enforcing ecclesiastical orders, the statute said that, when the contempt which it contemplated had taken place, it should be lawful for the Judge of the Ecclesiastical Court to pronounce the guilty person contumacious and in contempt, and within ten days to "signify the same in the form to this Act annexed to His Majesty in Chancery as hath heretofore been done in signifying excommuni-

cations." So far the form actually followed in this case was that contemplated by those words of the statute. But then the statute proceeds, "and thereupon a writ *de contumace capiend*o in the form to this Act annexed shall issue from the Court of Chancery, directed to the same persons to whom the writs *de excommunicato capiend*o have heretofore been directed, and the same shall be returnable in like manner as the writ *de excommunicato capiend*o hath been by law returnable heretofore, and shall have the same force and effect as the said writ." Upon those words it was argued that no writ *de contumace capiend*o could lawfully issue except from the Court of Chancery, and that in this case there was not a writ *de contumace capiend*o issued from the Court of Chancery, or, what is now the same thing, the Chancery Division, but a *mittimus* to the local authority in the County Palatine of Lancaster, from which local authority the writ *de contumace capiend*o was issued.

Now, pausing at those words, and not yet proceeding further, I think it is sufficiently plain, even from those words, that the intention of the Legislature was that, *mutatis mutandis*, the same procedure and no more should be followed as to the new writ *de contumace capiend*o as had before been followed as to the old writ *de excommunicato capiend*o. The next observation is, that this general practice, assuming that in ordinary circumstances the procedure would be in the Court of Chancery, follows very much the parallel legislation of the Act of Queen Elizabeth, to which reference is afterwards made, which also assumes that the ordinary and normal course of proceeding would be by a writ issuing from the Court of Chancery, and directed to be returnable into the Court of Queen's Bench.

But the Act of Queen Elizabeth, taking notice that there were cases in which the writ would not be properly returnable into the Court of Queen's Bench, and providing for those cases, contained the 11th section, by which in regard to certain exempt and other special jurisdictions, of which the Counties Palatine of Lancaster, Chester, Durham and Ely were some, "where the Queen's Majesty's writ doth not run, and process of *capias* from thence

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not returnable into the said Court of the King's Bench after any *significavit* being of record in the said Court of Chancery," it was expressly provided that in those cases, and for that reason "the tenor of such *significavit* by *mittimus* shall be sent to such of the head officers" (of those Counties Palatine) "within whose offices, charge or jurisdiction the offenders shall be resiant." Then it expressly specifies that in the County Palatine of Lancaster it shall be sent "to the Chancellor or chamberlain." Then it goes on to say, "And thereupon every of the said Justices and officers to whom such tenor of *significavit* with *mittimus* shall be directed and delivered shall by virtue of this estatute have power and authority to make like process to the inferior officer and officers to whom the execution of process there doth appertain, returnable before the Justices there at their next sessions or courts two months at the least after the teste of every such process." "Like process" there, I apprehend, means clearly process similar to that which in other cases would issue returnable into the Court of Queen's Bench—that is to say, a writ *de excommunicato capiendo*.

The course which has been taken in this case has, in point of fact, followed that exceptional direction for such special cases, substituting only the ultimate writ *de contumace capiendo* for the writ *de excommunicato capiendo*. The matter arose in the County Palatine of Lancaster; there was a regular *significavit* to the Court of Chancery, as I have called it; and from Chancery there was *mittimus*, under this clause of the statute, to the Chancellor or the Vice-Chancellor of the County Palatine of Lancaster. By him the process of execution by the writ *de contumace capiendo* was issued to his inferior officers returnable in the proper form before the Justices; and the question is, whether the statute of 53 Geo. 3, which substitutes the writ *de contumace capiendo* for the writ *de excommunicato capiendo*, prescribes this process of *mittimus*, or absolutely requires in the case of the special and exempt jurisdictions, as well as in other cases, that the writ shall issue from the Court of Chancery, and, in some way that is not explained, be made returnable somewhere in a different man-

ner from that which would have been right under the Act of Elizabeth. Of course, a want of due provision for those cases, and for proper directions as to the mode of dealing with them, and a want of any direction that in the case of these exempt jurisdictions as well as others the writs should be returned into the Court of Queen's Bench—these defects, if they were such in fact, might not necessarily determine the question, because—strange as it would be that with the Act of Elizabeth before them, and when they were evidently intending to put an end to excommunication specially, and to substitute the writ *de contumace capiendo* for the writ *de excommunicato capiendo* generally, the Legislature should have forgotten that there were such cases to be provided for—yet, if that had been the actual state of things, I do not say that your Lordships would have by any unnecessary implication incorporated into this Act of 53 Geo. 3 the provisions of the 11th section of the Act of Elizabeth.

But the answer to the objection is that the Legislature has not overlooked the point, and has expressly incorporated into this Act of 53 Geo. 3 the provisions of the Act of Elizabeth; for after the words which I before read, this statute of 53 Geo. 3 proceeds thus: "And all rules and regulations not hereby altered now by law applying to the said writ" (by which I do not understand the said writ when issued from the Court of Chancery, but the said writ whenever and however it can lawfully be issued—that is, the writ *de excommunicato capiendo* as it was before that statute), "and the proceedings following thereupon, and particularly the several provisions contained in a certain Act passed in the 5th year of Queen Elizabeth," "shall extend and be applied to the said writ *de contumace capiendo*, and the proceedings following thereupon as if the same were herein particularly repeated and enacted." If this 11th section had been herein particularly repeated and enacted, no question could possibly have arisen, and it is to be taken to have been so. It is said, Oh no! because those provisions are merely incorporated into this statute as far as they are rules and regulations applying by law to the writ issued

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from Chancery; but these are not the words of the statute—it is “to the said writ,” and I understand “the said writ” to be the writ *de excommunicato capiendo*, whether issued from Chancery or issued in any other manner which may be found provided for by the Act of Queen Elizabeth. This particular case I find so provided for, and in this particular case under the Act of Queen Elizabeth that writ is to be issued, not direct from the Court of Chancery, but as a consequence of *mittimus* from the Court of Chancery, in substance directing it to be issued from what for that purpose was the proper jurisdiction.

I have no hesitation in saying that I think the proceedings in that respect are perfectly right, and I find nothing whatever to change that conclusion in the subsequent Act (2 & 3 Will. 4. c. 93). Assuming (though it is not necessary for your Lordships to decide it) that those words have a more definite aspect of application to a writ issued out of the Court of Chancery only, I apprehend the reason for it is manifest, because the whole object of that later statute is to provide for the manner of executing the writ as against persons having privilege of peerage or being members of Parliament or not being within the jurisdiction of the Ecclesiastical Courts. The persons within these various exempt jurisdictions—I mean exempt from the ordinary currency of the Queen’s writ—which are provided for by the 11th section of the Act of Elizabeth, would be within the jurisdiction of the ordinary Ecclesiastical Courts, and would not be persons with respect to whose special cases the statute 2 & 3 Will. 4. c. 93 was intended.

I pass to the next point, which was this: Assuming the Judge to have had jurisdiction to issue the *significavit* upon which the writ *de contumace capiendo* is in this case founded, he ought to have issued it (it is said), not, as he did, at Westminster, but at some place within the jurisdiction of the Provincial Court of York. That question turns upon the interpretation which your Lordships will give to the 9th section of the Act of 1874, which is intitled “An Act for the Better Administration of the Laws respecting the Regulation of Public Worship.” This argument assumes that the Judge who

took this proceeding was, and was acting as, Official Principal of the Chancery Court of York, and that the proceeding itself is to be deemed to have been taken in that Court. On that assumption it is said that the ordinary ecclesiastical law would require a proceeding of that Court to have been taken locally within its jurisdiction, and that this proceeding was not so taken. But the answer is, that this is a proceeding not taken under the general jurisdiction of that Court, so far as relates to the conditions of its inception and prosecution, but taken under the special provisions of this Act of Parliament of 1874, to which I have referred; and of course whether in one Court or in another, whether in a new Court or in an old Court, when an Act of Parliament prescribes a new manner of proceeding for a particular purpose, and in so far as it does so prescribe it, that prescribed manner must be properly followed, and if properly followed the proceeding is justified, although it might not have been capable of being taken in the same way merely by virtue of the general jurisdiction of the Court.

Now the Act of Parliament under which this proceeding was undoubtedly taken says that upon the representation of a certain matter complained of against a certain person being made, and the parties not consenting to abide by the directions of the Bishop, the Bishop shall forthwith transmit the representation to the Archbishop of the province, and the Archbishop shall “require the Judge to hear the matter of the representation at any place within the diocese or province, or in London or Westminster.” Plainly, therefore, if so directed, as in this case he was, by the Archbishop, the Judge might hear the matter of the representation in London or Westminster, although those cities might not be within the diocese or province; and that was what he actually in this case did. Well—was it right, or was it wrong? Did the authority as to place given to the Judge by those words of the 9th section extend to the particular act and proceeding now in question? I think it did. It appears to me that the whole determination of the matter of the representation, with all its necessary antecedents and proper consequences, was intended by

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and included in that power, which is given to the Archbishop to require the Judge to "hear" it in London or Westminster. There are various things to be done by him under the Act before the hearing and preparatory to it: orders as to evidence, orders as to attendance of witnesses, notices, orders for the production of documents. Technically those are not a part of the hearing, but I entertain no doubt whatever that those things, and every other thing preliminary and antecedent to the hearing, are covered by and are included in the authority to "hear," which I consider means to hear and finally determine, "the matter of the representation," which I consider to be equivalent to the cause—the whole matter. Those antecedent things are in my judgment within that authority, and the "hearing" within the meaning of these words does not appear to me to terminate till the whole matter is disposed of; therefore it includes not only the necessary antecedents, but also the necessary or proper consequences. There is an illustration of one of them on the face of the same clause: there is to be a power of appeal, and "the Judge may on application in any case suspend the execution of such monition pending an appeal if he shall think fit." In the narrow sense of the word "hearing" which has been contended for, that must necessarily be a proceeding subsequent to the hearing; and if it were necessary that all proceedings subsequent to the hearing should be taken at some place within the ordinary jurisdiction of the Chancery Court of York, that proceeding amongst others would have to be so taken. But, as there is no provision in the Act that the Judge must go away from Westminster in order to receive such an application, it would follow, if he could not suspend the execution of a monition pending appeal elsewhere than in the province of York, that unless he chose to do something which he is under no obligation to do, the subject who wishes to make an appeal would be deprived of the benefit of that provision of the statute. I think that instance is quite enough to carry with it all the consequences, and to shew that the provision is applicable to all proceedings incident to and consequent upon a sentence and necessary for giving it due effect;

all such proceedings, according to your Lordships' recent decision in the case of *Mackonochie v. Lord Penzance* (5), being proceedings in the same suit consequent upon and incident to the power of pronouncing the sentence in the suit and flowing out of that sentence. Therefore I am of opinion that the objection as to place fails.

I come, lastly, to the larger and more important question—the most important question of all—namely, whether the Judge in this case had any power at all to enforce the monition and the inhibition which he had issued, and particularly to enforce it in the manner provided by the Act of 53 Geo. 3. Now, I must return to the words of that statute, which are these: "In all causes which, according to the laws of this realm, are cognizable in the Ecclesiastical Courts." It has not been contended that that is to be interpreted only as the law stood in the year 1813 when that Act was passed. It has been admitted in the argument that the words "cognizable according to the laws of this realm" mean cognizable for the time being, according to the laws of the realm in the Ecclesiastical Courts. It says "that in all causes which according to the laws of this realm are cognizable in the Ecclesiastical Courts, when any person or persons, having been duly cited to appear in any Ecclesiastical Court or required to comply with the lawful orders or decrees, as well final as interlocutory, of any such Court, shall neglect or refuse to appear, or neglect or refuse to pay obedience to such lawful orders or decrees," then this process of *significavit*, followed by the writ *de contumace capiendo*, and its consequences, is to take place. If we have not in the Act of 1874 special directions as to the mode of enforcing obedience to such orders as may be lawfully issued under it, still if those orders are orders made in causes or a cause cognizable according to the laws of this realm in an Ecclesiastical Court, and if the Court which made those orders is an Ecclesiastical Court, then I think we have a very sufficient explanation of the absence in the Act of 1874 of particular provisions and directions as to the way in which the

(5) 50 Law J. Rep. Q.B. 611; Law Rep. 6 App. Cas. 424.

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orders of the Court or the Judge under that Act are to be enforced, because we have here a general Act of Parliament which, as to all cases of disobedience to all orders of any Ecclesiastical Court in causes which, according to the laws of the realm are cognizable in such a Court, tells you what the mode of enforcing those orders is to be. It was therefore purely and entirely unnecessary to repeat particular provisions by reference or otherwise on that subject in this Act of 1874.

We are therefore brought to the question whether the order sought to be enforced in this case is an order in a cause cognizable in an Ecclesiastical Court, and whether the Court which pronounced that order is an Ecclesiastical Court. That, in this case, the party complained of was duly cited by proper notice within the meaning of the statute is, I apprehend, clear, and that there was disobedience is not denied; the sole question is whether it was a "cause," and whether the Court was ecclesiastical. I have no hesitation about the word "cause." It is not a technical word signifying one kind or another, it is *causa jurisdictionis*, any suit, action, matter or other similar proceeding competently brought before and litigated in a particular Court, and I have no hesitation whatever in saying that "the matter of a representation" transmitted by the Archbishop under this 9th section to the Judge under the Act, with a requisition that he should hear it, becomes, at all events from the time of notice to the party affected by it, a cause cognizable by that Judge in that Court. Is he then, or is he not, an "Ecclesiastical Court"? I should have thought, I must say, that nothing in the world could be plainer than the answer to that question.

The Act of Parliament of 1874 was passed when the offices of Judge of the Arches Court of Canterbury and Judge of the Chancery Court of York were full, and for whatever reason it was thought expedient that one Judge should exercise the particular manner of jurisdiction provided for by this statute, and that it should not be divided between two Judges who might possibly not always agree; whether for that or for any other reason a provisional arrangement was made for the period

of time during which those offices, or either of them, should be so full, and a new Judge was to be appointed by virtue of the Act, who was to be during good behaviour the Judge of the Provincial Courts of Canterbury and York. We are not dealing now with anything that has taken place under that which I may call the provisional arrangement; but it was pressed upon us that the character of the proceeding after the cessation of that provisional arrangement ought to be regarded as the same in the view of the statute as it was before. Even if there were no words which expressly dealt with the question after the provisional arrangement had ceased, I own I could not myself have overcome the force of these words, that "the Judge" (so called throughout the statute) is from the beginning under the Act of 1874 "a Judge of the Provincial Courts of Canterbury and York," which are Ecclesiastical Courts. And when it is said what that Judge is to do in dealing with the earlier stage of the transaction, I could not possibly regard him as acting in any other character or capacity than that which is alone attributed to him by the statute—the character and capacity of a Judge of one of those two Ecclesiastical Courts. What he does under the Act is done by him as an Ecclesiastical Court, and in my humble opinion it is clear that the orders lawfully made by the Judge in that stage of the jurisdiction would be orders of an Ecclesiastical Court within the meaning of the Act of 53 Geo. 3.

But it does not stop there, because the same clause expressly provides for what is to happen afterwards. The Judge, so in the first instance appointed, is, when vacancies may happen, to succeed to the two offices of Dean of the Arches in the province of Canterbury, and Official Principal or Auditor of the Chancery Court of York in that province. The offices, though to be held by one person, are as to procedure and jurisdiction to be distinct; and it is said that, from the time when that union of offices shall have taken place, "All proceedings thereafter taken before the Judge, in relation to matters arising within the province of York, shall be deemed to be taken in the Chancery Court of York." The proceeding out of which the present appeal has arisen was with regard to a

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matter arising in the province of York, and was commenced after the Judge had become under the Act Official Principal of the Chancery Court of York. There is an argument, which I have in vain endeavoured to follow, which suggests that "all proceedings thereafter taken before the Judge" do not include proceedings under this Act, which made him the Judge and which gave him that jurisdiction. But manifestly the word "all" includes those proceedings if there be not some context to the contrary; and so far from there being any context to the contrary, I should myself think, although the words are quite large enough to include other proceedings under the general jurisdiction of these Courts or under any particular Act of Parliament which may regulate the proceedings in these Courts, yet primarily and distinctly in the view of the Legislature, "all proceedings" do and must include the proceedings under this Act. If that be so, I think that it is enough by itself to shew that the Act 53 Geo. 3 applies.

There are other passages of the Act of 1874 which seem to me to tend to shew that the Legislature was not guilty of the strange inadvertence of authorising these proceedings which are specially provided for, and directing that prohibitions and inhibitions shall be issued, with the consequence of deprivation in the case of persistent disobedience after the lapse of three years, and of not at the same time arming the Judge with any power whatever to execute his orders. The words at the end of the 9th section, "The Judge may on application in any case suspend the execution of such monition pending an appeal, if he shall think fit," plainly shew that the Legislature contemplated that a monition might be executed; and for my own part I do not think that an inhibition such as is contemplated by the 13th section would have been very likely to have been described—certainly I am sure it could not appropriately have been described—by the term "execution." These words, therefore, have a very strong aspect as indicating that some powers were contemplated by the Legislature to execute a monition as well as to pronounce it.

But by words at the end of the 13th section the matter is made still more

clear. The earlier part of that section provides that "obedience by an incumbent to a monition or order of the Bishop or Judge, as the case may be" (I say nothing about the Bishop's jurisdiction—I assume that not to be in question), "shall be enforced if necessary" by inhibition with very serious consequences. I will even assume, in favour of the argument of the appellant, that that means that whenever there is any necessity to enforce it at all there must be an inhibition. I must pause, however, to observe that I am doubtful if that is so, because amongst the powers given by the 9th section to the Judge, one is to "make such order as to costs as the judgment shall require;" and I apprehend that it would be a very unlikely thing that, if the substance of a monition were obeyed as to everything except costs, it would be thought necessary on account of costs either, on the one hand, to inhibit the clergyman from performing any duty within the diocese, and to deprive him of his benefice at the end of three years, or, on the other hand, so entirely to disregard the right of the party entitled to costs as to give him no means of enforcing an order in his favour except by such an inhibition, and such a deprivation of the clerk.

But be that as it may, the concluding words are, as it appears to me, plain and unmistakable. A monition may have been issued, an order for costs may have been issued, and, as it seems to me, some other interlocutory orders might have been issued also before the hearing. No doubt before a monition there could not have been an inhibition; that particular order, of course, from the nature of the case, could not have already been made when the matter was being for the first time tried before the Judge. But that being the state of the powers of the Court and the Judge as to the orders which he might make, the concluding words of section 13 are, "Any question as to whether a monition or order given or issued after proceedings before the Bishop or Judge, as the case may be, has or has not been obeyed, shall be determined by the Bishop or the Judge." Those words appear to me most clearly to include all orders which, at any stage of the proceedings, can lawfully have been made in the

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Court of the Judge by the Judge, whether that order be a monition, whether it be an inhibition, whether it be an order for costs, or whether it be an order for any interlocutory purpose. If the Judge has made an order, he is to determine whether it has been obeyed or not, and the section goes on to say that "any proceedings to enforce obedience to such monition or order shall be taken by direction of the Judge." The Legislature plainly contemplated that there should be such proceedings, and having made the whole proceeding a proceeding before an Ecclesiastical Court, in this case the Chancery Court of York, how, in the absence of express provision, would the orders of that Court be enforced? Surely, necessarily by the ordinary powers of that Court. Everything that the statute requires must be done; but when it refers generally to powers to enforce obedience, and does not prescribe any procedure, those powers generally referred to would be the powers of the Court in which the proceedings are deemed to be taken. And with regard to this particular proceeding by *significavit* of contumacy and by the writ *de contumace capiendo*, it does not end there merely; because there is a general Act of Parliament applicable to all proceedings in the Ecclesiastical Courts, and all disobedience to lawful orders of those Courts. And if this is a lawful order of such a Court, then disobedience to that order may be punished.

I shall not enter into the question whether imprisonment is in a case of this particular kind a convenient or a desirable punishment or not; that is for the Legislature. The Legislature has so enacted, and has so enacted without excepting this particular class of cases. Again, whether such ceremonies as those which are alleged to have been unlawfully practised by this present appellant are ceremonies which it is desirable by law to prohibit and treat as penal, is also a question for the Legislature. A competent Court appointed by the Legislature has so determined, and whatever any individuals who are the keepers of their own consciences may prescribe to themselves as their rule of conduct in these matters, in all Courts of justice of the realm there can be but one rule, and that is, that every subject of the

Queen must yield obedience to the law. Under these circumstances it appears to me that your Lordships have only one duty in this case, and that is to dismiss the appeal.

I doubt whether, having regard to the nature of the case, it is your Lordships' duty, and if it is not your Lordships' duty I do not think it would be your wish, to add to the burden which the appellant already has had to sustain, by making any order for costs.

LORD BLACKBURN.—I am entirely of the same opinion. I think that the only point which is really one of substance, is the question as to what is the construction of 37 & 38 Vict. c. 85—the Public Worship Regulation Act. Though I have not been able to bring myself to doubt what our decision must be upon that, still it is a matter upon which there might be some question and some argument. I have no doubt that that Act was intended to provide a particular mode in which proceedings might be instituted for what was already an ecclesiastical offence, and, according to the law then in force, might be remedied by proceedings in the Ecclesiastical Courts. It was intended to enact (for what reason the Legislature thought it expedient does not at present concern us) that proceedings for that purpose might be instituted in a different way; and accordingly it was provided that when the Archdeacon, or the different persons named in section 8, have made a representation to the Bishop, proceedings are to follow upon it. The Bishop may, if the parties agree in writing to abide by his directions, dispose of the matter of the representation in what I may call a summary way. With that branch of the question we have nothing at present to do, for the parties did not pursue that course. If the parties will not submit to the Bishop and agree to follow his directions, then section 9 says, "The Bishop shall forthwith transmit the representation in the mode prescribed by the Rules and Orders to the Archbishop of the province, and the Archbishop shall forthwith require the Judge to hear the matter of the representation at any place within the diocese or province, or in London or Westminster." Now stopping

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there for a moment, and observing that it says the Judge is to "hear" it (a word upon which I shall have to say something afterwards), it seems to me quite plain that there is a peculiar mode of bringing the case before the Judge, but that what he has to do is to perform his duty as an Ecclesiastical Judge in disposing of that case. He is to hear it, and it is to be noticed that he is to hear it at Westminster (I will leave the other places out), if the Archbishop so directs.

Then, the first question comes to be, What is the effect of the statute as to what it says there that "the Judge" is to do? We have not at present to decide this question as to the Judge before he became Official Principal. When the Act was passed, there was what my noble and learned friend has happily enough called a provisional state of things provided for, by which the Judge who was to be appointed was made a supplemental and additional Judge of the provincial Courts of both Canterbury and York, and for the time proceedings were to be taken before him as such; but it was further provided by the latter part of section 7 that, "Whosoever a vacancy shall occur in the office of Official Principal of the Arches Court of Canterbury, the Judge shall become *ex officio* such Official Principal, and all proceedings thereafter taken before the Judge in relation to matters arising within the province of Canterbury shall be deemed to be taken in the Arches Court of Canterbury; and whensoever a vacancy shall occur in the office of Official Principal or Auditor of the Chancery Court of York, the Judge shall become *ex officio* such Official Principal or Auditor, and all proceedings thereafter taken before the Judge in relation to matters arising within the province of York shall be deemed to be taken in the Chancery Court of York." Now it happened, before any of these proceedings were instituted, that the Judge had become the Official Principal of the Chancery Court of York, and this was a proceeding relating to matters within the province of York, and consequently by the express terms of the Act that proceeding was to be "deemed to be taken in the Chancery Court of York." Some argument was used to the effect that these words might have a sensible, though a very

unnecessary, meaning, if they were read as saying that, by the fact of the same person becoming the Judge of both Courts, the two Courts would not merge together. Doubtless if it was thought fit to follow such a fanciful course, the words would, I think, be enough for that purpose; but it does not seem to me that there is sufficient reason for cutting down the obvious meaning of the words which say that "all proceedings" (which would include any proceedings) "taken before the Judge," after he has become Official Principal of the Chancery Court of York, "shall be deemed to be taken in the Chancery Court of York."

When once that has been determined it seems to me that the rest of the Act is plain enough. It says that the proceedings shall be taken in an Ecclesiastical Court, namely, the Chancery Court of York, and shall be taken before "the Judge" who has now become the Official Principal of that Court; he shall hear the matter at Westminster if he is so directed by the Archbishop. Now comes the question, what does "hear" mean? It was disclaimed, and no doubt justly disclaimed, that it was ever intended to argue that it only meant to hear what was said, and that it did not include determining. Unless there be something which by natural intendment, or otherwise, would cut down the meaning and intention of the Legislature and make it less, I apprehend there can be no doubt that the Legislature, when they direct a particular cause to be heard in a particular Court, mean that it is to be heard and finally disposed of there. And further, when they say that it is to be heard (meaning heard and finally disposed of) in a particular Court, they mean, unless there is something in the context which either by natural interpretation or by necessary implication would cut it down, that in all matters which are not provided for that Court is to follow its ordinary procedure.

Now taking that, as I think it must be taken, to be the case, it seems to me to dispose at once of almost all the objections which have been raised before us. In the first place, section 9 of the statute expressly says that the Judge may make orders as to costs. How are those orders to be enforced? The statute is absolutely

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silent. It cannot be that it was intended that an order for costs should be enforced by inhibiting a clergyman from performing service; that would be too absurd to be supposed for a moment. It cannot be that an order for costs was not to be enforced at all. Then what does the Legislature mean when it authorises the Judge to make an order for costs? Such an order would not necessarily be against the incumbent, for it might be against the other side. When the Legislature says that the Judge may make orders for costs, it must mean that those orders shall be enforced in the ordinary way in which Ecclesiastical Courts do enforce their orders for costs.

Then the statute goes further, and says that there may be a monition issued by the Judge. I pass by any notice of what was to be done in the case of a monition from the Bishop, because that question does not arise here; but there may be a monition from the Judge, and it is said by section 13, "Obedience by an incumbent to a monition or order of the 'Judge' shall be enforced, if necessary, in the manner prescribed by Rules and Orders, by an order inhibiting the incumbent from performing any service of the Church." Now it was said that that mode of enforcing obedience was exclusive of other modes. I have already intimated that I do not think it could be so in all cases, because I do not think it could possibly be so in the case of enforcing an order for costs. However, passing that by, I am not prepared to say whether or not, a monition having been issued to forbear in future from acting in the manner in which the clergyman is represented and found to have been acting, that monition could be enforced in any other manner. I apprehend that no Judge in the exercise of a reasonable discretion would think of passing a sentence of suspension, or deprivation, and still less of sending a *significavit*, before he had tried taking this course which the Legislature has pointed out of granting an inhibition for three months and no more; therefore, whether or not it would be absolutely beyond his power to do it, we need not be concerned about. But when the inhibition is granted and is in its terms (as the Act itself says the inhibition shall be) to inhibit him "from performing any

service of the Church or otherwise exercising the cure of souls within the diocese for a term not exceeding three months," is it possible that the Legislature meant that order should be made, and that, if disregarded, it should be disregarded with perfect impunity? It may be disregarded with perfect impunity unless the interpretation of the Act is what I have already said, namely, that there being nothing either by express terms or by necessary implication to prevent it, obedience to that order of inhibition is to be enforced by the ordinary process of the Ecclesiastical Court as applicable to such a case as that. Otherwise there would be no remedy at all; for as for the supposition that there could be any common law remedy, upon the ground that this inhibition amounted to deprivation and so gave rise to an action of trespass, and gave a right to turn the clergyman out, I take it that that is perfectly idle. There is no remedy at all unless there be a remedy by the ecclesiastical law and by the powers of the Ecclesiastical Courts; and it seems to me that there must be that remedy.

Then comes the question, There being that remedy, can the writ *de contumace capiendo* be used for the purpose? I have been quite unable—I do not say it disrespectfully to the learned counsel who argued the case, because I do not see how they could be expected to make facts for themselves—but I have been unable to perceive any reason why it should not be used. By common law, long before the statute of Elizabeth, the only remedy the Ecclesiastical Courts had besides their ecclesiastical censures, including deprivation and suspension, was to excommunicate; and the common law of England establishes that when a proper competent tribunal—which it was decided that the Pope was not, for an order of excommunication by the Pope did not justify a *significavit*—but when a proper competent tribunal excommunicated a person in the course of a judicial proceeding and signified it to the Chancellor, he would issue the writ *de excommunicato capiendo*, which writ, it appears, was not returnable in open Court, but was simply a writ ordering the sheriff to take the excommunicated person; and, inasmuch as the Queen's writ did not run in the Counties

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Palatine and other exempt jurisdictions, I apprehend that at common law the Lord Chancellor could not have issued a writ to be executed in Lancashire, but he must have sent a *mittimus* to the Chancellor of the Duchy or County Palatine of Lancaster. In those early times, when this course of procedure was established, the Duchy of Lancaster was not attached to the Crown. I suppose, therefore, that the *mittimus* came to the Chancellor of John of Gaunt, or whoever was the Duke of Lancaster at the time. It must have been a *mittimus* going to the Chancellor of the Duchy or County Palatine commanding him to issue the writ.

However, that does not matter much, because it is all done away with by the Act of Elizabeth. That Act recites that writs *de excommunicato capiendo* were disregarded and disobeyed, inasmuch as they were "not returnable into any Court that might have the judgment of the well executing and serving of the said writ." Then, in order to remedy that, it proceeds to enact that "every writ of *excommunicato capiendo* that shall be granted and awarded out of the High Court of Chancery against any person or persons within the realm of England, shall be made in the time of the term, and returnable before the Queen's Highness, her heirs and successors, in the Court commonly called the King's Bench, in the term next after the teste of the same writ, and that the said writ shall be made to contain at the least twenty days between the teste and the return thereof; and after the same writ shall be so made and sealed, that then the said writ shall be forthwith brought into the said Court of King's Bench, and there, in the presence of the Justices, shall be opened and delivered of record to the sheriff or other officer to whom the serving and execution thereof shall appertain;" "and if afterwards it shall or may appear to the Justices of the same Court," then it goes on to say what shall happen if it appear that the writ has not been executed. That Act provided that when the writ was the Queen's writ coming out of Chancery, it was no longer left a simple writ, but was to be made returnable into the Court of Queen's Bench; and there is an express direction there given that it shall be

brought to the Queen's Bench in term time, and opened, as I should say, having regard to the words of the preamble, in order that it might be delivered to the sheriff, so as to fix the sheriff with the responsibility as to its being properly executed. However, whether that be so or not, the question does not arise here. In *Dale's Case* (2) the Court of Appeal held that it should be brought into open Court and that the direction was not properly followed unless that was done. They also held that the object was that the Court of Queen's Bench might examine the writ in order to see whether it was such a writ as they would execute or not. I greatly doubt whether that was the purpose for which the statute was passed. However that is not material; the probability is that the Court of Appeal were perfectly right in saying that, there being that express enactment, it must be pursued or else the writ would be ineffectual.

But then the writs *de excommunicato capiendo* issued by the Court of Chancery were within the County Palatine of Lancaster a mere dead letter, because the Queen's writ did not run in that county; and the consequence was, I apprehend, at common law, that when a *significavit* was sent to the Lord Chancellor he could not issue his writ to a place within the County Palatine of Lancaster; but, as I said before, at common law he sent his *mittimus* with a transcript of the *significavit* to the Chancellor of the Duchy of Lancaster, and directed him to see that the writ was issued. The statute expressly says that that course, whether it was the original old course or not, shall be followed. By section 11, after reciting that there are jurisdictions and places "where the Queen's Majesty's writ doth not run and process of *capias* from thence not returnable into the said Court of the King's Bench," it goes on to provide that "after any *significavit* being of record in the said Court of Chancery, the tenor of such *significavit* by *mittimus* shall be sent" "to the Chancellor or Chamberlain for the said County Palatine of Lancaster," and he shall direct his subordinates to issue the writ, and to make that writ returnable in the County Palatine of Lancaster.

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That was the old common law form as altered by the statute of Elizabeth, by which obedience to the Ecclesiastical Courts was enforced in the Court of Chancery. Then came the statute of 53 Geo. 3. c. 127, which abolished excommunication (which obviously must have been a very offensive thing to people who had a reverence for the forms of religion) altogether in civil proceedings, and substituted for it the writ *de contumace capiendo*. It could not have been the intention of the Legislature that, the writ *de excommunicato capiendo* being gone, the writ *de contumace capiendo* should not be enforceable against persons within the County Palatine of Lancaster. That is too absurd. They evidently wished that that writ should run in the County Palatine of Lancaster; and when the statute said that all the provisions of the Act of Elizabeth should be read as if they were re-incorporated into that Act, I am quite unable to see why the provisions of section 11, including the *mittimus*, should not be held to be read into that Act of Geo. 3. If that be so, it seems to me that, on the principle I mentioned before, that the acts of the Court are to be enforced in the manner in which other acts of the Court are enforced, it would follow that this was to apply to the writ *de contumace capiendo*. But besides that I need not repeat the words which have already been read by the noble and learned Lord on the woolsack, which shew that if the words of the statute of 53 Geo. 3 had been picked for the very purpose of meeting such a case as this, they could not have been better chosen, for they enact that whenever there is an ecclesiastical cause cognizable in an Ecclesiastical Court, obedience to an order of that Court in such a cause shall be enforced by a writ *de contumace capiendo*.

Having said that, I may almost pass over all the rest of the arguments. I have already said that, in my opinion, "to hear the matter of the representation" means to do everything necessary to dispose of it; and as the Judge is to hear it at Westminster, I think he is to do everything he has to do in order to dispose of it at Westminster. I do not see how it could be taken otherwise. Then, I think, as this writ *de contumace capiendo* was in obedi-

ence to the *mittimus*, and was never returnable into the Court of Queen's Bench at all, no point arises as to the opening it and delivering it of record in term time in the Court of Queen's Bench. I cannot see the slightest ground for saying that the statute of Elizabeth, or the statute of Geo. 3, contains any provision to the effect that it shall be opened in the Common Pleas of the county of Lancaster; indeed, that would practically not be possible, for the Court of Common Pleas was not sitting in the County Palatine of Lancaster.

I need hardly say as to the last point, which supposed that Order II. rule 8 of the Rules under the Judicature Act had made a difference in the form in which a writ of *mittimus* is to be tested, that it does not apply to such a writ at all. The rule applies to writs of summons "and other writs," meaning, of course, other writs of a similar nature; that does not apply to this writ.

I consequently think that, on all the points which have been mentioned, the appellant is properly and legally detained in custody, and therefore the writ of *habeas corpus* should not be granted. I consequently agree with the motion that has been proposed, that the appeal should be dismissed. I think it has not been the custom generally in the Courts, when there has been an application for a *habeas corpus*, to fix the party applying with the costs. I am not quite sure about that, but I certainly think that in this case, unless there is a fixed rule, it would be better not to give costs.

LORD WATSON.—I am quite of the same opinion, and I do not think it necessary to add anything to the observations which have fallen from your Lordships, in all of which I agree.

Order appealed from affirmed, and appeal dismissed.

Solicitors—Brooks, Jenkins & Co., for appellant; the Solicitor to the Treasury, for Lord Penzance; Tebbe & Sons, for respondents; the Solicitor to the Duchy of Lancaster, for the Vice-Chancellor of the Duchy.

[IN THE COURT OF APPEAL.]

1881. }
 June 28. } FLETCHER v. HUDSON.*
 Aug. 5. }

Local Board—Contract of Member with Board—Disqualification of Member—Penalty for Acting—Public Health Act, 1875 (38 & 39 Vict. c. 55), sched. II. rules 64 and 70.

The Public Health Act, 1875, provides by schedule II. rule 64, that any member of a local board who in any manner is concerned in any bargain or contract entered into by the board shall cease to be a member, and his seat shall become vacant; and by rule 70, that any person who, being disabled from acting as a member of the board by any provision of the Act, does act as such member, shall be liable to a penalty of 50l.:—Held (by BRETT, L.J., and COTTON, L.J.; dissentiente BRAMWELL, L.J.), that a person who, being duly qualified and duly elected a member of a local board, became afterwards concerned in a contract entered into by the board, ceased thereby to be a member of the board, and that he could not, when the contract was at an end, continue to act as a member of the board, for that he was disabled within the meaning of rule 70 from acting as a member, and was liable to a penalty if he did so act.

Appeal from the judgment of Stephen, J., at the trial without a jury.

This was an action brought by the plaintiff, a ratepayer within the district of the Grasmere Local Board, to recover a penalty alleged to have been incurred by the defendant under the provisions of the Public Health Act, 1875 (1), by reason of

* *Coram* Bramwell, L.J.; Brett, L.J.; and Cotton, L.J.

(1) 38 & 39 Vict. c. 55. sched. II. rule 64: "Disqualification of members.—Any member who ceases to hold his qualification, or becomes bankrupt, or submits his affairs to liquidation by arrangement, or compounds with his creditors, or is absent from meetings of the local board for more than six months consecutively (unless in case of illness), or accepts or holds any office or place of profit under the local board of which he is member, or in any manner is concerned in any bargain or contract entered into by such board, or participates in the profit thereof, or of any work done under

his having attended and voted at the meetings of the local board when he was disqualified from so doing by having entered into a contract with the board and having received payment for work done by the board.

It appeared that the defendant was first elected a member of the local board on May 24, 1872, and that he had assumed to remain and act as a member ever since; that in March, 1879, he had been paid a sum of 9l. 19s. 9d. for work done by him for the surveyor of the board. The defendant alleged that he had done the work and used his carts and horses in doing the work, at the request of the surveyor, who could not get the work done by any other person; that he had entered the charges in his book in the usual way, but that he had made no profit; and that he had entered into no contract with the board. The work was done during the years 1877 and 1878, and the defendant, during 1879, acted as a member of the board.

Stephen, J., gave judgment for the plaintiff.

The defendant appealed.

Crompton (with him *Sir J. Holker, Q.C.*), for the appellant.—The question in this appeal turns on rules 64 and 70 of schedule II. of the Public Health Act, 1875 (1). The contention of the defendant is that he was not "concerned in any bargain or contract entered into by the board in or for the district." The facts shew that he made no contract; that he made no profit; that there was no bargain between him and the local board; nor is there any evidence that the work done was done within the district.

[BRAMWELL, L.J.—We all think that there is evidence of a bargain made between the defendant and the local board.]

the authority of this Act, in or for the district, shall . . . cease to be such member; and his office as such shall thereupon become vacant. . . ."

Rule 70: "Any person who, not being duly qualified to act as member of the local board, or not having made and subscribed the declaration required of him by this Act, or being disabled from acting by any provision of this Act, acts as such member, shall be liable to a penalty of fifty pounds. . . ."

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If that be so, then it is submitted that the defendant's seat was vacated pursuant to the provisions of rule 64 (1); and as he was never re-elected he is not liable to the penalty imposed by rule 70 (1) on a person who acts without being duly qualified. The circumstances of the present case are not materially different from those which existed in *Lewis v. Carr* (2); whereas in *Nicholson v. Fields* (3) there was a continuing contract.

[BRAMWELL, L.J.—The argument is that the defendant is not disabled from acting by any provision of the statute. BRETT, L.J.—But if the seat was vacated, was not an election necessary to enable the defendant to act as a member of the board?]

Rule 70 (1) only imposes penalties on "any person who, not being duly qualified" does certain acts. "Any person" must mean any member; and even if the defendant ceased to be a member in 1879, he still is not liable to the penalty imposed by rule 70 (1) on a member who does certain acts.

Charles (with him *Addison, Q.C.*).—The defendant received payment on March 6, 1879, for work done for the board. He then ceased to be a member of the board, and all that he has done since at meetings of the board has been done without qualification, and has rendered him liable to the penalty imposed by rule 70 (1). The disability pointed out in rule 70 (1) is the same as the disqualification referred to in rule 64 (1); so that the defendant was not duly qualified to act. *Nicholson v. Fields* (3) is in point, and cannot be distinguished; and *Lewis v. Carr* (2) does not apply, for the language of the Municipal Corporations Act (5 & 6 Will. 4. c. 76) is different.

Cur. adv. vult.

BRAMWELL, L.J.—I am of opinion that this judgment must be reversed.

I agree with the learned Judge who tried the case that the proper conclusion, as a matter of fact, from the evidence, is that the defendant was concerned in "a bargain

or contract entered into by the board," perhaps in several, though trifling. The consequence, therefore, declared in rule 64 of schedule 2 of 38 & 39 Vict. c. 55 (1) followed, namely, "he ceased to be a member of it, and his office as such thereupon became vacant." It may be also that while such contract existed he was ineligible, for it is difficult to suppose that he could be re-elected or that a person could be elected who had a contract with the board.

I am not clear upon this, however, as it may be that all that the statutes meant was that the propriety of his conduct should be referred to his constituents as in the case of a member of the House of Commons accepting office under the Crown. Be this as it may, he was not re-elected. He "ceased to be a member." Then is he within the penal clause, rule 70 (1)? That says, "any person," not "member" indeed, but meaning "member," as is shewn by the next provision, "any person who, not being duly qualified to act as member or not having made, &c., the declaration," this must mean member, it cannot mean "person," not being "member" or "being disabled from acting by any provision of this act," acts, &c., shall be liable to a penalty. Now the question is whether a man who has been, but is not, a member is within these provisions. I say "who has been," but in my judgment that might be left out. For I cannot see what having been a member has to do with it. How does it make any difference in the offence that a man acting who is not a member was so formerly—perhaps twenty years before?

Why not as long back, if at all? I think, therefore, the question may be reduced to this: Whether a man who is not a member is within these provisions. First of all, why should he be? Why should a penalty be put on a man for doing what the members of the board can prevent his doing. His having no right to do so must be known to them, or some of them, if they do their duty.

Is a man returned, but unseated on some enquiry for want of the requisite votes, subject to this penalty? He is not within the protection of the last clause of section 70 (1).

(2) 46 Law J. Rep. Exch. 314; Law Rep. 1 Ex. D. 484.

(3) 7 Hurl. & N. 810; 21 Law J. Rep. Exch. 233.

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I see no reason, then, for holding such a person liable to a penalty. Then look at the language of section 70: "Any person not being duly qualified to act." Does not that mean, not having the qualification prescribed in rule 3? I cannot but think it does. By that, "a person shall not be qualified to be a member of a local board unless at the time of his election, and so long as he continues in office," he is a resident possessed of property, &c.

If he had not this qualification when elected, or ceased to have some such afterwards, he is not qualified. But this defendant is qualified and might have been re-elected before he voted.

"The burden of proving qualification, or of negating disqualification by reason of non-residence, &c., shall be on the defendant." But why also is it not on the defendant to prove that he was elected? It is said that what he has to prove is affirmative and within his own knowledge; but so also is his having been elected. Then as to the words "or disabled from acting by any provision of this Act." That supposes that he is qualified, that he has taken the declaration, and therefore, by implication, that he is a member but is disabled from acting. That is not this case. The words "disabled from acting" are satisfied by the concluding provisions of rule 64. I really can see no reason for the construction contended for. If the statutes had said that any member of the board becoming party to a contract with it should be liable to a penalty and vacate his seat, I could understand it. But I cannot see why, if no penalty attaches to the entering into the contract except the loss of the seat, there should be a penalty for acting without re-election, any more than if he had never been elected. It may be that the mischief contemplated by the statute will not be prevented. I should have thought the best way to do that would have been to make it penal, as I have said, for a member of a board to enter into a contract with it. I do not see much harm in the acting after with it without re-election. Of course I am aware that it is desirable he should not act in the matter of his contract; but all acting is forbidden.

The truth is, it is difficult to apply the principle of the statute to a trifling case

like this. I am quite unable to distinguish this case from *Lewis v. Carr* (2). There the defendant had had an interest in a contract with the council. By section 28 he lost his qualification during that time. One would think he ceased to hold office, though Lord Justice Baggallay seemed not to think so. But whether or no, it was held that the defendant was not "disqualified" after he ceased to be interested in a contract. I admit I cannot distinguish *Nicholson v. Fields* (3), except indeed that it was decided on its own particular language. If it is in point here, it was overruled by *Lewis v. Carr* (2). Yet those who decided *Lewis v. Carr* (2) did not think they were overruling *Nicholson v. Fields* (3). I say nothing about the statute now in question being a penal statute, nor that it ought to be construed strictly. I think it ought to be construed rightly. I cannot see any reason for implying a penalty applicable to such a case as the present, namely, a case where a non-member acts.

BRETT, L.J.—I am unable to agree with Lord Justice Bramwell. It seems to me that the case is within rule 64 of the schedule (1). The defendant was a member of the local board, and the effect of that rule is that a member who is concerned in a bargain or contract, or participates in the profit of a bargain or contract, ceases to be a member, and his seat becomes vacant. It seems to me that a person, although qualified in every other respect, who does something after his election which the statute forbids, is by statute made incapable of acting. The defendant is such a person and the statute enacts that he shall cease to be a member. What is the consequence? Rule 70 says that any person not duly qualified (this defendant was qualified); or who has not made a declaration (this defendant had made the necessary declaration); or who, "being disabled from acting by any provision of this Act, acts as such member." These last words seem to me to cover this case exactly, and they must apply to this case or to no case at all, so that I think the plaintiff must recover and that this appeal must fail.

COTTON, L.J.—The question turns on two rules in a schedule to the Public

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Health Act, 1875. It is said this is a penal action; but though this is so, still those rules must be construed fairly. The point to be decided is whether the defendant was disabled from acting as a member of the local board. I think, as we intimated during the argument, that the defendant was interested in a contract entered into by the board. He was, therefore, within the provisions of rule 64 (1), and ceased to be a member. Was he within rule 70, and so disabled from acting as a member of the board? I think he was: he had an apparent right to be on the board, but he was disabled from acting as he had ceased to be a member. It is said that the words "disabled from acting," in rule 70 (1), only apply to persons who are members, and that he was not a member; but in my opinion rule 70 (1) includes a person who has a qualification when elected, but who loses it afterwards, so that I think the appeal fails and the defendant is liable to the penalty. As to *Lewis v. Carr* (2) I would add that the decision in that case was on different words, in a different statute, and that it does not apply to this case.

Appeal dismissed.

Solicitors—Iliffe, Russell, Iliffe & Cardale, agents for Laycock, Dyson & Laycock, Huddersfield, for plaintiff; J. & E. Scott, agents for G. Gatey, Ambleside, for defendant.

1881.	{	<i>In re</i> FOSTER AND ANOTHER <i>v.</i>
June 25.		THE GREAT WESTERN RAILWAY COMPANY. <i>Ex parte</i> THE
Nov. 21.		GREAT WESTERN RAILWAY COMPANY.

Railway Commissioners—Jurisdiction—Discretion as to Costs—Ordering Successful Defendant to pay Costs—Prohibition—Regulation of Railways Act, 1873 (36 & 37 Vict. c. 48), s. 28.

The Railway Commissioners, in dismissing an application, ordered the defendants to pay half the costs of the applicants, on the ground that the application was occasioned by uncertainty as to obligations

for which the defendants were to blame. The defendants applied for an order to prohibit or stay proceedings upon the order of the Commissioners:—Held, that the Commissioners had not exceeded the jurisdiction given them by 36 & 37 Vict. c. 48, s. 28 (which enacts that "the costs of and incidental to any proceeding before the Commissioners shall be in the discretion of the Commissioners"), and that therefore the Court, not being a Court of Appeal from them, had no power to interfere with their order.

This was an application (by summons referred by Huddleston, B., at chambers to the Court) asking, in the alternative, for an order to stay the Master from taxing costs upon, or for a prohibition against proceeding further on an order of the Railway Commissioners, whereby, in dismissing an application by T. N. Foster and R. G. Foster against the Great Western Railway Company, the Commissioners ordered the railway company to pay half of Messrs. Foster's costs. The facts (which are fully stated in the judgment of the Court) were shortly these: The application to the Railway Commissioners was based upon alleged neglect by the company, as owners or managers of a canal, to keep it in good working condition. The company denied that they were such owners or managers, and satisfied the Commissioners that they were not; but, the company having formerly been such owners or managers, and not having given public notice that they had ceased so to be, the Commissioners considered the company, in the circumstances of the case, responsible for the litigation, and made the order in question.

Webster (R. S. Wright with him) (on June 25), in support of the application.—The enactment of the Regulation of Railways Act, 1873 (36 & 37 Vict. c. 48), s. 28, that "the costs of and incidental to any proceeding before the Commissioners shall be in the discretion of the Commissioners," does not empower the Commissioners to order, as has here been done, a successful defendant to pay costs of an unsuccessful applicant. Notwithstanding the rule as to costs in the Court of Chancery being in the discretion of the Court, and notwithstanding

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ing the express provision of the Rules of the Supreme Court, Order LV. rule 1, that "subject to the provisions of the Act, the costs of and incidental to all proceedings in the High Court shall be in the discretion of the Court," there is no precedent for an order such as this against a successful defendant, either in the practice of the Court of Chancery before the Judicature Acts, or in the practice of the High Court since the Judicature Acts; and the authorities shew conclusively that the Court of Chancery had not, and the High Court has not, power to make such an order. In *Cooth v. Jackson* (1) Lord Eldon said, "If I dismiss the bill I cannot give the plaintiff his costs." And *Dicks v. Yates* (2) shews that it is not within the discretion of the High Court to make such an order. An order having there been made by Bacon, V.C., in an action for infringement of copyright, not containing any declaration of right, but simply ordering the defendant to pay the whole costs of the action, and an appeal having been brought by the defendant from that order, objection was taken to the competency of the appeal, but the Court of Appeal overruled the objection; and Jessel, M.R., said that if a plaintiff had no title, the costs of the action were not in the discretion of the Court, so that the Court could give the whole of them to the plaintiff; that the Court had a discretion to make a successful defendant pay, perhaps, the greater part of the costs by giving against him the costs of issues on which he failed, or costs in respect of misconduct in the course of the action; but a judgment ordering the defendant to pay the whole costs of the action could not be supported unless the plaintiff was entitled to bring the action, and therefore the appeal lay. And James, L.J., said there was an essential difference between a plaintiff and a defendant, that a defendant was dragged into Court and could not be made to pay the whole costs of the action if the plaintiff had no title to bring him there. The Railway Commissioners cannot, under an enactment in the same terms as the provision which gives the High Court discretion

over costs, have wider discretion than the High Court. The order is against law even apart from its being an order upon a successful defendant, as distinguished from a successful plaintiff. The general principle as to costs is that costs ought never to be considered as a penalty, but merely as a necessary consequence of a party having created a litigation in which he has failed—per Lord Cranworth in *Clarke v. Hart* (3).

He referred also to *Daniell's Chancery Practice*, ch. xxxi. (4).

H. Matthews, Q.C., and *Anstie, contra*.—The Railway Commissioners had discretion to make this order. The terms of the Act, 36 & 37 Vict. c. 48. s. 28, are absolutely unlimited. No doubt the Court of Chancery never ordered a successful defendant to pay costs; but *Harris v. Petherick* (5) shews that under the Rules of the Supreme Court, Order LV. rule 1, the High Court has power to make an order as to costs for which there may be no precedent in the practice of the Court of Chancery. In that case the plaintiff, who had obtained a judgment for a small amount, was ordered to pay the defendant's costs, and the order was upheld by the Court of Appeal, Bramwell, L.J., and Brett, L.J., speaking of the discretion given by the first portion of Order LV. rule 1 as being absolute and unlimited, and Cotton, L.J., not dissenting from their decision that there was power to make the order, though he said he did not think that under the old practice of the Court of Chancery a successful plaintiff was ever ordered to pay costs. The discretion of the Railway Commissioners, under 36 & 37 Vict. c. 48. s. 28, cannot be less than that of the High Court under Order LV. rule 1. Prohibition was refused where costs were given by an Ecclesiastical Court against a successful defendant to a criminal prosecution—*Rolle's Abridgment* (6).

Webster, in reply.—In *Harris v. Petherick* (5) the Court did not go beyond the former practice of the Court of Chancery; for there are instances in that of a successful

(3) 6 H.L. Cas. 632; 27 Law J. Rep. Chanc. 615.

(4) Vol. ii. (5th ed.) 1235, *et seq.*

(5) 48 Law J. Rep. Q.B. 521; Law Rep. 4 Q.B. D. 611.

(6) "Prohibition," p. 4.

(1) 6 Ves. 11, at p. 40.

(2) 50 Law J. Rep. Chanc. 809; Law Rep. 18 Ch. D. 76.

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plaintiff being ordered to pay costs—*Edwards-Wood v. Marjoribanks* (7), *Norman v. Johnson* (8), *Burrell v. Delevante* (9). The case of *Dicks v. Yates* (2) shews that a successful defendant cannot be ordered to pay costs.

Cur. adv. vult.

The judgment of the Court (10) was delivered (on Nov. 21) by

BOWEN, J.—This is an application, on the part of the Great Western Railway Company, to stay the Master from taxing costs under an order of the Railway Commissioners, dated the 14th of February, 1877, in the matter of an application of Thomas Nelson Foster and Richard Gibbs Foster against the Great Western Railway Company; or, in the alternative, for a prohibition to prevent the Railway Commissioners or Messrs. Foster from proceeding further on the said order.

By section 17 of the Regulation of Railways Act, 1873, a railway company owning, or having the management of, a canal, is bound to keep it in good working condition. The applicants (Messrs. Foster) had instituted proceedings against the railway company before the Railway Commissioners on the ground that the Great Western Railway Company were in default under this section in respect of the Upper Avon river navigation. The Commissioners had dismissed the application on the ground that the Great Western Railway Company were not shewn to be either owners or managers of the navigation; but, nevertheless, ordered the railway company to pay one-half of Messrs. Foster's costs, for reasons which we shall presently mention. The railway company now complain that such an order inflicting an unsuccessful plaintiff's costs on a successful defendant is illegal and *ultra vires*, and ask us to stay all further proceedings in respect thereof.

Under an Act of Parliament of 1846, it appears that the Stratford-on-Avon canal, with which the Avon river navigation communicates at Stratford, was the

property of the Oxford, Worcester and Wolverhampton Railway Company, whose whole undertaking has been vested since August, 1863, in the Great Western Railway Company. In the year 1857, Mr. Broughton, the then manager of the canal, either purchased or agreed to purchase the upper portion of the Avon river navigation; and the Railway Commissioners were of opinion that he acted in the matter in the interest of his employers, the Oxford, Worcester and Wolverhampton Company; but whether the Upper Avon river navigation ever became vested legally in the Oxford, Worcester and Wolverhampton Railway Company seems to be a disputed point. The management of the navigation, in the opinion of the Commissioners, from the early part of 1860 was exclusively in railway charge: first, by the Oxford, Worcester and Wolverhampton; next by the West Midland; and since 1863 by the Great Western Railway Company. Down to June, 1875, Mr. Hudson, acting as the railway company's agent, had collected the tolls, repaired the weir and lock gates, and managed the navigation for the railway company. But in June, 1875, it appearing that the cost of maintenance had for many years exceeded the tolls, the Great Western Railway Company resolved that they would no longer collect or receive tolls; and since then have abandoned the works and ceased to keep them repaired.

After hearing the evidence in the case, the Commissioners were of opinion that the Great Western Railway Company had formerly been, but since 1875 had ceased to be, a company owning or managing the Upper Avon navigation; and that they were not bound to repair the same under section 17 of the Act. Messrs. Foster's application accordingly failed. But the Commissioners, considering that the railway company were responsible for the uncertainty as to the ownership and liability to repair which had occasioned the proceedings under the Act, directed that the railway company should pay half the costs of Messrs. Foster.

The following passage in their judgment shews the principle on which this order was made:—

(7) 1 Giff. 384; 3 De Gex & J. 329; 28 Law J. Rep. Chanc. 298.

(8) 29 Beav. 77.

(9) 30 ibid. 550; 31 Law J. Rep. Chanc. 365.

(10) Field, J.; Manisty, J.; and Bowen, J.

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"Our opinion on the whole is, that at the date of the passing of the Act of 1873 they were a railway company having the management of the navigation, and were within reach of the 17th section; but that that section does not at the present time apply to them. They had, it seems to us, power to surrender the management, and so relieve themselves of liability; and they did, we think, what had that effect, by passing the resolution that the collection of tolls should be discontinued. But, considering they had been managing since 1860, some public notice might well have been given that the railway company no longer claimed or possessed, and, if that was their view, were by law unauthorised to possess any kind of interest; and, as they are responsible for the uncertainty as to ownership and liability to repair which has occasioned these proceedings, it will be reasonable that they should pay at least part of the costs of the application. The applicants, accordingly, are granted half their costs."

The order actually drawn up to carry out this direction is in some respects informal; but it was agreed on both sides, upon the argument before us, to treat the order as drafted so as to give effect to the judgment, if the judgment can legally be enforced, and that all necessary amendments to that extent should be deemed to be made. The railway company, however, insist that the Commissioners have exceeded their jurisdiction in ordering a successful defendant to pay any portion of an unsuccessful plaintiff's costs.

A summons to stay proceedings on taxation, or, in the alternative, for a prohibition, was taken out on behalf of the company, on the alleged ground that the order, so far as it related to costs, was *ultra vires*. The learned Judge at chambers referred the application to this Court.

Now it is, no doubt, contrary to the practice of the Superior Courts of this country to inflict on a defendant who has succeeded any portion of the costs of a plaintiff who has made out no title to relief. But the question before us is not whether, in making such an order, the Railway Commissioners have acted in conformity with the practice of the Courts

administering law and equity; but whether, in making such an order, the Railway Commissioners have stepped outside their statutory powers.

Under the Railway and Canal Traffic Act of 1854, the Court of Common Pleas was entrusted with functions similar, in some respects, to those which the Legislature has since imposed on the Railway Commissioners, of dealing with complaints made against railway and canal companies in respect of anything done, or any omission made in violation or contravention of that Act. By section 3 of the same statute it was (among other things) provided that in any such proceeding "the Court may order and determine that all or any costs thereof or therein incurred shall and may be paid by or to the one party or the other as such Court shall think fit." This wide power over costs has been transferred to the tribunal which succeeded to the functions of the Common Pleas. By the Regulation of Railways Act, 1873, the Railway Commissioners were created as a special tribunal, and clothed with exceptional powers to adjudicate on like complaints; and section 28 of the Act of 1873 enacts as follows: "The costs of and incidental to any proceeding before the Commissioners shall be in the discretion of the Commissioners."

It appears to us that, in establishing an extraordinary tribunal of the kind, the Legislature have, in plain terms, conferred upon them a wide discretion as to the manner in which they should deal with all questions of costs arising before them, and, provided that their decisions on such matters are *bona fide*, it is not for a Court of law to examine the principle on which such decisions are based. That the Commissioners have, in the present case, exercised their discretion honestly on a matter upon which Parliament has made them the sole judges cannot be doubted; and, this fact once established, we are not entitled to enquire further, nor do we propose to criticise or offer any opinion on an order which it is not within our province to review. The counsel for the company has indeed argued before us that a plaintiff's costs when the plaintiff has been unsuccessful are not costs which fall within the definition of costs of a proceeding before

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the Commissioners—a contention based on language used by the Master of the Rolls, sitting in the Appeal Court, in the case of *Dicks v. Yates* (2), a shorthand copy of the judgment in which has been furnished to us (11). In that case, the Vice-Chancellor's decree in the Court below had contained no declaration that the plaintiff in the action was entitled to relief, but simply had directed the defendant to pay the plaintiff's costs. On an appeal being brought against the Vice-Chancellor's order, the respondent's counsel (it would seem) took a preliminary objection that the appeal was a mere appeal in respect of costs, and ought not to be entertained. The point so made was overruled by the Court of Appeal, which decided that it was a necessary inference from the form of an order ordering that the defendant should pay costs, that the plaintiff had succeeded in his title to relief, and that an appeal accordingly would lie. "Otherwise" (according to the Master of the Rolls) "costs so given, if the plaintiff had no title, would not be costs by law in the discretion of the Court."

But we think that it would be pressing this language of the Master of the Rolls far beyond its legitimate scope if it were interpreted to mean that a Court established by Act of Parliament with absolute discretion over costs was exceeding its statutory jurisdiction by making a similar order in favour of an unsuccessful plaintiff. His words must be read as having reference only to the control to be exercised by a Court of Appeal over a Court of first instance. The Court of Appeal in *Dicks v. Yates* (2) was the proper tribunal to correct the discretion of the Court below, if founded on a wrong principle. We have no such authority as regards the Railway Commissioners; and, having no such authority, we abstain from discussing the question, which it is beyond our province to entertain, whether the order complained of is right or wrong upon the merits, or whether it does or does not diverge from the ordinary practice of the Courts administering law and equity. Assuming the divergence to be established, it is not one with which we have power to interfere; it

(11) The case had not been reported at the date of the argument.

might or might not be a matter for appeal, if the Legislature had given an appeal—it is not a matter for prohibition.

The application of the Great Western Railway Company must therefore be dismissed with costs.

Application dismissed.

Solicitors—R. R. Nelson, for the company; Crowder, Anstie & Vizard, agents for New, France & Garrard, Evesham, for the opposite party.

1881. }
Nov. 3. } VERLANDER v. EDDOLLS.

County Court—Person not a Solicitor acting for another Person in an Action—Claim for Services and Disbursements—6 & 7 Vict. c. 73 (The Solicitors Act, 1843), s. 2—9 & 10 Vict. c. 95 (The County Courts Act, 1846), s. 91—37 & 38 Vict. c. 68 (The Attorneys and Solicitors Act, 1874), s. 12.

A person not a solicitor sued for the amount of Court fees paid by him on commencing a County Court action on behalf of the defendant, and as a preliminary to the hearing of it, and for remuneration for services rendered in it out of Court:—Held, that the claim was, by 37 & 38 Vict. c. 68 (The Attorneys and Solicitors Act, 1874), s. 12, not maintainable.

Appeal from a County Court by the following Special Case:—

This was an action in the Reading County Court. The decision of the County Court Judge, delivered on the 20th of January, 1881, was in the following terms:—

The plaintiff in this case is what is called an agent—that is, a person, not being a solicitor, who by way of avocation assists parties suing or sued in the County Court by rendering services out of Court, and, if permitted by the Judge, also representing them in Court. The particulars of his claim are as follows: "1879—Nov. 13: Paid for summons, *Eddolls v. Whitehead*, 9s. Oct. 9: Paid hearing fee, 16s. Attending Court, waiting upon defendant

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several times both at Reading and Earley, 17s.—2l. 2s." On behalf of the defendant, the payment of the Court fees and the rendering of the services specified were not denied; but it was contended that the plaintiff, not being a solicitor, was not entitled to sue in respect of such matters. It is obvious that, in deciding this question, I am bound to take as my sole guide the intention of the Legislature, so far as it can be ascertained in the Acts regulating County Courts and the rules that have been framed thereunder. The 91st section of the Act of 1846 (1) enacts that "no person, not being an attorney admitted to one of Her Majesty's Superior Courts of Record, shall be entitled to have or recover any sum of money for appearing or acting on behalf of any other person in the said Court." "Appearing," here, means appearing in Court on the hearing of the summons, for there is no other appearance in County Court procedure (section 80). So likewise "acting in the said Court," as the words themselves demonstrate, applies to proceedings in Court and not to any proceeding out of Court. For so appearing or so acting in Court the plaintiff is clearly not entitled to recover. On the other hand, there is nothing in the Acts, so far as I see, to prevent the plaintiff from recovering the Court fees which he has paid at the defendant's request, or from recovering reasonable reward for the services he has rendered to the defendant out of Court. The Solicitors Act, 1843 (6 & 7 Vict. c. 73), was passed before the County Court Act, and does not, I think, apply to this case. I shall direct, therefore, that the claim of the plaintiff be referred to the Registrar, who, as the officer of the Court, and most familiar with its practice, seems the most proper person to decide the amount. I desire also to add the following observation: Order XXXVII. rule 8 (2) appoints that, "when by these rules any act may be done by any party, such act may be done either in person or by his solicitor or agent, if it can be legally done by an agent;" and the 10th section of the Act of 1852 (3) en-

acts that "it shall be lawful, by leave of the Judge, for any other person" (that is, any other person than the party or a barrister or attorney retained by him) "to appear instead of the party to address the Court, but subject to such regulations as the Judge may from time to time prescribe for the orderly transaction of the business of the Court." I have not prescribed any such regulations, nor shall I do so unless it prove necessary, for, while recognising the services which solicitors render to their clients and to the Court, and the occasional loss or even wrong which suitors may suffer from trusting to miscellaneous and untrained assistants, I feel bound to bear in mind that this is the Court of the poor man.

Agreeably with the Judge's decision, the Registrar has deducted 7s. from the amount of the plaintiff's claim, and judgment was given for the plaintiff for 1l. 15s. The defendant, with the leave of the Judge, now appeals from this decision.

The question for the opinion of the Court is: Is the plaintiff entitled to recover any sum at all, either as a fee or reward or for disbursements?

Wills, Q.C., and *Murray*, for the appellant.—The County Court Judge was wrong in thinking 9 & 10 Vict. c. 95 (The County Courts Act, 1846), s. 91, the only enactment applicable, and was wrong also in his construction of it. The Solicitors Acts (6 & 7 Vict. c. 73. s. 2 and 37 & 38 Vict. c. 68. s. 12) apply. The enactment of 6 & 7 Vict. c. 73. s. 2 cannot be held to have been repealed by 9 & 10 Vict. c. 95. s. 91, or by the County Courts Act, 1852 (15 & 16 Vict. c. 54), s. 10, which partly repeals and re-enacts 9 & 10 Vict. c. 95. s. 91. The enactment of 9 & 10 Vict. c. 95. s. 91 does not mean, by "appearing or acting on behalf of any other person in the said Court," appearing or acting in open Court to the exclusion of services rendered out of Court.

[BOWEN, J.—In *In re Toby* (4), which came after two other decisions on the same section—*Ex parte Clipperton* (5) and *In re Keighley* (6)—it seems to have

(1) The County Courts Act, 1846 (9 & 10 Vict. c. 95).

(2) The County Court Rules, 1875.

(3) The County Courts Act, 1852 (15 & 16 Vict. c. 54).

(4) 1 L., M. & P. 426; 19 Law J. Rep. Q.B. 503.

(5) 12 Jur. 1044.

(6) 1 L., M. & P. 204; 19 Law J. Rep. C.P. 166.

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been held that those words do not extend to services rendered out of Court.]

The Court in *In re Toby* (4) intended only to follow the decision in *In re Keighley* (6); and in *In re Keighley* (6) the Court decided only that work done out of Court before the commencement of a suit was not within the section. Moreover, the case is within the enactment of 37 & 38 Vict. c. 68 (The Attorneys and Solicitors Act, 1874), s. 12, that "no costs, fee, reward or disbursement on account of, or in relation to, any act or proceeding done or taken by any person who acts as an attorney or solicitor without being duly qualified so to act, shall be recoverable in any action, suit or matter by any person or persons whomsoever."

[BOWEN, J.—May not that clause have been directed merely against the right of a party to a cause paying money to an uncertificated person to recover the money as part of his costs from the opposite party?]

No. The clause clearly intended to extend previous provisions in other respects as well; for instance, by saying, "any person who acts as an attorney or solicitor," without adding in relation to legal proceedings, or the like, it covers conveyancing.

The respondent did not appear.

GROVE, J.—In this case, the claim which was before the learned County Court Judge, and with which we have to deal, was the claim of a person not a solicitor, and called an "agent," seeking payment in respect of services which he had rendered to the defendant in connection with another suit in the County Court, unquestionably services in the suit, although not *in curia*—not before the Court itself.

It is unfortunate that the plaintiff does not appear before us either personally or by counsel; we must deal with the case as best we can.

The first two items in the particulars of the plaintiff's claim were—"Paid for summons, *Eddolls v. Whitehead*, 9s. Paid hearing fee, 16s." Those seem clearly to be solicitors' charges. The rest of the claim was—"Attending Court, waiting upon defendant several times both at Reading and Earley, 17s." The learned

Judge was of opinion that the plaintiff could not recover for services rendered in Court, and therefore, on this appeal by the defendant, we have not to deal with such part (if any) of the claim as was for services rendered in Court. There remain the services rendered to the defendant out of Court, and included in that charge of 17s., as to which it is to be observed that the learned Judge treated them as being services in the suit, though not in Court.

The ground of his decision in favour of the plaintiff was that section 91 of 9 & 10 Vict. c. 95 (The County Courts Act, 1846) only applies to appearing or acting in Court, and not to any services out of Court. I should, but for *In re Toby* (4) and *In re Keighley* (6), have had considerable doubt as to whether "acting on behalf of any other person in the said Court" would not extend to acting in any proceeding in the Court, although the acting might not be actually in Court. But in those two cases, differing from an earlier case—*Ex parte Clipperton* (5)—it seems to have been held that the section applied only to appearing and acting "in Court," and not to services out of Court; and we are bound by those decisions. It appears to me, however, that the County Court Judge was wrong in thinking that the County Courts Act, 1846, s. 91, was the only enactment applicable. I am inclined to think that the Solicitors Act, 1843 (6 & 7 Vict. c. 73), s. 2, is in its terms applicable, and that it applies, notwithstanding the provisions of 9 & 10 Vict. c. 95, and the other County Court Acts. But I am of opinion that the later Solicitors Act (37 & 38 Vict. c. 68), s. 12, clearly applies. The second clause of that section says, "No costs, fee, reward or disbursement, on account of, or in relation to, any act or proceeding done or taken by any person who acts as an attorney or solicitor without being duly qualified so to act, shall be recoverable in any action, suit or matter by any person or persons whomsoever." Those words are very wide; and, whether they do or do not extend to remuneration for conveyancing, they, at all events, apply to amounts claimed for costs in an action. The plaintiff's claim is, undoubtedly, a claim to costs in respect of services rendered in an action,

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first, in commencing the action, and, afterwards, in the action so commenced.

The learned Judge speaks of the County Court as being the poor man's Court; but, in my opinion, costs would be increased, instead of being diminished, by allowing claims such as the present to succeed. The reasons for not permitting unqualified persons to recover remuneration for services in connection with legal proceedings are stronger in respect of acts done out of Court than in respect of acts done in Court, inasmuch as the former are less under the control of the Judge than the latter.

I am of opinion that the appellant is entitled to our judgment.

BOWEN, J.—I am of the same opinion; and I only wish to make one observation. Although, if the case rested on 9 & 10 Vict. c. 95. s. 91, there might be some difficulty by reason of the decisions, there is room for doubt whether in *In re Toby* (4), which is the chief support for a construction of that Act favourable to the plaintiff, the Court meant to say more than that "appearing or acting on behalf of another person in the County Court" did not extend to services rendered out of Court before the commencement of a suit.

Judgment for the appellant.

Solicitor—E. W. Williamson, for appellant.

1881. } GORDON v. THE GREAT WESTERN
Nov. 17. } RAILWAY COMPANY.

Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), s. 7—Conditions limiting Liability of Company—Alternative Rate of Charge—Exemption for Detention in Delivery—Refusal to Deliver—Wilful Misconduct.

The defendants charge two rates for the conveyance of goods—one where they take the ordinary liability of the carrier, and the other a reduced rate known as the "owners' risk rate," in which they make

it a condition of carriage that they shall not be liable in respect of loss or detention of or injury to the goods in the receiving, forwarding or delivery thereof, except upon proof that such loss or damage arose from wilful misconduct on the part of the company's servants.

The plaintiff delivered to the defendants at W. some cattle to be carried to G., and there delivered to his agents. The cattle were consigned and the carriage prepaid at "owners' risk rate." On their arrival at G. they were unloaded and placed in cattle-pens by the defendants' servants, but in consequence of the clerk at W. having negligently omitted to enter the cattle on the consignment note as "carriage paid," the defendants refused to deliver the cattle to the plaintiff until two days afterwards, alleging that the carriage had not been paid. In an action brought by the plaintiff to recover damages for the wrongful detention of the cattle,—

Held, that the defendants were liable, inasmuch as the condition as to "detention" did not include the case of an intentional refusal to deliver by reason of a supposed claim or lien which turned out to be unfounded.

Whether, upon the above facts, there was evidence of wilful misconduct on the part of the defendants, quære.

Special Case on appeal under 13 & 14 Vict. c. 61.

1. This action was brought to recover damages sustained by the plaintiff by reason of the illegal and wrongful detention and negligence by the defendants or their servants at Gloucester Station of and to certain property of the plaintiff.

2. At the trial of the action before the Judge of the County Court, without a jury, the following facts were proved:—

3. On the afternoon of the 6th of April, 1881, the plaintiff delivered to the defendants at Waterford Station ten cattle, to be carried to Gloucester, and there delivered to one John Wilkins, the plaintiff's agent, for sale or his order. The said cattle were consigned and the carriage was prepaid by the plaintiff at what is known as the "owners' risk rate," and the plaintiff signed a consignment note, of which the following is the material portion:—

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"Great Western Railway.

"Consignment of cattle, horses, sheep, pigs, &c., to be carried at owners' risk.

"The Great Western Railway Company hereby give notice that they have two rates for the conveyance of cattle, horses, sheep, pigs, &c.—one the ordinary rate or toll, when they take the ordinary liability of the carrier; the other a reduced rate, adopted when the sender relieves them of all liability of loss, damage or delay, except upon proof that such loss, damage or delay arose from wilful misconduct on the part of the company's servants.

"To the Great Western Railway Company.

"Waterford, April 6, 1881.

"Receive and forward the under-mentioned cattle or horses to be carried at the reduced rate, below the company's ordinary rate or toll, in consideration whereof I undertake to relieve the Great Western Railway Company, and all other companies over whose lines the cattle or horses may pass, from all liability in case of damage or delay, except upon proof that such loss, detention or injury arose from wilful misconduct on the part of the company's servants. I also agree to the conditions and regulations on the back of this notice.

"(Signed) Jas. Gordon."

On the back of the notice was the following:—

"Special Conditions and Regulations.

"In consideration of the company accepting the animals named on the other side, to be carried and delivered as declared at the reduced charge mentioned on the other side hereof, it is agreed:—

"1. That the company are not to be liable in respect of any loss or detention of, or injury to, the said animals or any of them, in the receiving, forwarding and delivery thereof, except upon proof that such loss, detention or injury arose from the wilful misconduct of the company or its servants."

[The remaining conditions and regulations were not material to the case, and are therefore omitted.]

4. In the ordinary and usual course of business, cattle, under the above circumstances, would be delivered at the Gloucester Station after their arrival directly the consignee applied for them. Special servants

were kept by the defendants for the purpose of their cattle traffic.

5. The cattle arrived at Gloucester late in the evening of the 7th of April, and were unloaded by the defendants' servants and placed in cattle-pens. On the following morning, a drover in the employment of the consignee duly applied for the cattle; but in consequence of the defendants' clerk at Waterford who received the amount paid by the plaintiff for carriage having negligently omitted to enter the cattle on the consignment note as "carriage paid," the defendants' servants refused to deliver the cattle, alleging that the carriage was not paid.

6. During the time the cattle were detained at Gloucester Station, they were supplied by the defendants' servants with water and hay, but they were placed and kept in pens on hard cinders, and exposed to the inclemency of the weather, so that by reason of such treatment they were considerably damaged and depreciated in value, and the plaintiff was put to some expense. The Judge found as a fact that the plaintiff had sustained damage to the amount of 35*l*.

7. On the 9th of April the plaintiff demanded the cattle. The defendants' manager then said that there had been a mistake by reason of the negligence of the defendant company's clerk at Waterford about the carriage, but that the plaintiff could have the cattle; and they were accordingly handed over to him at Gloucester Station.

8. At the conclusion of the plaintiff's case, the defendants submitted that, having regard to the terms of the consignment note, the plaintiff should be nonsuited. The learned Judge declined to nonsuit, and, the defendants not calling any witnesses, judgment was given for the plaintiff for 35*l*., on the ground that, although no wilful misconduct on the part of the defendants' servants was proved, their conduct amounted to a refusal to deliver which was not covered by the terms of the consignment note.

The question for the opinion of the Court was, whether upon the above facts the judgment was erroneous in law.

Ernest Page, for the defendants (the

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appellants).—The cattle were accepted for conveyance at a lower rate than is ordinarily charged, on condition of such conveyance being at "owner's risk." The authorities shew that the consignment note and the conditions contained in it were, under the circumstances, reasonable—*Lewis v. The Great Western Railway Company* (1), *Haines v. The Great Western Railway Company* (2), *Robinson v. The Great Western Railway Company* (3). The railway company was, therefore, protected from liability under the terms of the consignment note; inasmuch as what happened here was a "detention" in delivery. To "detain" means "to keep that which belongs to another," and includes any delay in delivery.

[GROVE, J.—Does not the word "detention" here mean something which prevents goods arriving at their destination at the proper time? This detention was in no way incident to the carriage.]

It is contended on the part of the company that the transit continued until the cattle were actually handed over, and that their character of carriers had not determined—see judgment of Lindley, J., in *Hoare v. The Great Western Railway Company* (4). There was no refusal to deliver, such as would entitle the plaintiff to maintain an action for *tort*. He cited *Morritt v. The North Eastern Railway Company* (5). On the question whether the facts disclosed any "wilful misconduct" on the part of the defendants, the decision of the County Court Judge was correct. As Bramwell, L.J., pointed out in *Lewis v. The Great Western Railway Company* (1), "what is meant by 'wilful misconduct' is misconduct to which the will is a party: it is something opposed to accidental or negligent; the *mis* part of it, not the conduct, must be wilful."

A. R. Jelf, Q.C., for the plaintiff.—No construction of the word "detention" was

given in *Hoare's Case* (4); and the observations relied upon in Lindley, J.'s, judgment were mere *obiter dicta*. If the term "detention" were held to include a case like this, cattle might be kept as long as ever a railway company pleased, provided wilful misconduct could not be proved. Again, there is no evidence whatever of any detention having occurred in the course of "delivery." As regards *Morritt's Case* (5), an accidental misdelivery is a totally different thing from a refusal to deliver.

He was then stopped by the Court.

GROVE, J.—In giving my decision upon this case I intend to put out of the question whether what occurred here amounted to wilful misconduct, for I am rather inclined to think that mere honest forgetfulness could not be fairly termed wilful misconduct, though there may have been wilful misconduct in the company's servants refusing to deliver. I base my decision on the words used in the conditions stated on the consignment note; and the conditions, fairly read, do not, as it seems to me, embrace a case like the present. The question is, whether the word "detention" covers a case where the goods are at their destination and ready for delivery, but where there has been an absolute and intentional refusal to deliver by reason of a supposed claim or lien which turned out to be entirely unfounded. There was no casual accidental detention, no detention occasioned by some act on the part of the company's servants which had delayed the transit of the cattle, but an intentional detention. I think the word "detention," as used here, means something which prevents the company from delivering at the proper time; if it included a case like the present the company would virtually be protected from loss, however occasioned, and the condition would be highly unreasonable. The defendants claimed to withhold the cattle for reasons which were entirely without foundation; and to hold that the company under such circumstances were not liable would be to place an unfair interpretation, as it seems to me, upon the terms of the contract entered into between them and the plaintiff. Moreover, the meaning of the condition is that the deten-

(1) 47 Law J. Rep. Q.B. 131; Law Rep. 3 Q.B. D. 195.

(2) 41 Law Times, 436.

(3) 85 Law J. Rep. C.P. 123; Law Rep. 1 O.P. 329.

(4) 25 W.R. 631.

(5) 45 Law J. Rep. Q.B. 289; Law Rep. 1 Q.B. D. 302.

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tion must take place in "delivery thereof;" there was nothing like a detention in the course of delivery here, but a refusal to let the plaintiff take the cattle, on the ground that the company had a lien which did not in fact exist. In my opinion, therefore, the judgment of the learned County Court Judge was correct and must stand. I merely desire to add that the authorities which have been cited have no analogy to a case like the present, where the defendants have not excused themselves on the ground of delay, but set up a legal claim to keep the plaintiff's property.

LOPES, J.—I am of the same opinion, notwithstanding the able argument which Mr. Page has addressed to us on behalf of the defendants. This is not the case of misdelivery of cattle nor of sending them beyond their proper destination, but the company's conduct amounts to an unjustifiable refusal to deliver at the proper time. It has been contended that such conduct, notwithstanding, is protected under the terms of the consignment note which frees the railway company from all responsibility in respect of any "detention;" but can it be said that an unjustifiable refusal to deliver comes within the fair meaning of these words? I think not, though I am ready to admit that delay in transit would come within the terms of the consignment note; but what occurred here is something quite *dehors* the contract. On this ground I come to the conclusion that our judgment must be in favour of the plaintiff, and it is therefore unnecessary for me to decide whether or not there was any wilful misconduct on the part of the defendants, though I am inclined to think that the facts stated here would warrant such a conclusion being drawn.

Judgment for plaintiff.

Solicitors—J. M. Weightman, agent for Philip J. W. Cooke, Gloucester, for plaintiff; R. R. Nelson, for defendants.

1881. }
Nov. 10. }

DALRYMPLE v. LESLIE.

Practice — Interrogatories — Sufficiency of Answer — Judicature Act, 1873, s. 25. sub-s. 11.

Action for libel. Interrogatory administered to B the defendant, by A the plaintiff, as to the contents of a letter alleged by A to have been written by B to a third person. B in answer swore she had no recollection of the exact words in the said letter contained:—Held (by GROVE, J., on appeal from order of LINDLEY, J., reversing order of MASTER POLLOCK for further and better answer), that B could not be called on to answer further as to the contents of a document of which she swore she had no recollection. Held also (by BOWEN, J.), that on principle B ought not to be called on to give secondary evidence of a document as to which it is not proved that it is in her possession, or in that of any one whom she could compel to produce it, but which might even be in the possession of A himself.

Semble (per GROVE, J.), section 25 (sub-section 11) of the Judicature Act, 1873, refers to "rules" of equity not to "practice."

This was an action for libel, and the plaintiff administered interrogatories for the examination of the defendant, the second of which ran thus:—

"If you deny that your letter contained the statements alleged in paragraph 3 of the statement of claim to have been stated therein, state whether you wrote any letter or letters to the lady in question, and, if so, when, making the statements hereinbefore set out, or any and which of the said statements, or to the same and what purport and effect as the said statements, or any and which of them, or any and which part of any, and which of them. Set out as fully as you can also what your said statement or statements were, and if you have any copy or copies of any such letters make a copy thereof an exhibit to your answer."

The defendant objected to answer, but Huddleston, B., at chambers, ordered her to answer the said interrogatory.

In obedience to the said order, the defendant delivered the following answer:

Dalrymple v. Leslie.

"In answer to the second of such interrogatories, I say that to the best of my recollection and belief, I never wrote and sent any letter or letters to the lady in question making the statements in the second of the said interrogatories mentioned, or any of those exact statements. I did write a letter to the said lady in August or September, 1879, but on what exact date I cannot say. I kept no copy of the said letter, and I am unable to recollect with exactness what the statements contained therein were. And I object further to answer the interrogatory on the ground that it is irrelevant, inadmissible and otherwise objectionable, and I submit that I should not be required to set out what the statements in the said letter were, unless I could do so with exactness."

To this answer the plaintiff objected as not being full enough, and obtained an order of Master Pollock for a further and better answer. The defendant appealed, and Lindley, J., at chambers, reversed the Master's order. The plaintiff appealed to the Divisional Court.

A. Cock, for the plaintiff.—There is a power to interrogate; as to the contents of a written instrument that has been in the possession of the party interrogating, but is not at the time in his possession (1), *a fortiori* there is power to interrogate as to the contents of a document that never has been in the possession of the interrogating party, but has been in that of the person interrogated. The answer given is no answer, as it only says that the defendant does not recollect.

[GROVE, J.—But is a person compelled to give information in answer to interrogatories as to the contents of a written document no longer in his possession, and as to which he swears he has no recollection?]

You are allowed to interrogate as to the words in the case of slander, and to ask defendant whether he did not use such and such words, and if not, what words he did use.

[GROVE, J.—Yes; that is primary evidence.]

There is no difference between libel and

(1) Daniel's Chancery Practice (5th ed.), vol. i. pp. 305, 306.

slander as regards the question of the sufficiency of the answer. The defendant is compellable to answer fully according to the practice in Chancery; and the words of section 25 (sub-section 11) of the Judicature Act, 1873 (2), being perfectly general, this Court is bound to adopt that practice, the object of that Act being to assimilate the two practices.

Barnes, for the defendant, was not called on.

GROVE, J.—The question before us arises on the second of a set of interrogatories administered by the plaintiff for the examination of the defendant. With the admissibility of this particular interrogatory we have nothing to do, but have to decide as to the sufficiency of the defendant's answer thereto. The interrogatory runs thus: [His Lordship then read interrogatory No. 2, and the answer thereto, from the beginning to the words "statements contained therein were."] So far the answer is, in my opinion, ample; but she adds: "I object further to answer this interrogatory on the ground that it is irrelevant, inadmissible and otherwise objectionable, and I submit that I ought not to be required to set out what the statements in the said letter were, unless I can do so with exactness." These are the words complained of by the plaintiff, and we are asked to say whether that part of the answer is sufficient, or whether the defendant is bound to file a further answer as to the words of a document of which she swears she has no recollection. I think she should not be called upon to answer further. So to call upon her might, in my opinion, put the defendant in a dangerous position, and give the plaintiff an unfair advantage. She does state in terms that she may have made some statements in writing, but that she is unable to recall the exact expressions used. Now it is consistent with this answer that she may have made some statements in

(2) 36 & 37 Vict. c. 66, s. 25. sub-s. 11: "Generally in all matters not hereinbefore particularly mentioned, in which there is any conflict or variance between the rules of equity and the rules of common law with reference to the same matter, the rules of equity shall prevail."

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writing of the same nature as those as to which she is asked. Is she to state from memory that which may put her in one or other of the following positions?—She may think she made statements which would have a worse bearing against her than those she actually did use, in which case every advantage of that would be taken by the plaintiff at the trial; or, on the other hand, she may think she has made statements less injurious than may be proved at the trial, and would then be accused of falsehood. As it is, she swears she cannot recollect some of the exact statements, and yet is required to give them. There is no authority for anyone being compelled to answer from recollection as to the contents of a written document, more especially when such answer, being likely to be more in her own favour or more to her disadvantage, as the case may be, would put her in a position of peril such as an untried person, so to speak, should not be compelled to undergo. I think her answer is fair and sufficient, and all that she can be called on to give before the trial of the action. To compel a further answer might do a serious injury to a person having a really good defence, or, if there be no good defence, might seriously aggravate the damages. The defendant ought not to be obliged to commit herself to state from imperfect memory what may prove to be untrue, and thus be put to the disadvantage of having to enter into explanation. Till I am obliged, by a decision of the Court of Appeal or some other binding authority, I shall not hold that a party is bound to answer as it is contended by the plaintiff that the defendant should be compelled to answer.

It has been contended that such further answer would have been ordered by the Court of Chancery, and that since the Judicature Act we are literally and entirely bound by the practice in Chancery; but I fail to see that we are. There is, as far as I know, no case laying it down that in every instance the Chancery practice is to be followed, and the word in the Judicature Act is not "practice" but "rules." It has not been decided how far the practice, as applying to cases in Chancery where documents are the chief evidence, is to be carried out in Courts of

law in preliminary proceedings such as these, and I should hesitate to say that every one of the rules of practice in Chancery is to be imported into the practice under the Judicature Act (3). But it is not necessary for us to decide that, as the question here is not as to the admissibility of the interrogatory, but as to the sufficiency of the answer. I think, therefore, that there should be no order for a further and better answer. It would, to my mind, create a very dangerous precedent to say that a person should be compelled to answer from memory as to the contents of a written document as to which she swears she has no recollection.

BOWEN, J.—I consider this, and desire it to be understood as deciding it, as a question of strict principle, and having no reference to the question of discretion. Is the plaintiff entitled to the information he seeks? The plaintiff is suing for damages for a libel, and asks the defendant, the writer of the document alleged to contain the libel, whether the contents of that document are correctly set out by him, or, if not, what they were. *Ex hypothesi* the written document is not in the possession of the defendant nor in the possession of one whom the defendant can compel to produce it, but in a third party's possession—it might be even in that of the plaintiff himself. Is the defendant to be compelled to give information about that as to which she swears she has no recollection? I think not. I particularly wish that nothing I say may be thought to be in disregard or to be said in forgetfulness of the practice of interrogating as to the contents of a written document. Nothing is more common than so interrogating to further proof as it is called in mercantile cases—*e.g.* in proof of signatures. I can remember that practice growing up; but I may say that before the Judicature Act, at any rate in the majority of cases, a demand to see the document was all that

(3) But see *Newbiggin-by-the-Sea Gas Company v. Armstrong* (49 Law J. Rep. Chanc. 231; Law Rep. 13 Ch. D. 310), where the Court of Appeal decided that where there is a conflict or variance between the practice of the Court of Chancery and the practice of the Courts of common law that practice which upon consideration appears to be the best ought to prevail.

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was necessary. Now, where is the law compelling a person to answer as to the contents of a document, as to which it is not proved that it cannot be produced—that is, to give secondary evidence, such as at the trial would not be allowed? The passage in *Daniel's Chancery Practice* (1) does not go that length. There is no case to shew what the Courts of Chancery have held as to this, but it was never the practice at common law. I do not profess to be cognisant of Chancery practice beyond a limited extent. But the learned Judge who refused the order, being not only a distinguished common law Judge, but also an accomplished master of equity, thought that the defendant should not be compelled to answer, and I am therefore confirmed in my opinion against ordering further and better answer by this fact.

Appeal dismissed with costs

Solicitors—C. Eyre, for plaintiff; Burton, Yeates, Hart & Burton, for defendants.

1881. } SHARP v. BIRCH. SIMPSON
Nov. 15. } (claimant).

Bill of Sale—Registration—Affidavit of Attestation—Presence of Attesting Witness—Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), ss. 8 and 10 (sub-s. 2).

Upon the registration of a bill of sale under the Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), ss. 8 and 10, the affidavit of attestation required by section 10 (sub-section 2) said that the name written (under a regular attestation clause) as the signature of a solicitor subscribing as attesting witness was in his handwriting:—Held, that the Act required an affidavit that the person subscribing as attesting witness was present at the execution of the bill of sale, and that therefore the affidavit was insufficient, and the registration invalid.

This was an interpleader summons, referred by Hawkins, J., at chambers to the Court, in respect of goods which had been seized by the sheriff in the execution of process against the goods of the

defendant, and which were claimed by Simpson as comprised in a bill of sale executed in his favour by the defendant. The plaintiff, as execution creditor, denied the claimant's title on the ground that the bill of sale was not duly registered under the Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), ss. 8 and 10, and particularly on the ground that there was no sufficient affidavit of attestation to satisfy section 10 (sub-section 2), by reason that the affidavit filed thereunder did not state that the person whose name was subscribed to the bill of sale as attesting witness was present at its execution (1).

The affidavit, which, it will be seen, was not made by the attesting solicitor himself, was, so far as material, in the following terms:—

1. The paper writing hereunto annexed . . . is a true copy of a bill of sale, . . . and of every attestation of the execution thereof, and the said bill of sale was made and given on the day it bears date, being the 6th of September, 1881, and I was present and did see John William Birch, . . . in the said bill of sale mentioned, and whose name is signed thereto, sign and execute the same on the said 6th day of September, the effect of the said bill of sale having been first explained to the said John William Birch; and the said John

(1) 41 & 42 Vict. c. 31, ss. 8 and 10, enact:—

Section 8: "Every bill of sale to which this Act applies shall be duly attested, and shall be registered under this Act within seven days after the making . . . thereof, . . ." otherwise as against execution creditors and others it is . . . to be deemed void as to chattels remaining . . . in the possession of the grantor.

Section 10: "A bill of sale shall be attested and registered under this Act in the following manner: 1. The execution of every bill of sale shall be attested by a solicitor of the Supreme Court, and the attestation shall state that before the execution of the bill of sale the effect thereof has been explained to the grantor by the attesting solicitor. 2. Such bill, . . . and also a true copy of such bill, . . . and of every attestation of the execution of such bill of sale, together with an affidavit of the time of such bill of sale being made or given and of its due execution and attestation, and a description of the residence and occupation of the person . . . giving the same, . . . and of every attesting witness to such bill of sale, shall be presented to, and the said copy and affidavit shall be filed with, the Registrar within seven clear days after the . . . giving of such bill of sale. . . ."

Sharp v. Birch.

William Birch resides at No. 39 High Street, Stamford, . . . and is a builder.

2. The name "Wm. F. Law" set and subscribed as the witness attesting the due execution thereof is of the proper handwriting of William Farmery Law, and he resides at No. 3 St. Mary's Place, Stamford, and is a solicitor.

The signature of Law was under an attestation clause in regular form, having (with other words) the words "signed, sealed and delivered by the above-named" [the grantor] "in the presence of" [attesting witness].

Lindsell, for the claimant.—The affidavit was a sufficient affidavit of the attestation of the bill of sale. The Act, in requiring, by section 10 (sub-section 2), an affidavit of the due "attestation" of the bill of sale, means an affidavit that the person appearing to have subscribed his name to the bill of sale in attestation of its having been duly executed did really so subscribe his name thereto, and that he is, as required by sub-section 1, a solicitor. To "attest" the execution of an instrument means to subscribe one's name to the instrument in testimony to having seen it duly executed; and the clause uses the word according to that, its legitimate meaning. The presumption that the clause so uses the word is strengthened by its use in sub-section 1, which directs that "the attestation shall state" that the bill of sale was before its execution duly explained to the grantor. The "attestation" there referred to cannot be the being present at the execution of the instrument in question, but must be the certifying upon the instrument to having been so present.

He referred to *Ex parte The National Mercantile Bank* (2).

Foote, for the execution creditor.—To "attest" an instrument is not merely to subscribe one's name to it as having been present at its execution, but includes also, essentially, the being in fact present at its execution. That is the normal meaning of the word; and the narrower use of the word in part of sub-section 1 is unimportant.

[*HAWKINS, J.*, referred to *Roberts v.*

(2) 49 Law J. Rep. Bankr. 62; Law Rep. 15 Ch. D. 42.

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Phillips (3) and *Bryan v. White* (4) upon the meaning of "attesting."]

Lindsell, in reply.—If "attesting" means the being present, and not merely the subscribing in sign of having been present, at the execution of an instrument, the affidavit was nevertheless sufficient; for, by proving the signature of the person subscribing as attesting witness, it affords also sufficient evidence that he was present. Evidence of the signature of the grantor of a deed is evidence also of its sealing and delivery.

DENMAN, J.—This case, which has been ingeniously argued by Mr. *Lindsell*, was a fair case to bring before the Court.

The Act says, by section 8, that every bill of sale to which the Act applies shall be duly attested, and shall be registered under the Act, otherwise it shall be void as against execution creditors and others, as to all chattels remaining in the possession of the grantor. Section 10 contains provisions as to what is meant by those two requirements, the due attesting and the registering. Sub-section 1 says that the execution of every bill of sale is to be attested by a solicitor, and the attestation is to state that before the execution of the bill of sale its effect has been explained to the grantor. Sub-section 2 deals with the registering, and requires the filing of a copy of the bill of sale together with an affidavit of (among other things) "its due execution and attestation." Was there, then, in this case the requisite affidavit of attestation? The affidavit says that "the name 'Wm. F. Law' . . . subscribed as the witness attesting the due execution . . . is of the proper handwriting of William Farmery Law, and he . . . is a solicitor." That is perfectly consistent with the supposition that the person subscribing as attesting witness was not present at the execution at all. Is that, nevertheless, enough? I think it is not. I think the Legislature intended that something more should be requisite—intended to require something more than that the affidavit of attestation should state the genuineness of the signature of the person appearing to sign as attesting

(3) 4 E. & B. 450; 24 Law J. Rep. Q.B. 171.

(4) 2 Robert. Ecc. Cas. 315.

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witness and his being a solicitor. Attestation imports, as was said in *Bryan v. White* (4), seeing the execution of the instrument attested, and not merely subscribing the instrument in sign of having done so. The Act, no doubt, requires, as part of the attesting, an attestation clause stating that the effect of the bill of sale has been explained to the grantor, and therefore makes a special requirement as to what is to be comprised in the attesting; but that case is, nevertheless, an authority applicable to this case for saying, that seeing the execution of an instrument is necessary to attesting it. My brother Huddleston (5) agrees in this opinion. There must be judgment for the execution creditor.

HAWKINS, J.—I am of the same opinion, I think that an affidavit of the signature of an attestation clause, without any sort of statement in the affidavit that the person so signing was present at the execution of the instrument, is not an affidavit of attestation within the meaning of the Act.

Judgment for execution creditor.

Solicitors—Wright & Law, agents for W. F. Law, Stamford, for claimant; Crowder, Anstie & Vizard, agents for Owston & Dickinson, Leicester, for execution creditor.

[IN THE COURT OF APPEAL.]

1881. } BOWLES v. DRAKE AND
Dec. 8. } COMPANY.*

Practice—Cause remitted to County Court for Trial—Appeal from Judgment of Divisional Court—30 & 31 Vict. c. 142. s. 10—Judicature Act, 1873, s. 45.

An action brought in the High Court but remitted for trial before a County Court, under 30 & 31 Vict. c. 142. s. 10, becomes thereby a cause in the County Court, so that there can be, under section 45 of the Judicature Act, 1873, no appeal from the judgment of a Divisional Court on a motion in the cause, unless leave to appeal be obtained.

Appeal by the defendants from a judgment of the Queen's Bench Division

(5) Who was present during the argument, but had left the Court.

* *Coram* Jessel, M.R.; Brett, L.J.; and Cotton, L.J.

making absolute a rule for a new trial. The plaintiff having brought an action against the defendants in the High Court of Justice, it was remitted to the County Court, pursuant to 30 & 31 Vict. c. 142. s. 10 (1). The case was tried in the County Court before the Judge and a jury, and resulted in a verdict for the plaintiff. The defendants then obtained in the County Court a new trial, and on this second trial the plaintiff was nonsuited: he then obtained, by way of appeal, in the Queen's Bench Division, a rule for a new trial, which was afterwards made absolute.

No leave to appeal was obtained.

The defendants appealed.

J. Vesey Fitzgerald, for the plaintiff, took a preliminary objection. There is no right of appeal in this case, as no leave has been obtained. This cause was remitted to the County Court, and it then became a cause in the County Court, and from a decision of the Divisional Court on an appeal from a County Court there is, by the Judicature

(1) 30 & 31 Vict. c. 142 provides by section 7 that in any action of contract brought in a superior Court where the claim does not exceed fifty pounds, a Judge may, on the application of the defendant, order the action to be tried in the County Court, and thereupon "the cause and all proceedings therein shall be heard and taken in such County Court as if the action had been originally commenced in such County Court."

Section 8 provides that where a suit is pending in the Court of Chancery which might have been commenced in a County Court, any of the parties may apply to have "the same transferred to the County Court," and the Judge may, either on such application or without such application, "make an order for such transfer, and thereupon such suit or proceeding shall be carried on in the County Court to which the same shall be ordered to be transferred."

Section 10 empowers defendants against whom an action of *tort* is brought in a superior Court to make in certain cases an affidavit that the plaintiff has no visible means of paying the costs, . . . and thereupon a Judge of the Court in which the action is brought shall have power to make an order "that in the event of the plaintiff being unable or unwilling to give security, the cause be remitted for trial before a County Court to be therein named, . . . and the County Court so named shall have all the same powers and jurisdiction with respect to the cause as if both parties had agreed by a memorandum in writing signed by them that the said County Court should have power to try the said action, and the same had been commenced by plaintiff in the said County Court."

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Act, 1873, s. 45 (2), no appeal unless leave is given. A cause sent down for trial under 30 & 31 Vict. c. 142. s. 10 is, in fact, transferred, and the High Court has no longer any jurisdiction over it—*Moodie v. Steward* (3).

[BRETT, L.J.—Does that decision relate to anything beyond the costs? JESSEL, M.R.—Section 7 of this Act, which refers to proceedings in equity, says they may be “transferred,” but section 10 says “remitted for trial.”]

The practical result must be the same, and the reasoning in *Moodie v. Steward* (3) goes beyond the question of costs; the judgment is in the County Court, the bailiff of the County Court executes it, and the High Court has no jurisdiction at all over any part of the cause, save by way of appeal. Moreover, as the defendants themselves obtained a new trial in the County Court in the first instance, they are estopped from saying that the cause is not in the County Court.

H. Kemp, for the defendants.—The difference in the words used in the three sections of this statute is intentional and marked. Section 7 (1) provides that in action of contract, where the sum in dispute does not exceed 50*l.*, a Judge may order the action to be tried in a County Court; section 8 (1) enables a Judge of the Court of Chancery to transfer an action, and section 10 (1), which relates to this cause, provides that in certain cases a cause may be remitted for trial. So that, although the effect of section 8 (1) is to limit the right of appeal in cases to which it applies, section 10 (1) does not do so with regard to causes which are merely remitted for trial.

[JESSEL, M.R.—Then a new trial may be moved for in two different Courts?]

Moodie v. Steward (3) is an authority on the question of costs, but it does not de-

cide that the cause itself is gone from the High Court.

JESSEL, M.R.—On reading the section (1) which applies to this case, I think it impossible to doubt that a cause sent for trial to a County Court under its provisions is in fact removed from the High Court. The reason for the removal is that the plaintiff has no visible means of paying the costs, and therefore the cause is “remitted for trial” to a County Court; that is, not only is the trial to take place in the County Court, but the cause itself is remitted, and therefore a motion for a new trial must be made in such a cause in the first instance in the County Court. If the argument of the appellants to this Court were to prevail, there could be two motions for a new trial—one in the County Court and one in the High Court. I think that this cannot be; the cause is remitted because the plaintiff is impecunious, and the proceedings in the County Court are less expensive, and yet it is urged that a motion should be in the High Court. I think this cannot be; and that on the fair construction of section 10 (1) of this statute, the action thus remitted becomes to all intents and purposes a County Court cause. This objection must be allowed and we cannot hear this appeal.

BRETT, L.J.—I am of the same opinion. The difference of the phraseology of sections 7, 8 and 10 (1) is curious; but I think they all have the same effect. The argument for the appellant would require us to read in section 10 (1) the words “the said trial,” when the section says “the said action;” the effect of the statute is, I think, that the County Court is to have the same power as if the whole cause were brought in the County Court; and the effect of an order made under section 10 (1) is to transfer the whole cause into the County Court. In *Moodie v. Steward* (3), Baron Bramwell would not bind himself to anything which was not necessary for the decision of the case then before him; but the reasoning of his judgment goes beyond the question of costs, and that reasoning applies to and covers this case. I am of opinion, therefore, that no part of this cause is primarily within the jurisdiction of the High Court, and the effect

(2) Judicature Act, 1873, provides by section 45 that “all appeals . . . from a County Court or from any other inferior Court . . . may be heard and determined by Divisional Courts of the said High Court of Justice.” “The determination of such appeals respectively by such Divisional Courts shall be final, unless special leave to appeal from the same to the Court of Appeal shall be given by the Divisional Court. . . .”

(3) 40 Law J. Rep. Exch. 25; Law Rep. 6 Exch. 35.

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of this judgment is that such a cause is by such an order as this practically, substantially and legally transferred to the County Court.

COTTON, L.J.—I am of the same opinion. The words of section 10 are to the effect that a Judge may make an order remitting the cause for trial, and the order made under that power does in fact make the cause a cause in the County Court.

Appeal dismissed.

Solicitors—Gribble, for plaintiff; Steele, for defendants.

[IN THE COURT OF APPEAL.]

1881. } ROBERTSON v. THE AMAZON
July 1, 2. } TUG AND LIGHTERAGE COM-
Aug. 5. } PANY.*

Contract—Implied Warranty that a Specified Article shall be fit for use.

The plaintiff contracted with the defendants to navigate for a lump sum a tug, which was named, towing several barges on a sea voyage. The tug was, unknown to the defendants, out of repair, and the voyage consequently occupied longer than it would otherwise have done. In an action by the plaintiff to recover as damages the loss of profit thus caused,—Held (by BRETT, L.J., and COTTON, L.J.; dissentiente BRAMWELL, L.J.), that he could not recover, for that there was no implied warranty that the named tug should be fit to perform the voyage.

Appeal from the judgment of Lord Coleridge, C.J., on further consideration.

The plaintiff entered into the following agreement with the defendants:—

"I, Robert Robertson, hereby agree to take steam-tug towing six sailing barges from Hull, and one small steamer from the Downs, the latter named to assist when required, to Para Brazils, providing and paying crew of officers, sailors, stokers and trimmers (forty-one men all told), also provisions for all on board for seventy days, and finding nautical instruments and

* *Coram* Bramwell, L.J.; Brett, L.J.; Cotton, L.J.

charts for the navigation of the above said steam-tug, steamer and six barges; the company paying pilotage from Hull to sea. All surplus stores to be left on board to be taken over by and to be the property of the company. I hereby undertake to do all the above, and hold the company harmless in regard to the return of the above crew from Para, expenses for which shall be borne by me wholly from the date of the arrival of the vessel in Para, for the sum of 1,020*l.* sterling, 100*l.* of which shall be payable to me on signing the contract, and a further sum of 600*l.* sterling before leaving Hull, for which I shall give guarantee satisfactory to the company; the balance of 320*l.* sterling to be paid by the company's agents in Para on their being satisfied that no claims exist against the company in regard to me, Captain Robertson, or my crew.

"(Signed) Robert Robertson.

"London, July 12, 1876."

It appeared at the trial that the steam-tug mentioned in the above agreement was one named the *Villa Bella*; that this tug was named to the plaintiff at the time of the agreement, and that he had an opportunity of seeing it. This steamer had been kept during the previous winter sunk in the water, and her engines were out of repair, so that she travelled very slowly. The defendants were not aware of these defects. The small steamer, named the *Galopin*, left the plaintiff during rough weather in the Bay of Biscay; and the plaintiff alleged that, in consequence of the defective condition of the *Villa Bella* and the misconduct of the captain of the *Galopin*, who was the servant of the defendants, the voyage had taken sixty days longer than it otherwise would have occupied; that his expenses were increased, his profits diminished, and he laid his damages at 1,200*l.*

Lord Coleridge, C.J., gave judgment for the plaintiff, leaving the amount of damages to be settled by arbitration.

The defendants appealed.

Sir H. Giffard, Q.C., and *K. Digby*, for the appellants, contended that the *Villa Bella* was taken with all faults; that there was no express warranty; that none could be implied; and that the conduct of the *Galopin* was justified by the weather.

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They cited *Couch v. Steel* (1) and *Thorn v. The Mayor of London* (2).

Butt, Q.C., and *E. Pollock*, for the plaintiff, contended that the written document did not contain all the terms of the contract; that the circumstances of the case shewed the *Villa Bella* was to be supplied with all necessaries and to be in a condition fit for the voyage.

They cited *Taylor v. Caldwell* (3) and *Appleby v. Myers* (4).

BRAMWELL, L.J.—With regard to the *Galopin* we are all of opinion that there were no circumstances which justified her captain in leaving the plaintiff. There was therefore a breach of contract between the plaintiff and the defendants, for we hold that there was a contract that the *Galopin* should assist the plaintiff. It does not, however, follow that the plaintiff has lost anything; that must be enquired into, and if he can shew he has sustained any damage he will be entitled to recover, inasmuch as the *Galopin* left without just cause. As to the other question—that relating to the *Villa Bella*—we will take time to consider our judgment.

BRAMWELL, L.J. (on Aug. 5).—I am of opinion that the judgment should be affirmed. We disposed on the hearing of that part of the case which relates to the *Galopin*, holding that in respect of it the plaintiff had a cause of action if he could prove any damages resulting from the breach of contract in relation to that tug, caused by its desertion from the enterprise. It remains to consider the question as to the larger tug.

Now the plaintiff's complaint was not that the vessel was unfit for the voyage and work; that it was not properly built, or strong enough. Nor did he complain that the machinery or boiler was inadequate, not of the best make, or a good make, or strong or large enough. Had such been his complaint, then I think it ought to have failed, because his engagement was with respect to specific things,

and he took them for better or worse. It is admitted that this was so, and rightly admitted. For in the same way as it might be shewn that on the sale of a horse or carriage a particular horse or carriage was meant, so might it be shewn in this case that a specific and definite vessel and specific and definite barges were meant. The plaintiff's complaint was that he had agreed upon a lump sum to take this vessel, towing several lighters, to the Brazils; that it was important to him that the vessel and apparatus should be efficient, as the faster he went the more he gained, and the slower he went the less he gained, or the more he lost. He proved as a fact that the boilers were out of order; that they were sufficient in themselves but needed repairs; and that in consequence it took him much longer to perform his undertaking than it otherwise would have done. The defects, the want of repair, were obvious—obvious to anyone who had looked at or tried the boilers.

The question is, if this gives a cause of action. I am of opinion that it does. The contract of the defendants was to deliver to the plaintiff the tug and barges with and in relation to which he was to perform a certain work or bring about a certain result, for the profitable doing of which the efficiency of the tug was all important. The case seems to me the same as a contract of hiring, and as all contracts when one man furnishes a specific thing to another, which that other is to use. The man so letting and furnishing the thing does not, except in some cases, undertake for its goodness or fitness, but he does undertake for the condition being such that it can do what its means enable it to do. Thus, if a man hired a specific horse and said he intended to hunt with it next day, there would be no undertaking by the letter that it could leap or go fast; but there would be that it should have its shoes on, and that it should not have been excessively worked, or unfed, the day before. If I am asked where I find this rule in our law, I frankly own I cannot discover it plainly laid down anywhere. But it seems to me to exist as a matter of good sense and reason, and it is, I think, in accordance with the analogous authorities. I am afraid that the nearest is the *dictum* of Lord Abinger

(1) 3 E. & B. 402; 23 Law J. Rep. Q.B. 121.

(2) 45 Law J. Rep. Exch. 487; Law Rep. 1 App. Cas. 120.

(3) 3 B. & S. 826; 32 Law J. Rep. Q.B. 164.

(4) 36 Law J. Rep. C.P. 331; Law Rep. 2 C.P. 661.

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in *Smith v. Murrable* (5)—“No authorities were wanted;” “The case is one which common sense alone enables us to decide.” The subject is treated in *Story on Bailments*, s. 383; and certainly, according to what is said there, if this had been a case of letting to hire, the defendants would be liable. But, as Story says, speaking of the letter's obligations (section 392), “It is difficult to say (reasonable as they are in a general sense) what is the exact extent to which they are recognised in the common law. In some respects the common law certainly differs.” This is so. What Story mentions, however, does not affect the principle I contend for. I have referred to some of Story's authorities. I may also refer to *Merlin Répertoire Bail*, s. 6. *Smith v. Murrable* (5) and *Wilson v. Finch-Hatton* (6) are favourable to the plaintiff's contention. In the former case is Lord Abinger's reference to common sense. But as to these two cases, I am afraid “common sense” has differed much in different people, and it is certainly remarkable that in the latter case the Lord Chief Baron refers to the plaintiff as “a lady who generally resides in the country coming to town for the season, sending her carriage, horses and servants,” &c., and proceeds: “Therefore it is abundantly clear that it was in contemplation of both parties that the house should be ready for her occupation.” Even if both parties “contemplated” that, I do not know it follows that they “agreed.” The cases of *Readhead v. The Midland Railway Company* (7) and *Hyman v. Nye* (8) do not help. They and similar cases shew that where there is an undertaking to supply an article, not specific, the article must be “as fit for the purpose for which it is hired as care and skill can make it.” The article here was specific, but I think the same reasoning which leads to that conclusion shews that when the article is specific it must be supplied in a state as fit for the purpose for which it is supplied as care and skill can make it. It was

asked in the course of the argument whether the defendants would have complied with their agreement had there been no rudder to the ship. If, as was suggested, a ship is not a ship without a rudder; or if some of its copper was off, if it was a coppered ship; or if there was a large hole in the deck or no covering to the hatchway,—I think it impossible to say that there was not a duty on the defendants to have the tug free from such defects, and consequently impossible to say that there would not be in such a case a breach of their implied agreement. So I think there is now, and that the judgment must be affirmed.

BRETT, L.J.—I am unable to agree with Lord Justice Bramwell. Lord Coleridge, before whom this case was tried, held that in the circumstances there was an implied warranty that the *Villa Bella* should be reasonably fit for the service to be performed. The contract was in writing, and, as it seems to me, the only parol evidence which could be admitted was such as shewed what was the subject-matter of the contract. The *Villa Bella* was named to the plaintiff, and he could, though this is not material, have seen it. The contract then was one with regard to the named vessels. The plaintiff undertook to navigate the *Villa Bella* and the barges to the Brazils; he undertook the voyage for a fixed sum; he undertook to provision the crews, but he was to be supplied with the means of working the *Villa Bella* and the *Galopin*; he would therefore desire to be able to calculate the time which the voyage would take.

Now the *Villa Bella* was in a bad condition; her engines were damaged by having been sunk in the water during the winter.

I agree that there is a close analogy between this case and the case of a person hiring a chattel for the purpose of using it. I think that where a person hires a specific thing for the purpose of using it, there is an implied contract on the part of the person who uses it that he will keep the chattel in repair, and that he will not allow it to deteriorate from the condition in which it is when the contract is made. But, with deference, I do not think that applies here. The *Villa Bella* was damaged when this

(5) 11 Mee. & W. 5; 12 Law J. Rep. Exch. 223.

(6) 46 Law J. Rep. Exch. 489; Law Rep. 2 Ex. D. 336.

(7) 38 Law J. Rep. Q.B. 183; Law Rep. 4 Q.B. 412.

(8) Law Rep. 6 Q.B. D. 685.

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contract was made. I think the defendants were bound by an implication in the contract not to allow the engines to get into a worse condition, and to take care that the vessel should be kept in as good a condition as it was when the contract was made. But that is not what is urged on this appeal. It is said the defendants were bound to hand the *Villa Bella* over to the plaintiff in a state reasonably fit for the voyage. When there is a specific article there is, in my opinion, no implied contract that it shall be reasonably fit for the purpose for which it is to be used; the distinction is clear between such a contract and a contract to supply a thing not yet made, and not specific. In the one case the article is taken as it is, in the other the person who supplies it is bound to supply something reasonably fit for its purpose. It appears to me Lord Justice Bramwell holds that the defendants were bound to supply the *Villa Bella* in a condition reasonably fit for the purpose for which the contract was made; but I think that there was no such implied contract.

If the evidence shewed that after the contract was made the engines of the *Villa Bella* had from want of reasonable care on the part of the defendants deteriorated, then there might well be a breach of the contract, and the defendants would be liable.

I, however, do not find any such evidence. The *Villa Bella* was, when the contract was made, not reasonably fit for this voyage. The delay which occurred was the result of a risk which the plaintiff ran, and he has, as it seems to me, no cause of action in respect of the *Villa Bella*. With regard to the *Galopin*, we have decided that the plaintiff is entitled to at least nominal damages, and if he can prove any substantial damage was caused by its desertion, his damages will be increased.

COTTON, L.J.—This is an action for breaches of a contract, and the breaches related to two matters. One of them related to the smaller vessel—the *Galopin*—and that we disposed of at the time the case was argued; and we did so on the ground that on the fair construction of the written contract there was a contract on the part of the defendants that the smaller

steamer, which was not named—the *Galopin*—should assist when required by the plaintiff, and that she deserted the expedition, and that there was a breach as to that part of the contract. Our judgment was reserved as to that part of the plaintiff's claim which sought to recover damages for the loss sustained by the inefficiency of the *Villa Bella*. The inefficiency was attributed to the fact that the boilers of the *Villa Bella* were not sufficiently powerful for the engines, and principally to the fact that the boilers were in bad condition in consequence of what had happened to the tug before she became the property of the defendants. The defendants were not aware of these defects, and the plaintiff cannot recover on the ground of misrepresentations. He must recover, if at all, on the ground of breach of warranty. The contract does not contain in express terms any warranty, and there is some uncertainty as to the form of the warranty on which the plaintiff relies. It must be either, as urged in argument, and held by Lord Coleridge, a warranty that the *Villa Bella* was a vessel reasonably fit for the service to be performed, or, as I understand Lord Justice Bramwell to hold, that the *Villa Bella* and her engines were in a reasonable state of repair and otherwise in a condition fit for the service so far as that vessel and her engines could be so. The plaintiff tendered evidence to shew that there was such a contract between the parties. But parol evidence is not admissible to construe the contract; and even if in such an action it would be open to the plaintiff to reform the contract, the evidence would not establish what is essential for such a case, namely, that both parties agreed to a contract not expressed in the written document. But evidence is admissible to shew what the facts were with reference to which the parties contracted, and thus to enable the Court to apply the contract. The evidence shewed that at the time of the contract the defendants were proposing to send out the *Villa Bella*, and that this was known to the plaintiffs. The contract must therefore be dealt with as one made with reference to an ascertained steam-vessel. Though the contract contains no warranty in terms, the question remains whether there are in it expressions from which, as a

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matter of construction, any such warranty as that relied on by the plaintiff can be inferred. In my opinion this is not the case. The question remains, Does the contract put the plaintiff and defendants into any relation from the existence of which the law, in the absence of any actual contract, implies such a warranty as is relied on by the plaintiff? In my opinion it does not. The plaintiff was to be master of the *Villa Bella*, but the law does not, as against the owner, imply in favour of a captain or master any warranty of the seaworthiness or efficiency of the vessel—*Couch v. Steel* (1). Here, however, the plaintiff is more than master. It has been suggested that the plaintiff is in the same position as the hirer of an ascertained chattel, and the defendant in the same position as the person who lets the chattel to hire. There is at least a doubt what warranty the law implies from the relation of hirer and letter to hire of an ascertained chattel. But, however this may be, in my opinion the relation of the parties here is different. The plaintiff here contracts with the defendants for a sum to be paid by them to take a vessel and barges to South America, with liberty to use the vessel as a tug. I say with liberty, for it can hardly be said that it would have been a breach of contract on his part not to use the motive power of the tug, but to tow both the *Villa Bella* and the barges to their destination. If the vessel were not at the time of the contract ascertained and known to both parties, probably the contract would imply such a warranty as is relied on by the plaintiff. But a contract made with reference to a known vessel, in my opinion stands in a very different position. In such a case, in the absence of actual stipulation, the contractor must be considered as having agreed to take the risk of a greater or less efficiency of the chattel about which he contracts. He has to determine what price he will ask for the service or work which he contracts to render or to do. He may examine the chattel, and satisfy himself of its condition and efficiency. If he does not, and suffers from his neglect to take this precaution, he cannot, in my opinion, make the owner liable. He must be taken to have fixed the price so as to

cover the risk arising from the condition of the instrument, which he might have examined if he had thought fit so to do.

It may well be that where parties enter into such a contract as that which exists in the present case, there is an implied contract that the owner of the chattel will not, after the agreement, and while the chattel remains in his possession, use or treat it in any way which will render it unfit for the service which has to be performed; and that he will take such care of it as is reasonable, having regard to the purpose for which it is, under the contract, to be used. But in the present case the inefficiency of the *Villa Bella* arose not from any improper use of the vessel by the defendants, or any neglect on their part to take due care of it after this contract, but from defects which, though unknown to the plaintiff and defendants, existed at the date of the contract. The cases of *Smith v. Marrable* (5) and *Wilson v. Finch-Hatton* (6), or at least the judgments in these cases, have been relied on in support of the plaintiff's case. Each of these cases arose on a contract of hiring, and in each the hirer was defending himself against a claim for damages in respect of a refusal on his part to perform his contract of hiring, while in this case the plaintiff, who is (in my opinion erroneously) said to be in the position of hirer, is suing for damages. In those cases, if there was an implied condition that the thing—a furnished house—was fit for the purpose for which it was let, by reading into the contract to take the house "if fit for habitation" the defendant was excused. Here the plaintiff must establish that there was a warranty to that effect.

In my opinion the plaintiff cannot establish that there was such a warranty as that on which he must rely, and the defendants are, as regards this part of the claim, entitled to have the judgment reversed.

Appeal allowed.

Solicitors—Lumley & Lumley, for plaintiff;
Ashurst & Co., for defendants.

[IN THE COURT OF APPEAL.]

1881. } HAYWOOD v. THE BRUNSWICK
Nov. 28, 29. } PERMANENT BENEFIT BUILD-
Dec. 3. } ING SOCIETY.*

Covenant—Assignment—Covenant not running with the Land—Liability of Assignees with Notice—Affirmative and Restrictive Covenants.

Land was granted to J. in fee subject to a rent-charge. The grantee covenanted for himself, his heirs, executors and administrators, that he, his heirs or assigns, would pay the rent, would erect buildings on the land, and would thereafter keep them in repair. The grantor afterwards assigned the rent-charge with the benefit of all covenants to the plaintiff, and the land and buildings which had been erected came by assignment to A., who mortgaged them, subject to the covenants, to the defendants, who afterwards entered into possession.

In an action on the covenant to repair,—

Held, that the defendants were not liable, that the covenant did not run with the land, that it was a collateral affirmative covenant, and did not impose a burden on the land, so that the defendants could not, as assignees with notice, be compelled to perform it.

Cooke v. Chilcott (Law Rep. 3 Ch. D. 694) questioned.

Appeal from the judgment of Stephen, J., on further consideration.

Action for rent and for breach of covenant to repair, and for an injunction restraining the defendants from further breaches of the covenant, and to compel them specifically to perform the covenant.

At the trial before Stephen, J., it appeared that by an indenture made in 1866 between Charles Jackson and Edward Jackson "in consideration of the yearly rent hereby limited in use, and the covenants and provisions hereinafter contained on the part of the said Edward Jackson, his heirs and assigns, to be performed and observed, he the said Charles Jackson doth hereby grant and convey unto the said Edward Jackson, his heirs and assigns" a plot of land, to hold the same "unto the said Edward Jackson and his heirs," to

* *Curam* Brett, L.J.; Cotton, L.J.; and Lindley, L.J.

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the use that Charles Jackson, his heirs and assigns, should receive a yearly rent of 11*l.* out of the lands; and Edward Jackson covenanted "for himself, his heirs, executors and administrators," with Charles Jackson, his heirs and assigns, that he, Edward Jackson, his heirs or assigns, would pay unto Charles Jackson, his heirs and assigns, the said rent, and would erect on the land within two years, and thereafter keep in good repair, buildings of the annual letting value of double the rent-charge by the indenture limited.

The buildings were duly erected. In 1867, Charles Jackson sold the above-mentioned chief rent and all powers and remedies in respect thereof, with the benefit of the covenants contained in the indenture of 1866, to the plaintiff, and the plaintiff received the rent accordingly. Edward Jackson afterwards assigned the land and buildings, and after divers *means* assignments they passed to W. McAndrew and were by him assigned by way of mortgage, subject to the rent-charge and covenants, to the trustees of the Brunswick Benefit Building Society, the present defendants. In 1874, the Brunswick Benefit Society was incorporated, and McAndrew having made default, the society entered into possession, and paid the rent to the plaintiff from time to time. In 1880 the defendants ceased to pay the rent, and allowed the buildings to fall into a bad state of repair.

The plaintiff then brought this action. The amount of the rent was paid into Court.

Stephen, J., on further consideration, gave judgment for the plaintiff, holding that, although the covenant did not run with the land at law, yet the defendants, as mortgagees in possession with notice, were bound to perform the covenants of the indenture of 1866.

The defendants appealed.

Ambrose, Q.C. (with him *Crompton*), for the appellants.—The benefit of a covenant to repair does not run at law with the land, so that no liability is thereby imposed on the defendants; and it is not within the second rule in *Spencer's Case* (1), for the covenantee

(1) 1 Smith L.C. (ed. 8), 68.

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had not the land at the time of the making of the covenant (2)—*Webb v. Russell* (3), *Stokes v. Russell* (4), *Milnes v. Branch* (5). [BRETT, L.J., referred to *Randall v. Rigby* (6).]

The remedy for rent was then not by an action on covenant, but the abolition of real actions has altered this (7)—*Whitaker v. Forbes* (8), *Thomas v. Sylvester* (9). So here the plaintiff can sue for rent, but he cannot sue the defendants on the covenant to repair.

[BRETT, L.J., referred to *Riddell v. Riddell* (10).]

But here the action is not brought in the name of the covenantee. Secondly, the burden of covenants will not run with freehold land—*Spencer's Case* (11), *Brewster v. Kitchell* (12), *Keppell v. Bailey* (13). The result of these cases is that the burden of a covenant will not run with the land except in the case of landlord and tenant. *Tulk v. Moxhay* (14) applies only to restrictive prohibitory covenants. In *Wilson v. Hart* (15) the covenant was held not to run with the land, but the defendant was held affected with notice in equity of the restrictive covenant in that case. *Cooke v. Chilcott* (16) contains dicta which are adverse to the defendants, but they were not necessary to the decision, for the facts of the case shew that an easement had been created, and that the defendant had acknowledged his liability; and it was on this last point alone that the decision of the Court of Appeal was given.

Lumley v. Wagner (17) puts the distinc-

(2) 1 Smith L.C. at p. 90.

(3) 3 Term Rep. 893.

(4) Ibid. 678.

(5) 5 M. & S. 411.

(6) 4 Mee. & W. 130; 7 Law J. Rep. Exch. 240.

(7) 3 & 4 Will. 4. c. 27. s. 36.

(8) 45 Law J. Rep. C.P. 140; Law Rep. 1 C.P. D. 51.

(9) 42 Law J. Rep. Q.B. 237; Law Rep. 8 Q.B. 368.

(10) 7 Sim. 529.

(11) 1 Smith L.C. (ed. 7), 82.

(12) Ld. Raym. 318; 12 Mod. 166; Holt, 175, 669.

(13) 2 Myl. & K. 517.

(14) 2 Ph. 774.

(15) 35 Law J. Rep. Chanc. 569; Law Rep. 1 Ch. App. 463.

(16) Law Rep. 3 Ch. D. 694.

(17) 1 De Gex, M. & G. 604.

tion clearly, and shews that the Court will not attempt to enforce the execution of affirmative covenants (18). The doctrine is based upon notice, and an under-lessee must use land occupied by him according to all the restrictive covenants of which he has notice; and an assignee with notice is liable, as he has privity of estate. *Moore v. Greg* (19) and *Cox v. Bishop* (20) shew that an equitable assignee is not liable to perform the covenants as though he were assignee at law, and the defendants here are only mortgagees.

[CORRON, L.J.—The defendants have the legal estate. BRETT, L.J.—The Court of equity used not to grant a mandatory injunction, but now all Courts do. Does not that destroy the distinction on which the defendants rely?]

The doctrine remains unchanged. There is no evidence that the defendants are in possession; the mortgagor never divested himself of the full estate.

Thirdly. The conduct of the defendants in taking this security was *ultra vires*. The trustees of a building society have no power to accept a security involving such a liability as this; and although the trustees may be personally liable, still the society cannot be liable, for section 27 of 37 & 38 Vict. c. 42, which vests in such a society as this on its incorporation "all rights of action and other rights, and all estates and interests in real and personal estate whatsoever now belonging to or held in trust for any society," would not transfer such a liability as this to the society.

Addison, Q.C., and *R. H. Collins*, for the plaintiff.—It is submitted that the defendants are legal mortgagees in possession.

[BRETT, L.J.—The Court does not require argument to shew that the defendants are legal mortgagees; but is there evidence that they were in possession?]

Of the three receipts, one is headed the Brunswick Building Society, "mortgagees in possession," all the rents were paid by them, there was an attornment clause and the premises were empty; the defendants also put the premises up for sale with conditions which would imply they could

(18) 1 De Gex, M. & G. at p. 617.

(19) 2 Phil. 717.

(20) 26 Law J. Rep. Chanc. 389; 3 De Gex, M. & G. 815.

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give possession. If they were in possession, then they are liable, for anyone who takes land with notice of a contract affecting that land is liable to perform that contract; and this principle is not limited to restrictive covenants, for he who takes the benefit must take the burden also. The Court can order affirmative covenants to be performed and can order repairs to be done—*Morland v. Cook* (21), *The Wolverhampton Railway Company v. The London and North Western Railway Company* (22), *Wilson v. The Furness Railway Company* (23), *Storer v. The Great Western Railway Company* (24), *Lane v. Newdegate* (25), *Tulk v. Moxhay* (14). *Moore v. Greg* (19) and *Cox v. Bishop* (20) do not apply, because in the latter case the question was as to equitable assignees who were in possession without any title. There was a question as to whether they were tenants, and no question as to the distinction between different kinds of covenants. In *Cooke v. Chilcott* (16) it is said that the defendant admitted his liability; but he withdrew that admission, and the case is therefore in favour of the plaintiff. Moreover, here the defendants have admitted their liability by paying rent. The defendants here had notice of this burden; they are therefore bound—*De Mattos v. Gibson* (26), *Luker v. Dennis* (27), *Greaves v. Tofield* (28), *Daniel v. Stepney* (29) and *Aspden v. Seddon* (30). But this covenant runs with the land at law. *Milnes v. Branch* (5) is adverse to this contention; but that decision cannot be supported, for a covenant of this kind may run with a rent-charge, and there is no difference between this rent and any other rent. This

covenant relates sufficiently to rent. A covenant may run with tithes—*Bully v. Wells* (31); privity of estate is not necessary to enable a covenant to run with the land—*Cooke v. Chilcott* (16), *Morland v. Cook* (21) and *Western v. McDermott* (32).

Ambrose, in reply.—

[BRETT, L.J.—The question is whether the judgment can be supported on the equity doctrine. We do not require any further argument on the question whether the covenant runs with the land at law.]

Daniel v. Stepney (29) was a case of landlord and tenant. A power of distress was reserved by the lease; the right, therefore, was valid at law—there was no need to resort to any equitable doctrine; and that case is not adverse to the contention of the appellants. *Aspden v. Seddon* (30) was also a plain case at law: it was a case of a limited grant, with a proviso for compensation; and it will be found that the cases relied on by the respondents are, as a rule, cases of actions brought, not against an assignee, but against an original contractor. *Cooke v. Chilcott* (16) is the only case which extends the doctrine of *Tulk v. Moxhay* (14) beyond restrictive covenants, and this Court will not follow that part of the Vice-Chancellor's judgment.

BRETT, L.J.—I am of opinion that this appeal must be allowed. In the first place I would say that I am clearly of opinion that this action would not be maintainable at common law. I think it is obvious that the covenant could not run with the rent. The case of *Milnes v. Branch* (5) has been criticised by Lord St. Leonards; but I think it has always been accepted as deciding that a covenant cannot run with rent, and I am of opinion that the covenant in this case is a collateral covenant and cannot run with the land, so that it would not support an action at common law.

The case, then, is reduced to the question whether the judgment can be supported on the equitable doctrine which has been so much discussed. That doctrine was brought to a focus and fully declared in *Tulk v. Moxhay* (14), so that that is a

(31) 3 Wils. 25; Wilmot, 341.

(32) 36 Law J. Rep. Chanc. 76; Law Rep. 2 Ch. App. 72.

(21) 32 Law J. Rep. Chanc. 825; Law Rep. 6 Eq. 252.

(22) 43 Law J. Rep. Chanc. 131; Law Rep. 16 Eq. 433.

(23) 39 Law J. Rep. Chanc. 19; Law Rep. 9 Eq. 28.

(24) 2 You. & C. 48.

(25) 10 Ves. 192.

(26) 4 De Gex & J. 276.

(27) 47 Law J. Rep. Chanc. 174; Law Rep. 7 Ch. D. 227.

(28) 50 Law J. Rep. Chanc. 118; Law Rep. 14 Ch. D. 563.

(29) Law Rep. 9 Exch. 185.

(30) 44 Law J. Rep. Chanc. 359; Law Rep. 10 Ch. App. 394; 46 Law J. Rep. Exch. 353; Law Rep. 1 Ex. D. 496.

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leading case on the subject. It seems to me that that case decided that an assignee of property taking property with notice of a covenant of a certain class, is bound by reason of the notice in such a way that a Court of equity will oblige him to observe the covenant.

The question is, What are the covenants which a Court of equity will enforce? It says that if a person takes a land as an assignee with notice, to which land covenants of a restrictive nature are attached, the Court will enforce as against the land those restrictive covenants. It may be, but it is not necessary to decide it, that a Court of equity would go further, and would enforce upon an assignee with notice such a covenant as would be a burden on the land and of such a nature that it could be enforced against the land. It is not, as I think, necessary to decide this point now.

It is obvious that the covenant in this case is not a covenant of a restrictive nature—not a covenant imposing a burden on the land which could be enforced against the land—so that this covenant does not come within either of the two propositions which I have enunciated, and therefore that this is not such a covenant as a Court of equity would enforce. It is admitted that no case has ever gone beyond the class of covenants to which I have referred, and yet some such cases must have occurred.

The strongest argument for the respondent seemed to me to be this: it was said that the reason why Courts of equity have not gone further was that to do so would have involved the making a mandatory injunction to do a particular thing, whereas Courts of equity did not, until recent times, make such injunctions; and that, as that restriction is no longer in force, the jurisdiction of the Court can embrace all kinds of covenants; and that, the difficulty as to the form being gone, a Court of equity would now enforce such a covenant as this. I am, however, of opinion that if we were to enlarge the equity doctrine beyond that which is laid down in *Tulk v. Moxhay* (14), we should not be enforcing an equity which is recognised and acknowledged, but that we should create a new equity, and do that which we have no power to do. It appears to me that Lord Cottenham and the Master of

the Rolls both confined the application of the equitable doctrine to cases of restrictive covenants, and possibly to cases of covenants imposing a burden on the land which could be enforced against the land, as I have already explained that in *Cox v. Bishop* (20) the Court refused to recognise any such doctrine as that for which the respondent contends, and that we should be overruling *Cox v. Bishop* (20) if we were to disallow this appeal. Then it is argued by the respondent that we must overrule the judgment of Vice-Chancellor Malins in the case of *Cooke v. Chilcott* (16). Speaking for myself, I may say that I should be unwilling to overrule any considered judgment of that learned Judge; but it appears to me that the Vice-Chancellor decided that case on the ground that the covenant there did run with the land, and did not base his decision on the proposition now contended for by the respondents. I confess that I do not think the covenant in that case did run with the land, and therefore one must consider the other part of the judgment of the Vice-Chancellor, and if the Vice-Chancellor held that a Court of equity will enforce a collateral covenant which does not bind the land, and if he decided that an assignee of the land will in such a case be bound, then I must say that I think his judgment went beyond the recognised doctrine of equity. The judgment of the Court of Appeal was given on an admission made by the defendant, so that there was no decision on the question of law, and it does not afford us any further assistance. I am of opinion that the judgment of Mr. Justice Stephen cannot be supported, and that this application must be allowed on the ground that this is a collateral covenant; that it is not a restrictive covenant; and therefore that the defendants are not bound by it, even though they had notice of it.

COTTON, L.J.—The first question is, whether the plaintiff has any right of action at common law. I am of opinion that he has not. For a covenant to run with the land it is necessary that it should affect the land, do benefit to the land or affect the rent issuing out of the land. Now this covenant does not affect the rent issuing out of the land—it is only a covenant

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to do something which shall be an improvement to the land, so that it is not a covenant within the second resolution in *Spencer's Case* (1). It is unnecessary to consider whether it is a covenant the burden of which runs with the land, although I am not inclined to favour that view; but it is clear, I think, that at common law this covenant would not run with the rent.

Has, then, the owner of the rent any remedy at equity? I think he has not, and that this is not a covenant which equity would enforce against the possessor of the land, on the ground that he had taken the land with notice of the covenant.

If we consider the examples which we find in the cases which have been reported, we find that, however minute the interest of the person in possession was, still a covenant which can be enforced will be enforced against a person in possession; but still, with the exception of the case of *Cooke v. Chilcott* (16), the covenants which have been referred to are all restrictive covenants.

It is not necessary to refer to any case earlier than *Tulk v. Moxhay* (14). In that case Lord Cottenham says, "That this Court has jurisdiction to enforce a contract between the owner of the land and his neighbour purchasing a part of it, that the latter shall either use or abstain from using the land purchased in a particular way, is what I never knew disputed." The expression is "use or abstain from using;" but in that case it was held that the expressed covenant implied another covenant, and what was done there was to grant an injunction restraining the defendant from using the land in any way which would be inconsistent with the affirmative covenant into which he had entered. The covenant was indeed affirmative, but the Court derived from it a negative covenant, which it enforced by the injunction. Lord Cottenham further said (at p. 778), "If an equity is attached to the property by the owner, no one purchasing with notice of that equity can stand in a different situation from the party from whom he purchased." That appears to me to lay down the real principle, and Courts of equity have never gone beyond granting an injunction restraining an owner with notice

of a restrictive covenant from using the land in any way inconsistent with the covenant.

There is, then, nothing in the doctrine of the Courts of equity which supports the judgment in this case, unless it be found in the case of *Cooke v. Chilcott* (16). The Vice-Chancellor considered that the covenant in that case ran with the land, and the judgment can be explained on that ground. It appears he also thought the case was within the decision in *Tulk v. Moxhay* (14), but in that view I am unable to concur. The Court of Appeal gave their judgment in *Cooke v. Chilcott* (16) on an admission, and not on the ground on which the Vice-Chancellor decided the case. In the present case Mr. Justice Stephen thought he was bound by *Cooke v. Chilcott* (16), but we are not so bound, and we ought not to follow it if we cannot agree with it. It may be said that there are expressions of the Master of the Rolls in *Morland v. Cook* (21) which tell in favour of the respondent, but there there was a common law liability on the defendants to contribute to the support of the sea wall, and therefore a right in the plaintiff to enforce a contribution. On the other hand, in *Cox v. Bishop* (20) it was held that the equitable assignees of a lease of a mine were not liable in equity to pay rent, or bound by a covenant to work the mine in a particular way, so that the covenants of the original lease could not be enforced against them.

In *Daniel v. Stepney* (29) there was a reservation by the owner of the land demised of a power of distress for the rent on land not the subject of the demise, and it was held to bind assignees with notice. No doubt the Court of Exchequer Chamber relied on the notice, but the decision is within the principle of a covenant affecting the rent to which I have already referred. The only points in *Aspden v. Seddon* (30) which aid the respondent are found in the judgment of Baron Bramwell. They are of course to be considered with respect, but they do not form the ground of his decision, nor were they necessary to it; and if reference be made to the same case before the Court of Appeal, both in Chancery and here, it will be found that there was in that case only

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a limited right to work the mine, subject to paying compensation in certain events. I agree therefore that this appeal must be allowed, for that there is no equitable doctrine which enables us to enforce this covenant to repair these buildings against these defendants as mortgagees in possession of this land.

LINDLEY, L.J.—The question is whether these defendants (whom I will assume to be mortgagees in possession) are bound to repair certain buildings. The obligation is said to be imposed by reason of their having taken certain land with notice of a covenant. It would seem that the covenant was inserted in the deed as a further security for the rent which the grantor reserved out of the land. The action is substantially brought, not for rent, but for non-performance of the covenant, and Mr. Justice Stephen considered that he was bound by the principle of *Tulk v. Moxhay* (14) and *Cooke v. Chilcott* (16) to give judgment for the plaintiff and against the defendants. Now it is clear that the defendants could not be hit on the covenant itself by any circuitry of action, for the defendants never covenanted with the plaintiff, and there was no privity between them; the defendants took as mortgagees. The question then is, Are the defendants liable at law; and does this covenant run with the land? We are all of opinion that it does not. I do not think that *Milnes v. Branch* (5) and *Randall v. Rigby* (6) are very closely in point, for in the former case the plaintiff was not the assignee of the rent, and in the latter case the question was a technical one as to whether the action should be in debt or in covenant; there was no question as to whether the covenant ran with the rent. With regard to the question whether the burden of the covenant runs with the land in the case now before the Court, I think the case is still clearer, and that the burden does not so run. It must be remembered that this is not a case of landlord and tenant, but a case between the grantee of a rent reserved and the owner of the land out of which that rent issues.

There remains the question whether there is any doctrine of equity by which these defendants must be held liable to the

plaintiff. The doctrine is laid down in *Tulk v. Moxhay* (14) and *Cox v. Bishop* (20), and both those cases are different from the present. The former case shews that if a person buys land with notice of a restrictive covenant, he will be bound to perform it. Now restrictive covenants are those which, so far as they are enforced, can be observed without expenditure of money or outlay. In such a case such a covenant will be enforced even against a tenant from year to year, as is manifest from *Wilson v. Hart* (15); but with the exception of *Cooke v. Chilcott* (16) there is no authority to shew that the Court of equity has ever extended the doctrine of *Tulk v. Moxhay* (14) so as to enforce anything more than abstention. I think that the facts of *Cooke v. Chilcott* (16) distinguish it from the present case, and the Vice-Chancellor held that there the covenant ran with the land; but I think that that case may be left untouched by our judgment in this case, on the ground that the detailed facts distinguish it from the facts of this case. I agree that this appeal must be allowed, and that this attempt by the plaintiffs to extend the doctrine of *Tulk v. Moxhay* (14) cannot be held to be consistent with the principles laid down in that case.

Appeal allowed. Judgment for the defendants.

Solicitors—Chester & Co., agents for Gardner, Manchester, for plaintiff; Le Riche & Son, agents for Stead, Manchester, for defendants.

1881. } TEMPLEMAN (*appellant*) v.
Nov. 16. } TRAFFORD (*respondent*).

Pharmacy Act, 1868 (31 & 32 Vict. c. 121), s. 17—*Sale of Poisons—Name and Address of Seller.*

[For the report of the above case, see 51 Law J. Rep. M.C. 4.]

1881. { THE SOUTH-WESTERN LOAN
Nov. 19, 21. { AND DISCOUNT COMPANY
v. ROBERTSON.

Charging of Stock—Statutes 1 & 2 Vict. c. 110. s. 14, and 3 & 4 Vict. c. 82. s. 1—Funds held upon Trust for Debtor and Others—Limitation over upon Attempt to charge or aliene Trust Fund.

A charging order can be made under 1 & 2 Vict. c. 110, upon stocks, &c., standing in the name of trustees for the debtor and other persons, the words "in trust for him" including the case of divided funds.

A testator bequeathed her personal property, including certain Bank of England stock to trustees, in trust as to one moiety thereof for her niece, and as to the remaining moiety upon trust to pay the annual income thereof to her nephew, the judgment debtor, so long as he should continue entitled to receive the same, for his personal use and benefit, or until he should charge or aliene the same, or attempt to charge or aliene the same, with a gift over, upon the determination of the preceding trust, in favour of the judgment debtor's wife for life, and afterwards of his children who should attain the age of twenty-one years. There was an ultimate remainder in favour of the judgment debtor absolutely in the event of there being no children who attained a vested interest under the testator's will:—

Held, that an order could properly be made under the provisions of 1 & 2 Vict. c. 110, and 3 & 4 Vict. c. 82, charging the judgment debtor's interest in dividends which had accrued due, and also his contingent interest, which was quite independent of the forfeiture clause.

This was a motion by way of appeal from an order made by Mathew, J., at chambers, directing that the judgment debtor's interest in one-half undivided share of the dividends payable on a sum of 2,577l. 4s. 3d. Bank of England stock, standing in the name of three trustees, should stand charged with the payment of the moneys due on a judgment debt.

It appeared that the judgment debtor's interest in the above stock was derived under his aunt's will, who bequeathed her

personal property, including a sum of 2,577l. 4s. 3d. Bank of England stock, to three trustees upon trust as to a moiety thereof for her niece, as to the remaining moiety thereof upon trust to pay the annual income thereof to her nephew, the judgment debtor, "so long as he shall continue entitled to receive the same, for his personal and exclusive use and benefit, free from control, . . . or until he shall aliene, charge or encumber, or attempt to aliene, charge or encumber the same;" and upon the determination of the preceding trust in the judgment debtor's lifetime there were limitations over in favour of the judgment debtor's wife and his children who should attain the age of twenty-one, with an ultimate remainder in favour of the judgment debtor absolutely, in the event of there being no children, or none of them living to attain a vested interest.

It appeared that on the 10th of October, 1881, being the date when the charging order was made, there was a dividend which had accrued due upon the stock in question, but which had not been received by the trustees.

Tindal Atkinson, for the appellant.—The charging order is bad on two grounds—first, because by the terms of the will the defendant cannot anticipate the fund, and secondly, the terms of the statute under which the order purports to have been made are not applicable to the defendant's interest (1). It is only where stock stands

(1) By 1 & 2 Vict. c. 110. s. 14, it is enacted that "if any person against whom any judgment shall have been entered up in any of her Majesty's superior Courts at Westminster shall have any Government stock, funds or annuities, or any stock or shares of or in any public company in England (whether incorporated or not), standing in his name in his own right, or in the name of any person in trust for him, it shall be lawful for a Judge of one of the superior Courts, on the application of any judgment creditor, to order that such stock, funds, annuities or shares, or such of them, or such part thereof respectively as he shall think fit, shall stand charged with the payment of the amount for which judgment shall have been so recovered, and interest thereon, and such order shall entitle the judgment creditor to all such remedies as he would have been entitled to if such charge had been made in his favour by the judgment debtor; provided

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in the name of a judgment debtor and belongs to him, or at least where it is vested in the names of trustees for him, and him alone, that such an order can be made; whereas here there are other parties interested in this stock. The trustees were not trustees of the stock "for him" within the meaning of 1 & 2 Vict. c. 110. s. 14. Again, the judgment debtor's interest cannot be charged, because by the terms of the will all interest in the stock passes away by virtue of the charging order.

He cited *Stanley v. Stanley* (2), *Pyke v. Fitzgibbon* (3), *In re Onslow* (4), *Widgery v. Tepper* (5) and *Dixon v. Wrench* (6).

Finlay appeared in support of the order.—The 3 & 4 Vict. c. 82. s. 1, expressly makes a charging order available to a case like the present, and such order was properly made upon the judgment debtor's interest in the dividends of the stock standing in the name of trustees. No restraint on the power of anticipation can be imposed except in the case of married women, and the principles deduced from most of the authorities which have been cited have no bearing on the present enquiry. Moreover, some of the dividends to which the charging order applies have actually accrued due to the judgment debtor. If the appellant's construction of the statute is correct, and divided funds cannot be made the subject of a charging order, the protection afforded to judgment

creditors is almost worthless, and can be easily got rid of at the discretion of the judgment debtor. In *Fowler v. Churchill* (7) an order of this kind was made on divided funds for so much of the dividend as was payable to the defendant "for his own use and benefit." It was there held that the Bank of England, notwithstanding the charging order, was bound to pay the dividend to the trustees, who were liable for its proper distribution. As Baron Alderson remarked, "the bank has nothing to do with the distribution of the fund, and is not bound to pay the present judgment creditor; that is the business of the trustees, and they are responsible in a Court of equity for its proper distribution."

He cited also *Cragg v. Taylor* (8).

Tindal Atkinson replied.

GROVE, J.—My mind has not been free from doubt during the argument; still I do not think we can set aside the order which has been obtained by the judgment creditor in this case. The order in question was a charging order made under the provisions of 1 & 2 Vict. c. 110, extended by 3 & 4 Vict. c. 82. s. 1, and charged the defendant's interest in the dividends of a certain sum of Bank of England stock, standing in the names of the trustees, with the payment of a certain loan due upon a judgment debt. It appeared that the judgment debtor's interest in the stock was derived under the will of his aunt, who bequeathed her personal property to three trustees upon trust as to a moiety thereof to pay the annual income thereof to the defendant so long as he should continue entitled to receive the same for his personal and exclusive use and benefit, or until he should charge or aliene or attempt to charge or aliene the same. In case of any defeasance taking place the fund was to go over, and the dividends to be paid to the wife and children on attaining twenty-one years with an ultimate trust for the judgment debtor. With regard to the contingent trust there is no affidavit stating whether the wife is dead or whether there are children, and therefore we have no information on which

that no proceedings shall be taken to have the benefit of such charge until after the expiration of six calendar months from the date of such order." By 3 & 4 Vict. c. 82. s. 1, the provisions of 1 & 2 Vict. c. 110. s. 14 "shall be deemed and taken to extend to the interest of any judgment debtor, whether in possession, remainder or reversion, and whether vested or contingent, as well in any such stocks, funds, annuities or shares as aforesaid, as also in the dividends, interest or annual produce of any such stock, funds, annuities or shares," &c.

(2) 47 Law J. Rep. Chanc. 256; Law Rep. 7 Ch. D. 580.

(3) 50 Law J. Rep. Chanc. 394; Law Rep. 17 Ch. D.

(4) 44 Law J. Rep. Chanc. 698; Law Rep. 20 Eq. 677.

(5) 48 Law J. Rep. Chanc. 367; Law Rep. 6 Ch. D. 364.

(6) 38 Law J. Rep. Exch. 113; Law Rep. 4 Exch. 154.

(7) 2 Dowl. 562; 11 Mee. & W. 57.

(8) 36 Law J. Rep. Exch. 63; Law Rep. 1 Exch. 148.

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we can act on those heads. The argument against the order is divided into two parts. First, it is said that the fund is not vested in a trustee for the debtor alone. That seems to me not a good argument. The statute 1 & 2 Vict. c. 110. s. 14, provides that "if any person against whom any judgment shall have been entered up . . . shall have any Government stock, funds or annuities . . . standing in his name in his own right or in the name of any person in trust for him, it shall be lawful for a Judge . . . to order that such stocks, funds, annuities, or such of them, or such part thereof respectively as he shall think fit, shall stand charged with the payment of the amount for which judgment shall have been so recovered and interest thereon, and such order shall entitle the judgment creditor to all such remedies as he would have been entitled to if such charge had been made in his favour by the judgment debtor." The charging order may be made on such part of the stock as the Judge may think fit, and the judgment debtor had a right legally to charge this moiety. I think the object of this statute extended to charging funds divided by will. The statute might otherwise be avoided by giving a small portion of the fund to a person other than the one really intended to be benefited. In *Fowler v. Churchill* (7) there was a divided fund. It has been argued that in that case the fund was not divided in moieties, but it was divided in aliquot parts, which amounts to the same thing. The shares, in short, were not ear-marked. The point, it is said, was not taken in that case, but there was the same state of things in *Cragg v. Taylor* (8). There would be no meaning in the words "such part thereof" if this construction were not correct.

The second argument was founded on the position that if Robertson charges the fund it passes to other parties. That argument had a good deal of effect on my mind. If I were the executor I should feel in some difficulty, particularly after the decision in *Fowler v. Churchill* (7). But all we have to enquire into is whether there is any interest on which this order can take effect, because, as a general rule, no order would be made when it would have no effect. I doubt whether it ought to have

been made, if there had been no dividends already accrued, and no contingent interest. At the time of the application there were existing dividends, which the trustees could have paid to Robertson, who is not to charge them before they become actually his. Robertson had just as much legal or rather equitable ownership as if the money had been paid to him. I do not think the clause against charging is infringed by the charging accrued dividends. The charge is therefore good, so far as these dividends are concerned. Then, with regard to the contingent interest, by 3 & 4 Vict. c. 82. s. 1, the power of 1 & 2 Vict. is extended to reversionary interests, whether vested or contingent. Here, then, is a contingent interest in Robertson, apart from the forfeiture clause, and there is no evidence that the contingency is put an end to. There is, therefore, something to charge, and the order is not discretionary. We are bound to make it if the legal right be shewn. *Fowler v. Churchill* (7) decides that the bank was still bound to pay to the executors, who were fixed with the charge, and bound to act upon it. In *Dixon v. Wrench* (6) the charging order was not made, because the interest was not in a fund, but in the produce of a sale after the performance of prior trusts. That case is distinguishable from *Cragg v. Taylor* (8) and the present case. What interest the debtor has is a matter which the trustees must settle.

LOPES, J.—The case of *Fowler v. Churchill* (7) removed the difficulties which occurred to me, so that the case is now fairly clear. As to the first point, that the debtor is not interested solely, I think it a narrow construction not intended by the Legislature, and liable to, at least, extremely inconvenient consequences. The Act would never apply to a case in which the fund was divided, if that construction were right. That contention goes to the whole order. As to the provision against alienation, it has been said to be like the case of a married woman without power of anticipation, but there is a great difference between the two cases. That of a married woman is a personal disqualification. Here there is no personal disqualification. The forfeiture attaches on an act perfectly legal in itself. It is unnecessary in this case to

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decide what is the effect of the charge when made, but it was not contended that the argument based on the forfeiture applied to accrued dividends or the contingent interest.

Order affirmed.

Solicitors—Blake & Snow, for the trustees;
Attenborough, for the company.

[IN THE COURT OF APPEAL.]

1881. { THE YORKSHIRE FIRE AND LIFE
Dec. 6. { INSURANCE COMPANY v.
CLAYTON.*

Inhabited House Duty—Building Let in Separate Rooms—Tenements used for Business Purposes—Exemption from Duty—41 Vict. c. 15. s. 13.

A building divided into different sets of rooms, but having one outer door common to all the rooms, was occupied partly as business offices and partly as residential chambers; a servant appointed by the landlord resided on the premises, and attended to the offices and to the residents. It was claimed that the part used as offices should be exempted from the payment of inhabited house duty, on the ground that the building came within the provisions of 41 Vict. c. 15. s. 13, which exempts from the duty, on certain steps being taken, those parts of a house, being one property, which being "divided into and let in different tenements," are used for business or trade purposes only:—Held (affirming the judgment of the Queen's Bench Division), that the claim to exemption ought not to be allowed, for that the house, although let in different offices and rooms, was not divided into different tenements within the meaning of the statute.

Appeal from the judgment of the Queen's Bench Division on a Special Case. The case is reported 50 Law J. Rep. Q.B. 471.

The Special Case was stated by way of

* *Coram* Jessel, M.R.; Brett, L.J.; and Cotton, L.J.

appeal from an assessment of the insurance company to the inhabited house duty.

The Yorkshire Fire and Life Insurance Company occupied a house at Hull, which they let out as offices and rooms. The ground floor was occupied as business offices by the insurance company themselves, by a banker and by a civil engineer; the first floor was also let as offices, and two sets of rooms on the second floor were occupied as residential chambers. Two servants of the insurance company also resided there; they waited on the residents and cleaned the various offices. All the rooms except one opened on to a staircase common to all the tenants; there was only one outer door, and none of the rooms in the building had any outer door which could be fastened in addition to the ordinary room door.

The insurance company claimed to be exempt from inhabited house duty in respect of that part of the premises which was occupied for business purposes only. The commissioners refused to allow the claim. The insurance company appealed, and the Queen's Bench Division dismissed the appeal.

The insurance company appealed.

Lumley Smith, Q.C., and *Bigham*, for the appellant company.—The question turns on the construction to be placed on 41 Vict. c. 15. s. 13 (1). The contention of the com-

(1) 41 Vict. c. 15. s. 13. sub-s. 1: "Where any house being one property shall be divided into and let in different tenements, and any of such tenements are occupied solely for the purposes of any trade or business, or of any profession or calling by which the occupier seeks a livelihood or profit, or are unoccupied, the person chargeable as occupier of the house shall be at liberty to give notice in writing at any time during the year of assessment to the surveyor of taxes for the parish or place in which the house is situate, stating therein the facts; and after the receipt of such notice by the surveyor, the commissioners acting in the execution of the Acts relating to the inhabited house duties, shall, upon proof of the facts to their satisfaction, grant relief from the amount of duty charged in the assessment, so as to confine the same to the duty on the value according to which the house should, in their opinion, have been assessed if it had been a house comprising only the tenements other than such as are occupied as aforesaid, or unoccupied."

Sub-section 2: "Every house or tenement

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missioners is that the words in that section, "divided into and let in different tenements," only apply to cases of structural severance, but that phrase is nowhere found in the statute, and is a purely arbitrary definition. The insurance company contend that the building is divided into different tenements, for a tenement means anything that is separately held, or any room separately held in such a way that the occupier has exclusive possession or complete control, whether there is an actual separate demise, or merely an agreement to allow the tenant to come in while the premises are in the legal occupation of the landlord. Such a test seems to be approved of by Blackburn, J., in *The Queen v. St. George's Union* (2), and such a test disposes altogether of the notion of structural severance, and makes separate tenancy by agreement the real criterion. *The Attorney-General v. The Mutual Tenement Westminster Chambers Association* (3) was the case which is supposed to have directed the attention of the Legislature to this point, and thus to have led to the alteration of the law by the statute now under consideration (1). The whole tendency of the law has been to favour trade by exemptions of this nature.

[JESSEL, M.R.—Does not this argument strike out the words "divided into"?]

No; for when a landlord parts with the control of part of his house, he allows it to be divided into more than one holding; but even if some words are superfluous, such cannot be held to increase the burden on the taxpayer. The insurance company may be *prima facie* within rule 6 of schedule B of 48 Geo. 3. c. 55, but this recent statute, 41 Vict. c. 15 (1), has introduced an exception to that rule, and the appellants come within that exception.

which is occupied solely for the purposes of any trade or business, or of any profession or calling by which the occupier seeks a livelihood or profit, shall be exempted from the duties by the said commissioners upon proof of the facts to their satisfaction, and this exemption shall take effect although a servant or other person may dwell in such house or tenement for the protection thereof."

(2) 41 Law J. Rep. M.C. 30; Law Rep. 7 Q.B. 98, at p. 100.

(3) 45 Law J. Rep. Exch. 886; Law Rep. 1 Ex. D. 469.

Rusby v. Newson (4), *Chapman v. The Bank of Scotland* (5), *Allan v. The Overseers of Liverpool* (6), *Evans and Finch's Case* (7), were also cited.

The Solicitor-General (Sir F. Herschell, Q.C.) (with him A. V. Dicey), for the respondents, was stopped by the Court.

JESSEL, M.R.—This section is not very easy perhaps to construe; but I am of opinion that we cannot differ from the judgment of the Court below. Perhaps standing by itself the section may not be very easy to understand, but I think if we look at the cases which have been decided, and at the history of the legislation, the construction of it does not prove difficult. Under the old statutes an entire house used, as at first the law was, entirely for business purposes, was exempt from duty, and then by a change in the law a house used partly for business and partly for residential purposes was as to the business part of it exempted from duty. Rule 6 of schedule B of 48 Geo. 3. c. 55 provides that, "Where any house shall be let in different storeys, tenements, lodgings or landings, and shall be inhabited by two or more persons or families, the same shall nevertheless be subject to, and shall in like manner be charged to, the said duties as if such house or tenement was inhabited by one person or family only, and the landlord or owner shall be deemed the occupier of such dwelling-house and shall be charged to the said duties." The first question is, What is the meaning of the phrase, "Let in different storeys, tenements, lodgings or landings"? It is of course possible to give a different meaning to each of these words, but I think a tenement means a separate house in law, though perhaps not a house in general parlance; and *Tomlin's Dictionary* gives the following definition of tenements: "Tenement signifies properly a house or homestead, but more largely it comprehends not only houses, but all cor-

(4) 44 Law J. Rep. Exch. 143; Law Rep. 10 Exch. 322.

(5) 60 Law J. Rep. Q.B. 670; Law Rep. 7 Q.B. D. 136.

(6) 43 Law J. Rep. M.C. 69; Law Rep. 9 Q.B. 180.

(7) Cro. Car. 473.

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poreal inheritances which are holden of another, and all inheritances issuing out of or exercisable with the same." Now it is obvious that the second meaning does not apply in the present case; a tenement means that which is in law a house, although it is at the same time a part of a house, as was the case in *Evans and Finch's Case* (7) in the time of Charles 2. The word "tenement" here means a legal house divided into different storeys, lodgings or landings. Then under this rule of the statute of Geo. 3, it was decided by the Court of Appeal in *The Attorney-General v. The Mutual Tontine Westminster Chambers Association* (3) that a large house was liable to duty as one house, irrespective of the fact that it was divided into, and contained within it, a number of smaller legal houses. The statute of 41 Vict. c. 15 was then passed, in order to remedy the hardship which that decision appeared to inflict on such a property as that; but if it was intended to go further, and to say that part of a house so occupied as this house is should be exempt from duty, why should the Legislature not also have exempted from the duty an owner of a house who uses the lower part of the house for business, and who lives at the top of the same building in respect of the part which he uses for business purposes? If two adjoining owners were to cross tenancies, and each to let to the other the lower part of his own house for business, each still residing in the upper part of the house, in such a case if the argument of the appellant were to prevail, the exemption from duty would be secured; but it would be very singular if it were so, and *a priori* it is not probable that 41 Vict. c. 15 intended to extend the exemption to every house used in part for business purposes. Moreover, on looking at rule 6 to the schedule of the Act of Geo. 3, one notices that the words "storeys, lodgings or landings" are not repeated, the word "tenement" alone is used in the latter part of the rule. Section 13 (1) of the Act now before us enacts that "where any house being one property shall be divided into and let in different tenements." Now it appears to me that the argument of the appellant altogether throws aside these words "divided into."

It is argued that so soon as a house is let in separate holdings, a tenement exists which creates the state of things pointed out by the section, and, therefore, that let in different tenements and divided into different tenements are really the same thing; but as a rule all the words in a section like this must have a separate meaning if such can be given to them, and this can be done in the present case if the word "tenements" is read as meaning that which is a house in law, for by this construction every word of the enactment becomes intelligible. The custom and practice of building houses divided into what are commonly called flats is of comparatively modern date. Such flats are for legal purposes and usage separate houses; each derives its support from the house below, instead of, as in ordinary houses of older date, from the ground, and the Legislature finding this to be a common practice, has extended to such flats advantages which, prior to the last Act, they, and houses built like them, did not enjoy. This construction seems to me to give a fair meaning to every word in the section, and I think we should frustrate the intention of the Legislature if we were to allow this appeal. The judgment of the Queen's Bench Division must therefore be affirmed.

BRETT, L.J.—I am of the same opinion. I think that section 13 (1) of 41 Vict. c. 15 must be read as though it were "divided into different tenements and let in different tenements." The two words "house" and "tenement" are used in different senses. A "house" is spoken of as being divided into "tenements;" what, then, does this distinction mean—what is a "house" and what is a "tenement"? A "house," as it seems to me, means a house which is capable of being divided. The word "tenement" is used, I think, to comprise several different kinds of premises, which it might otherwise be said were not comprised in or provided for by the section. The word "house," in the first line of sub-section 1, does not mean a dwelling-house only, and I think the word "tenement" was put in lest it should be said that the word "house" could not apply to premises such as shops, offices or warehouses.

We must first construe the words "shall

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be divided into "different tenements—that is, as it seems to me, divided into different premises such as offices, shops or warehouses, and they mean a house so structurally arranged that it may be used or actually occupied, in the ordinary sense of those words, as a man's own residence, and as offices, shops or warehouses. It is, however, not sufficient to satisfy the statute to shew that a house is divided into different tenements unless it is also shewn that it is let in different tenements; the one phrase has reference to structural arrangement, the other to the manner in which, or agreement by which, the house is let. It is a sound canon of legal construction to say that, in construing a statute, we ought to have regard to the state of the law, and of judicial decisions at the time when the statute is passed.

It is well known that many decisions have been given in registration cases relating to houses which have been divided into chambers or flats, or divided in other ways in which houses are divided, and the case of *The Westminster Chambers Company* (3), which is a decision of this Court, decided that, in respect of inhabited house duty, a building must be considered as one house, even though it contains many sets of rooms, so constructed as to be each capable of being used as a separate house, and even though, for the purposes of franchise, each set of chambers was considered as a separate house. Considering, then, these things, one may well say that 41 Vict. c. 15 was passed to meet that decision, and to alter the law. It appears to me that the words of the section are fulfilled by the construction which we put on it, and that if we were to go further we should in fact strike out of the section the words "divided into." Now to do so would be contrary to well-known rules of construction, for words are not to be struck out unless it is absolutely necessary to strike them out in order to construe the section; but this is not in this case necessary, for the section applies to chambers in the Temple, to buildings such as those described in *The Westminster Chambers Case* (3), and very likely to other cases which it is not necessary to specify. The facts before us shew that this house does not differ in structural arrangements from

any ordinary house, so that if the statute applied to this house it might apply to all houses. I therefore think that this judgment must be affirmed; that this house is not exempt from the duty, because, however it may have been let, it has never been divided into different tenements.

COTTON, L.J.—I am of the same opinion. One question which we have to determine is, whether the letting a house to separate persons as separate holdings is enough to satisfy the statute 41 Vict. c. 15. s. 13 (1), so as to secure exemption from inhabited house duty. I am of opinion that it is not; and that to hold it is, we should have to alter the words of the statute, and to leave out some part of the statute, which would in fact be to depart from the sound and recognised rules of construction. I do not think that the requirements of the statute are satisfied in a case where a house is let in separate holdings without any structural division. The word "divided" must have a meaning given to it, and in this case there was no division other than that which is found in every house which has rooms. The appellants, in fact, argue that a house which has rooms which can be let separately, is a house divided into different tenements within the meaning of the statute; but if this had been intended the statute could easily have been framed so as to include such cases. The word "divided" means houses so constructed as to be capable of being used as separate houses for the purposes of occupation or trade, and it does not merely refer to the ordinary division into rooms which is almost universal, and which exists in this house as in almost all others.

Judgment for the Crown affirmed.

Solicitors—Bell, Brodrick & Gray, agents for W. & E. Gray, York, for appellants; W. H. Melvill, Solicitor of Inland Revenue, for respondents.

[IN THE COURT OF APPEAL.]

1881. { ERICHSEN (*representative of the*
 Dec. 6. { *London Agency of the Great*
 { *Northern Telegraph Company*
 { *of Copenhagen*) v. LAST (*sur-*
 { *voyor of taxes*).*

Income-Tax—Foreign Corporation with English Agency — Telegraph Company transmitting Messages to Foreign Countries —16 & 17 Vict. 34. s. 2. sched. D.

A foreign telegraph company, with an agency in the United Kingdom, had, besides certain lines abroad, three marine cables which landed on the shores of the United Kingdom, through which it despatched and received messages between the United Kingdom and foreign parts. It had in the United Kingdom a separate line worked by its own servants. A message received by the company for transmission passed partly over lines belonging to the Post Office, over the marine cables of the company, over cables belonging to foreign governments or companies, and in some cases over cables abroad belonging to the company. The proprietors of each of the cables received a portion of the sum paid for the transmission of the message, and the company retained the balance. No profit accrued to the company from its land lines in the United Kingdom:—Held (affirming the judgment of the Queen's Bench Division), that the company exercised a trade within the United Kingdom within the meaning of 16 & 17 Vict. c. 34. s. 2. sched. D, and that income-tax was payable on the profits accruing therefrom—that is, on the difference between the sum received and the cost of earning that sum.

Appeal from the judgment of the Queen's Bench Division, on a Special Case stated by the Commissioners of Income-Tax for the City of London.

The case is reported 50 Law J. Rep. Q.B. 570, where the Special Case is set out.

The Great Northern Telegraph Company of Copenhagen is a foreign corporation resident at Copenhagen. It has three marine cables in connection with the United Kingdom; these cables are connected with telegraph lines under the control of the

* *Coram* Jessel, M.R.; Brett, L.J.; and Cotton, L.J.,

Postmaster-General, and by agreement separate wires have been provided by the Post Office from Aberdeen to Newcastle, and from Newcastle to London, for the company's traffic to and from the continent. These wires are worked at Aberdeen, Newcastle and London by the servants of the company. Messages sent from this country by the company pass over the three marine cables of the company, then over cables belonging to foreign governments or other companies, and in a few cases over cables in foreign countries which belong to the company.

The persons sending messages to foreign parts pay, as a rule, the whole sum for the cost of transmission to the Post Office Telegraph department, which retains the sum due to it, and hands over the balance to the company, which then retains out of the balance the sum due for messages which pass over its own cables, and pays over the residue to the foreign governments and companies entitled.

In a few cases the company receives payments direct from firms which hand their messages direct to the company, and it accounts to the Post Office.

The expenses incurred by the company in the transmission of messages over their separate wires in the United Kingdom exceed their earnings in respect of those wires, and no profit is made by the company from the use of their separate land lines in the United Kingdom.

The company contended that as no profits were derived from the land lines used by the company in the United Kingdom the company made no profits within the United Kingdom, and therefore that it was not liable to be assessed to the income-tax; and further, that if it was liable it could only be liable to be assessed in respect of profits earned in the United Kingdom, from the transmission of messages over the three marine cables belonging to the company.

The Queen's Bench Division gave judgment for the Commissioners of Income-Tax.

The Telegraph Company appealed.

Sir H. Giffard, Q.C., and *Bremner*, for the appellant company.—This company is a foreign company and carries on business

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at the place where its head office is situated, and where the control and management of the business is—*Brown v. The London and North Western Railway Company* (1)—so that it does not exercise a trade within the United Kingdom within the meaning of 16 & 17 Vict. c. 34. s. 2. sched. D (2), and in any event the company ought to be allowed to make a deduction for the profits made on the cables abroad not connected with this country.

The Solicitor-General (Sir F. Herschell, Q.C.) and *A. V. Dicey*, for the respondent, were not called on.

JESSEL, M.R.—The Divisional Court decided two things—first, that the appellant company carries on trade in this country—I use words which express the meaning of the Act—and, secondly, that the profits of that trade are subject to income-tax wherever the expenses may be incurred, and whether they are incurred by reason of the company carrying on trade over its own cables or over cables belonging to others—that is, that the company cannot deduct from the profits earned any imaginary or estimated profit which would accrue if the company carried the message along its own cables abroad.

The facts are clear, and the question is whether the company does carry on trade. There is no principle of law which decides what carrying on trade is—a multitude of circumstances make up what is called carrying on a trade; for it is a compound fact made up of a variety of things. Now the facts of this case shew that this is a company with stations in this kingdom, with the ends of cables in this kingdom, and these cables are worked from here by the staff of the company. There is an office in London, and the company takes messages and sends them to foreign parts. There is, as it

appears to me, a perfectly plain case of carrying on trade here. This company habitually receives messages here, and receives money here for sending those messages from stations here to foreign parts. A company in this country which regularly undertakes the carrying of goods abroad for money as part of its ordinary business carries on trade in this country, even though the whole of the carriage is done abroad. The mere fact that the company enters into contracts in this country with English subjects for the right of carriage appears to me to be the same thing as if it made similar contracts for the sale of goods. Whether the contract is for carriage or for the right to transmit messages makes no difference. So if a railway company with a station at Dover and another at Calais carries passengers from Dover to Calais as a regular practice, that would be a trading at Dover; and here there are one or two instruments connected with a trade in this country, and these bring the company within the purview of the statute.

The question then arises, What is profit? Profit is the difference between the price received and the cost price. The expense of management or establishments is an element in the cost. Then in this case it is necessary to take the amount received and deduct from that what it costs the company to transmit the messages; the difference is the profit, and on this difference the company ought to be taxed. It is, however, urged that the company has cables of its own abroad, not connected directly with this country, that messages are sent over those cables, and that those cables earn the profit, and that such a profit so earned may be deducted. The answer is that those cables do not earn a profit: the use of them may diminish the expense of earning a profit, and thus diminish the cost price, and that is all; for it is, I think, a fallacy to say the cables earn a profit, and the company can only deduct from the price of the messages the cost of transmission. On both points then this judgment must be affirmed.

BRETT, L.J.—By the statute it is enacted that a tax shall be levied on the profits of a company not resident within the

(1) 4 B. & S. 326; 32 Law J. Rep. Q.B. 318.

(2) 16 & 17 Vict. c. 34. s. 1 grants certain rates and duties specified as follows in section 2, schedule D: "For and in respect of the annual profits or gains arising or accruing to any person whatever, whether a subject of Her Majesty or not, although not resident within the United Kingdom, from any property whatever in the United Kingdom, or any profession, trade, employment or vocation exercised within the United Kingdom."

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United Kingdom derived from any trade exercised within the United Kingdom. So that it is to be a tax collected in respect of annual profits accruing from a trade exercised within the United Kingdom. I do not think the statute is difficult to construe, the difficulty (if any) is in determining the mercantile or business fact whether gains do accrue to foreign companies in respect of a trade carried on here. It would be nearly impossible, and certainly unwise, to attempt to give an exhaustive definition of what will constitute carrying on trade in this country. Our decision must be based upon the facts of this case alone. I should incline to say that wherever profitable contracts are habitually made in England by or for foreigners with persons in England—because they are in England—to do something for or supply something to those persons, such foreigners are exercising a profitable trade in England, even though everything to be done by them in order to fulfil the contract is done abroad. The profit which they derive is derived from the payment by the person with whom they contract. In this case they would not have any such profit unless the person making the contract by himself or by some one else were in England. The contract is made in England because the person or his agent is in England, and out of the payment for that comes the profit. So that, as it seems to me, it is immaterial to consider whether any part of the cable of the company is in England, or whether any part of that which the company undertakes to do is done in England or not—the case would be the same if everything to be done was done abroad. That which is done abroad is to incur expenses; those are not profit, but rather they diminish the profit which the company makes from the money received for contracts habitually made within the United Kingdom.

The tax is to be paid on profits which the company receives from making business or trading contracts: the profit is the difference between what the company receives and what it costs it to earn the money. It matters not whether the company has expended in this country or abroad what it costs to earn the money. If every part of the whole in-

strumentality of conveyance belonged to the company, it would cost a certain sum to maintain it, and the profit would be the difference between what it cost the company to carry the message and the sum the company received from the person sending the message. If the company employs some one abroad to do the work of carriage for it, then the cost to the company is what it has to pay that person, and included in that is the ordinary trade profit of that person; but if the company does the work itself then the trade profit which might thus be gained is no part of the cost, because in this way the whole profit might be deducted, and it might be said that none was made. The company, as it seems to me, cannot deduct as to the line abroad what is called a trade profit. The judgment must be for the Crown.

COTTON, L.J.—The two questions here are whether this company exercises a trade within the United Kingdom within the meaning of the statute, and the amount of profits on which tax is payable. This company has its principal place of business at Copenhagen; it has also an office and servants in London, and carries on business in London. It habitually receives messages for transmission to all parts. It is immaterial, I think, to consider whether the company owns lines starting from the United Kingdom or not; the fact, however, is that it does own such lines. The company receives by its servants and by the Postmaster-General messages to transmit, and money in payment. The company habitually contracts to send messages, and a person who habitually does a thing capable of producing profit, and for the purpose of producing profit, carries on business; and, in my opinion, the business or trade which this company carries on is that of collecting messages for transmission to various parts of the world. It could carry on that business without having any lines of its own, but it has, in fact, the advantage of three lines which start from the United Kingdom; and although it has its principal place of business at Copenhagen, still it carries on a trade or business within the United Kingdom. It was urged on behalf of the company that a company only carries on

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business where the head office or centre of management is. That may be so as regards the meaning of the phrase "carrying on business" in certain statutes when the question is as to the place where a company is to be sued; but it is not so when the question is, Where does a company earn profits on which tax is payable?

Then there is the question of profit. The profit on this business is the sum received after deducting all expenses paid for the purpose of performing the contract. If the company performs part itself, still it cannot deduct an imaginary profit supposed to have been earned by a contract supposed to have been made with regard to the carriage of a message over a line belonging to the company. The contract made is one entire contract, a contract to send a message all the way to its destination; and if as to part the company carries the message more cheaply by using its own lines, still no deduction can be made in respect of a profit which it is alleged is thus earned: such a profit is imaginary, it has no real existence and cannot be deducted. The appeal must therefore be dismissed.

Appeal dismissed. Judgment for the Crown.

Solicitors—Ashurst & Co., for appellant company; Solicitor of Inland Revenue, for respondent.

[IN THE COURT OF APPEAL]

1881. } HORNEY v. CARDWELL.
Dec. 19, 20. } HANBURY (third party).*

Practice—Third Party—Costs of all Proceedings—Discretion of Court—Appeal—Judicature Act, 1873, ss. 24 (sub-s. 3) and 49—Order XVI. rule 18—Order LV. rule 1—Sub-lease—Implied Contract of Indemnity.

The plaintiff let certain premises to the defendant by a lease, which contained a covenant to repair. The defendant under-

* *Coram* Jessel, M.R.; Brett, L.J.; Cotton, L.J.

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let the premises to H. by an agreement made "subject in all respects to the terms of the existing lease and the covenants and stipulations contained therein." The plaintiff sued the defendant for breaches of the covenant to repair; and notice of the plaintiff's claim was given by the defendant to H., who was subsequently made a third party under Order XVI. rule 18. The two cases were tried separately by an official referee, who reported that 54l. 2s. 6d. was due in each case as damages for non-repair. Judgment was given for the plaintiff for that sum against the defendant, who, in his pleadings, claimed from the third party the amount of the judgment and the costs of defending that action. The third party demurred to the claim for costs, but the Divisional Court overruled the demurrer, and also ordered the third party to pay all the costs of the action, including the costs of the proceedings between the plaintiff and defendant:—Held (affirming the decision of the Divisional Court), that the demurrer was properly overruled; and that, as H. had been duly made a third party to the action under the Judicature Act, 1873, s. 24. sub-s. 3, and Order XVI. rule 18, the costs of all the proceedings, including the costs of the proceedings brought by the plaintiff, were in the discretion of the Court within the meaning of Order LV., so that there was no appeal by reason of section 49 from an order dealing with those costs. Held also (per BRETT, L.J., and COTTON, L.J.), that the defendant could recover these costs from the third party as damages, since the agreement between them amounted to an implied contract to indemnify him against such costs.

Appeal by the third party from a decision of the Divisional Court overruling a demurrer, and ordering the third party to pay all the costs of the action.

The action was originally brought against the defendant to recover damages for breaches of covenant to repair. The plaintiff let a house to the defendant by a lease which contained a covenant to repair. The defendant under-let the house to the third party, Hanbury, by an agreement, which was made "subject in all respects to the terms of the existing lease, and the covenants and stipulations contained

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therein." The house being out of repair, the present action was brought, and notice of the plaintiff's claim was given by the defendant to Hanbury, who took no steps in the matter and was subsequently brought in as a third party under Order XVI. rule 18.

The two cases, as between the plaintiff and defendant, and as between the defendant and third party, were referred to an official referee, who tried them separately, and reported that the amount due for non-repair was 54*l.* 2*s.* 6*d.* in each case. On the determination of the issues in the first case judgment was given for the plaintiff against the defendant for the sum found due by the official referee.

The defendant, in his pleadings, claimed that sum from the third party, and also the costs of defending the proceedings between himself and the plaintiff. The third party demurred to so much of the defendant's pleadings as claimed the costs of those proceedings.

The Divisional Court (Lord Coleridge, C.J., and Field, J.) overruled the demurrer, and, on the findings of the referee, gave judgment for the defendant, and ordered the third party to pay to the defendant all the costs of the action, including the costs of defending the claim made by the plaintiff against the defendant.

The third party appealed.

Cowie, Q.C., and *Archibald*, for the third party.—The substance of the demurrer is that the defendant is not entitled to recover against the third party the costs of the action brought by the plaintiff.

[JESSEL, M.R.—The demurrer is to so much of the defendant's claim as relates to damages. Is not that a frivolous demurrer?]

The claim does not allege any facts which, if true, would give a cause of action against the third party. Section 49 of the Judicature Act, 1873, limits the right of appeal to costs only, which by law are left to the discretion of the Court. The costs here claimed are not costs in the discretion of the Court; they are not recoverable at all, because there was not any contract of indemnity, nor can such a contract be implied—*Barendale v. The London, Chatham and Dover Railway*

Company (1), *Fisher v. The Val de Travers Asphalt Company* (2). The agreement here does not amount to a contract of indemnity—*Logan v. Hall* (3).

[BRETT, L.J., referred to *Smith's Leading Cases* (7th ed.), p. 155, where it was said that "it is necessary to observe the distinction between the case of a contract to indemnify, or a contract to do the very thing to which the contractee is liable, and the breach of which consequently may raise an obligation to indemnify the contractee against such liability, and a contract to do something not precisely the same with that to which the contractee is liable." JESSEL, M.R.—The decision in *Baxendale's Case* (1) was put on the ground that the measure of damages was not entirely the same; and the observations then made were right, but it is otherwise now under the Judicature Act (4).]

(1) 44 Law-J. Rep. Exch. 20; Law Rep. 10 Exch. 35.

(2) 45 Law J. Rep. C.P. 479; Law Rep. 1 C.P. D. 511.

(3) 4 Com. B. Rep. 598; 16 Law J. Rep. C.P. 252.

(4) Judicature Act, 1873, s. 24. sub-s. 3: "The said Courts respectively, and every Judge thereof, shall also have power to grant to any defendant . . . all such relief relating to or connected with the original subject of the cause or matter, and in like manner claimed against any other person, whether already a party to the same cause or matter or not, who shall have been duly served with notice in writing of such claim pursuant to any Rule of Court or any Order of the Court as might properly have been granted against such person if he had been made a defendant to a cause duly instituted by the same defendant for the like purpose; and every person served with any such notice shall thenceforth be deemed a party to such cause or matter, with the same rights in respect of his defence against such claim as if he had been duly sued in the ordinary way by such defendant."

Order XVI. rule 17: "Where a defendant is or claims to be entitled to contribution or indemnity, or any other remedy or relief over against any other person, or where from any other cause it appears to the Court or a Judge that a question in the action should be determined not only as between the plaintiff and defendant, but as between the plaintiff, defendant and any other person, or between any or either of them, the Court or a Judge may, on notice being given to such last-mentioned person, make such order as may be proper for having the question so determined."

Rule 18: "Where a defendant claims to be

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No doubt the measure of damages for breach of a covenant to repair is the sum necessary to restore the premises to the state in which they ought to have been kept. And where there is a covenant to indemnify, ulterior consequences have to be contemplated, such as the risk of an action against the party indemnified for non-performance of duties which the party indemnifying has taken upon himself—*Mayne on Damages* (3rd ed.), p. 82. But there is no such contract here. The third party was not properly added here. In *Schneider v. Batt & Co.* (5) it was held that where all the questions could not be tried together the third party ought not to be added. Again, in *Witham v. Vane* (6) the Court of Appeal held that they had no jurisdiction to make a plaintiff pay the costs of a third party who had been brought in under Order XVI.; and conversely the third party cannot be ordered to pay the plaintiff's costs. The third party did not defend, nor is there evidence of any request to defend, at his expense, the claim brought by the plaintiff.

The discretion over costs given to the Court by Order LV. rule 1, must not be a mere arbitrary discretion, but one which must be exercised according to the ordinary accepted rules. The object of the Rules of Court is not to create an indemnity, but to bring into the action parties in whom some liability in the shape of an indemnity does exist, and so avoid multiplicity of legal proceedings. At all events, the third party was not liable for costs incurred before he was made a party to the action, because section 24, sub-section 3, of the Judicature Act, 1873, enacts that the party served with notice shall "thenceforth"—that is, from the time when he is so served—be deemed a party to the cause.

The following cases were also referred to: *Beymon v. Godden* (7), *Treleven v. Bray*

entitled to contribution, indemnity or other remedy or relief over against any person not a party to the action, he may, by leave of the Court or a Judge, issue a notice to that effect. . . ."

(5) 50 Law J. Rep. Q.B. 525.

(6) W. N. 1881, p. 79.

(7) 48 Law J. Rep. Exch. 80; Law Rep. 4 Ex. D. 246.

(8), *Bower v. Hartley* (9), *The Swansea Shipping Company v. Duncan, Fox & Co.* (10), *Willmott v. Barber* (11), *The Cartsburn* (12), *Williams v. The South Eastern Railway Company* (13), *Dicks v. Yates* (14).

R. Wallace, for the defendant.—The defendant is entitled to recover both damages and the costs of the action from the third party. Although a lessee, who under-lets, with covenants to repair in the same terms as in his own lease, is not necessarily entitled to recover from the under-lessee the cost of an action for non-repair brought against himself, yet he may recover the amount of dilapidations recovered against himself and occasioned by the under-lessee's neglect—*Penley v. Watts* (15), *Walker v. Hatton* (16). And he may recover the costs of such action if he has given notice of it to the under-lessee, and received his sanction for defending it; and his sanction may be inferred if he does not prohibit the defence—*Blyth v. Smith* (17), *Rolph v. Crouch* (18), *Roscoe on Evidence* (13th ed.), p. 700. [He was then stopped by the Court on this point.]

As to the other question: The Court had jurisdiction to deal with the costs of the whole action. If the costs are in the discretion of the Court then there is no appeal; if, on the other hand, the Court has no discretion over them, they are, nevertheless, recoverable as damages.

Cowie, Q.C., in reply.—It does not appear in *Penley v. Watts* (15) that the defendant requested the plaintiff to defend the action

(8) 45 Law J. Rep. Chanc. 113; Law Rep. 1 Ch. D. 176.

(9) 46 Law J. Rep. Q.B. 126; Law Rep. 1 Q.B. D. 652.

(10) 45 Law J. Rep. Q.B. 638; Law Rep. 1 Q.B. D. 644.

(11) Law Rep. 17 Ch. D. 772.

(12) 49 Law J. Rep. P., D. & A. 14; Law Rep. 5 P. D. 35.

(13) 26 W.R. 352.

(14) 50 Law J. Rep. Chanc. 809; Law Rep. 18 Ch. D. 76.

(15) 7 Mee. & W. 601; 10 Law J. Rep. Exch. 229.

(16) 10 Mee. & W. 249; 11 Law J. Rep. Exch. 361.

(17) 5 Nan. & G. 405, 412-13; 6 Scott, N.R. 360; 12 Law J. Rep. C.P. 203.

(18) 37 Law J. Rep. Exch. 8; Law Rep. 3 Exch. 44.

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brought by the original lessor. The authorities would apply, however, if there was anything equivalent to a request here, but such is not the case.

JESSEL, M.R.—Two points are raised by this appeal. The first is, whether this demurrer, which relates to part of this claim only, was properly overruled. Demurrers now can only be put in under Order XXVIII. rule 1, by which any party may demur to any pleading or to any part of a pleading setting up a distinct cause of action. The relief sought by the claim is the sum of 54*l.* 2*s.* 6*d.*, and the costs of defending the proceedings between the plaintiff and the defendant, and the demurrer is to so much of the relief asked for as includes those costs. Now that is not a separate cause of action; it is only a statement of the relief claimed. There is but one cause of action here, namely, the breach of the covenant to repair, and there the relief is prayed with a certain amount of detail. If a person claims too much he will not get it, but nevertheless the cause of action will remain. It was never intended that there should be such a demurrer as this, and it must therefore be overruled.

The next question raised is of very great importance, for it is one of jurisdiction. The appeal is from so much of the order of the Divisional Court as directed the third party to pay the whole of the costs of the action, including the costs paid by the defendant to the plaintiff, and the costs of defending the claim of the plaintiff against the defendant. The real question we have to decide is, whether an appeal will lie, because if there was jurisdiction to make the order, and the costs are costs in the discretion of the Court, then there will be no appeal whether the order be right or wrong. The third party was compelled to argue that the Court had no jurisdiction to make the order. It was said that the third party is brought in originally under section 24, sub-section 3, of the Judicature Act, 1873, and that Order LV. rule 1 provides that, subject to the provisions of the Act, the costs of and incidental to all proceedings in the High Court shall be in the discretion of the Court. The third party was therefore compelled to argue that the Act contained a provision which prevented

the costs from being in the discretion of the Court. The words of the section upon which he relied are—"With the same rights in respect of his defence against such claim as if he had been duly sued in the ordinary way by such defendant." Now that provision does not relate to costs, but to the same rights in respect of the defence against such a claim. It was argued that before the Judicature Act, the third party could not have been made a party to the action between the plaintiff and defendant, and that therefore his rights are interfered with, because he had a right not to be made a party at all. This, however, is a confusion between respective legal rights and a particular mode of procedure—that is, it is entirely a confusion between rights of property which are vested rights and rights in legal procedure.

Then there was an argument founded upon the word "thenceforth" in section 24, sub-section 3, to the effect that the third party only became a party to the action from the time when the notice was served. If, however, he is made a party, he would not be exempted from costs which were incurred before he was made a party; for he may be liable to costs from the very beginning of the action. The result, therefore, is, that a third party is a party to the cause, and is liable to the discretionary power of the Court over costs. It is a misfortune if that discretion be wrongly exercised, but it was thought better to run the risk of a mistake being made in some cases than that further costs should be incurred where costs have already been given against a party. It is therefore no answer to say that the discretion may be exercised wrongly. It may be that the third party ought not to be made a party at all, but the answer to that is that he may appeal from such an order, and if there is a *prima facie* case shewing that he ought not to be made a party, he will be dismissed from the action. We should be interfering with the plain and literal meaning of the Act of Parliament if we put any other construction upon these words, and there are no sufficient grounds for interfering with the order. I am of opinion that the decision of the Court below should be affirmed. There was another argument also entitled to considerable weight, namely, that, inde-

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penderly of this discretion over costs, the Court had no power to give these costs in the shape of damages, but they have not done so. The question here decided is that the Court had discretion over the costs.

BRETT, L.J.—I should be very sorry if I thought that the judgment of the Court below could only be supported on the ground that the question of costs was in the discretion of the Court below, because then there would be no appeal even though we might come to the conclusion that the order was wrong and unjust. I am of opinion that the judgment of the Court below can be supported upon both of the grounds urged, and if it can be supported upon the first ground, it gives me satisfaction to think that we are not driven to say that although there is a wrong, yet nevertheless we cannot apply a remedy to it. The action was brought by the plaintiff against the defendant for breaches of covenant to repair contained in a lease made between them. The third party was made a party upon an allegation that there was a lease between him and the defendant, which entitled the defendant to bring an action against him. It is obvious that there was no privity of contract between the plaintiff and the third party. If the Court below were right in giving, as against the third party, the costs paid by the defendant to the plaintiff by way of damages, then I think that this judgment can be fairly construed to give those costs. With regard to the plaintiff and defendant in the original action, there can be no difficulty, because the plaintiff is clearly entitled upon the findings of the referee to recover from the defendant the sum of 54*l.* 2*s.* 6*d.* and costs of suit; and again there is no doubt that, upon the report of the referee as between the defendant and third party, the defendant is entitled to recover the sum of 54*l.* 2*s.* 6*d.* from the third party. Then the question arises, whether the defendant can recover from the third party the costs of the action brought by the plaintiff against him. That depends upon the question, whether he can recover these costs at all; and unless there was an implied contract of indemnity in the contract between him and the third party, I think that he cannot recover them. Can such a

contract be inferred? It seems to me that upon the proper construction of the sublease, there was a contract by the third party to perform the covenants in the original lease which the defendant was bound to perform. That, however, did not make any privity of contract between the third party and the plaintiff, but it amounts to a stipulation that the third party will indemnify the defendant if he does not perform those covenants. There is, therefore, an implied contract to indemnify the defendant if the third party does not perform those covenants; and as he did not perform them, there is no doubt that he was liable to indemnify the defendant against the damages. It was said that he was not liable for the costs of an action which is defended unreasonably. Was this done so here? If a defendant gives notice to the third party of a claim made against him, and gives the third party an opportunity to defend the action if he chooses, but the third party will not do anything, then the defendant can recover the costs of the action which he defends under these circumstances. The Court would have been justified in this case in arriving at the conclusion that this was a reasonable defence, and might have given these costs to the defendant by way of damages. It was said that the Court could not have done so now, since the decision in *Baxendale v. The London, Chatham and Dover Railway Company* (1). That case, however, is not in point, because there the company had made no contract to indemnify the plaintiff, and did not know there was any contract at all between him and the person whose goods were injured. A contract to indemnify cannot be implied where the party has no knowledge of the former contract. In this case the third party had knowledge of the lease, and contracted in terms to perform the obligations imposed by it. I think that this judgment may well be supported on that ground. Another point which seems to me to be one of the greatest difficulty is that it must not be assumed that there is any contract of indemnity, and the defendant therefore cannot recover as damages against the third party the costs which he was liable to pay to the plaintiff. It seems to me that under these Rules and Orders there may be a question

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between the defendant and third party which turns out not to be in common as between all the parties, and if that be clear, then the third party ought not to be made a third party; but if *prima facie* there is a question which turns out to be in common, then the third party ought to be made a third party. Rule 17 of Order XVI. seems to assume that there may be one question in common, and also other questions which are not in common; but the third party is to be brought in if it can be plausibly shewn that there is a question in common. It may turn out at the trial that there is no such question, and I should be sorry to say that therefore no judgment could be given for the defendant against the third party upon the issues tried between them. That would be a narrow construction to put upon these rules. In *Benecke v. Frost* (19) it was held that there might be a case in which the questions between the plaintiff and defendant might not be in common as between the plaintiff and third party, but that nevertheless such a case would come within these rules. I agree with that decision.

It was also said that these rules were made for the purpose of introducing the Chancery procedure into the common law practice. It appears from the rules themselves that all the Chancery procedure is not to be applied to common law actions, but certain parts only of that procedure. Now what is the practice? It seems to me that the third party can be brought in, although there may be questions which are not in common between him and the plaintiff. Supposing that to be so, it would not be just or right to make the third party pay costs as between the plaintiff and defendant. The question is whether, if such a wrong were done, the third party has a right to appeal.

I should, with the greatest reluctance, feel bound to construe the rules so that, if such an injustice did happen, there should be no appeal. But even if that accident were to happen, it seems to me that the third party is a party to the cause within the rules. If that be so, then the question is whether the Court is at liberty to circum-

(19) 45 Law J. Rep. Q.B. 693; Law Rep. 1 Q.B. D. 419.

scribe the ordinary reading of Order LV. as to the discretion of the Court over costs. I cannot see my way to do so. If therefore any such injustice, which happily has not been the case here, should happen, there would be no remedy. As regards the demurrer, it is clearly frivolous to demur to a claim for damages.

COTTON, L.J.—I agree with the other members of the Court as to the demurrer. The order which comes before us is one which in terms is for the costs paid by the defendant to the plaintiff, not as damages, but as part of the costs of the cause which the third party had to pay to the defendant. The order was made upon the ground that the Court had discretion, under the Judicature Act and Rules, to make the third party pay all the costs of the action. It is not necessary to distinguish the different rules of Order XVI., which are intended to give effect to the mode of procedure provided by section 24, sub-section 3, of the Judicature Act, 1873. When a person has been properly served with notice under Order XVI. rule 18 (and this must be assumed here, because there has been no appeal), the section says that he "shall thenceforth be deemed a party to such cause or matter;" so that from that time he is to be treated as a party to the cause in which he has been made a defendant. Now what are the consequences of making him a party? Under Order LV. the Court is to have discretion over costs as between all parties to the action; and the third party, having been properly served with a notice under the Judicature Act and Rules, has therefore become a party to the action. It is true that Order LV. rule 1 says "subject to the provisions of the Act," and we must therefore consider whether these words prevent the third party from being made liable to pay these costs, if, before the Judicature Act, he could not have been made liable. Now section 24, sub-section 3, only refers to any right which the third party might have had to defend himself against any claim in another action, but not as regards costs in any action in which he is brought before the Court. The Judicature Act only alters the form of procedure, and the third party is still liable to pay such costs as he would

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have been liable to pay if the old form of procedure had been followed. Here he has been made liable as a matter of procedure to the costs of an action to which he has been made a party.

I am of opinion that the true construction of these rules is that they were intended to enable the Court, in dealing with proceedings in which a third party who has been brought in has raised an allegation, to make that party pay the costs which have been incurred by reason of that allegation. I am therefore of opinion, without going into the question whether or not a proper discretion has been exercised, that the Court has power to deal with the costs of these proceedings as well between the original parties as between them and the third party. There may be cases in which the discretion might be exercised so as to cause hardship, but we must not, for that reason, cut down the general effect of the power. There is another matter to be considered. Section 24, sub-section 3, says that the person served with the notice shall "thenceforth" be treated as a defendant. Now a defendant who has been added at a subsequent period may be made liable for costs from the very beginning of the action. It is said that this is a hardship, because he may be made liable for the cost of proceedings which have been improperly incurred before he was joined. I do not see how the fact of making him a party to the proceedings would enable him to prevent the plaintiff from taking unnecessary proceedings. The rule is that no one is to remain liable for any costs except those incurred for the purpose of litigation. That, however, is no obstacle to our holding that in this case he is a party liable to pay costs, if the Court in its discretion thinks that he ought to be so liable. I in no way dissent from the view expressed by Lord Justice Brett on the other point as to the contract of indemnity.

Appeal dismissed.

Solicitors—Foord & Edwards, agents for Dearle & Elgeworth, Eastbourne, for defendant; Phillips & Son, for third party.

1881. }
Nov. 21. } CORY AND SONS v. BURR.
Dec. 9. }

Ship and Shipping—Marine Insurance—Barratry of Master leading to Capture—Warranty against Capture—Proximate Cause of Loss.

Plaintiffs had effected a time policy of insurance with the defendant, and among the risks and losses insured against was included barratry of the master. The policy contained the usual sue and labour clause, and the subject-matter of insurance was warranted free from capture and seizure, and the consequences of any attempt thereat.

While the policy was in force the ship was seized by foreign revenue authorities in consequence of the master having barratrously engaged in a smuggling adventure, and plaintiffs incurred expense in obtaining her liberation, which they sought to recover under the policy:—

Held, that the warranty applied to exempt the defendant from liability, inasmuch as, notwithstanding that the barratrous act led to the seizure, the seizure was the proximate cause of loss.

Special Case stated in an action for the opinion of the Court.

1. The plaintiffs at the several times hereinafter mentioned were the owners of the steamship *Rosslyn*, and the defendant is an underwriter at Lloyds'. On or about the 30th of May, 1878, the plaintiffs effected a policy of marine insurance for 3,500*l.*, which the defendant subscribed for the sum of 100*l.*, on the said steamship the *Rosslyn*, the ship valued at 12,000*l.*, and the machinery valued at 6,000*l.*, for the space of twelve calendar months, at and from the 30th day of May, 1878, to the 29th day of May, 1879, both days inclusive. A copy of the policy accompanies the case, and is to be taken as part thereof.

2. The risks and losses insured against were those usually covered by a marine policy, and included perils of the sea, men-of-war, enemies, takings at sea, arrests, restraints and detainments of all kings, princes and people of what nation, condition or quality soever, barratry of the

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United Kingdom derived from any trade exercised within the United Kingdom. So that it is to be a tax collected in respect of annual profits accruing from a trade exercised within the United Kingdom. I do not think the statute is difficult to construe, the difficulty (if any) is in determining the mercantile or business fact whether gains do accrue to foreign companies in respect of a trade carried on here. It would be nearly impossible, and certainly unwise, to attempt to give an exhaustive definition of what will constitute carrying on trade in this country. Our decision must be based upon the facts of this case alone. I should incline to say that wherever profitable contracts are habitually made in England by or for foreigners with persons in England—because they are in England—to do something for or supply something to those persons, such foreigners are exercising a profitable trade in England, even though everything to be done by them in order to fulfil the contract is done abroad. The profit which they derive is derived from the payment by the person with whom they contract. In this case they would not have any such profit unless the person making the contract by himself or by some one else were in England. The contract is made in England because the person or his agent is in England, and out of the payment for that comes the profit. So that, as it seems to me, it is immaterial to consider whether any part of the cable of the company is in England, or whether any part of that which the company undertakes to do is done in England or not—the case would be the same if everything to be done was done abroad. That which is done abroad is to incur expenses; those are not profit, but rather they diminish the profit which the company makes from the money received for contracts habitually made within the United Kingdom.

The tax is to be paid on profits which the company receives from making business or trading contracts; the profit is the difference between what the company receives and what it costs it to earn the money. It matters not whether the company has expended in this country or abroad what it costs to earn the money. If every part of the whole in-

strumentality of conveyance belonged to the company, it would cost a certain sum to maintain it, and the profit would be the difference between what it cost the company to carry the message and the sum the company received from the person sending the message. If the company employs some one abroad to do the work of carriage for it, then the cost to the company is what it has to pay that person, and included in that is the ordinary trade profit of that person; but if the company does the work itself then the trade profit which might thus be gained is no part of the cost, because in this way the whole profit might be deducted, and it might be said that none was made. The company, as it seems to me, cannot deduct as to the line abroad what is called a trade profit. The judgment must be for the Crown.

COTTON, L.J.—The two questions here are whether this company exercises a trade within the United Kingdom within the meaning of the statute, and the amount of profits on which tax is payable. This company has its principal place of business at Copenhagen; it has also an office and servants in London, and carries on business in London. It habitually receives messages for transmission to all parts. It is immaterial, I think, to consider whether the company owns lines starting from the United Kingdom or not; the fact, however, is that it does own such lines. The company receives by its servants and by the Postmaster-General messages to transmit, and money in payment. The company habitually contracts to send messages, and a person who habitually does a thing capable of producing profit, and for the purpose of producing profit, carries on business; and, in my opinion, the business or trade which this company carries on is that of collecting messages for transmission to various parts of the world. It could carry on that business without having any lines of its own, but it has, in fact, the advantage of three lines which start from the United Kingdom; and although it has its principal place of business at Copenhagen, still it carries on a trade or business within the United Kingdom. It was urged on behalf of the company that a company only carries on

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business where the head office or centre of management is. That may be so as regards the meaning of the phrase "carrying on business" in certain statutes when the question is as to the place where a company is to be sued; but it is not so when the question is, Where does a company earn profits on which tax is payable?

Then there is the question of profit. The profit on this business is the sum received after deducting all expenses paid for the purpose of performing the contract. If the company performs part itself, still it cannot deduct an imaginary profit supposed to have been earned by a contract supposed to have been made with regard to the carriage of a message over a line belonging to the company. The contract made is one entire contract, a contract to send a message all the way to its destination; and if as to part the company carries the message more cheaply by using its own lines, still no deduction can be made in respect of a profit which it is alleged is thus earned: such a profit is imaginary, it has no real existence and cannot be deducted. The appeal must therefore be dismissed.

Appeal dismissed. Judgment for the Crown.

Solicitors—Ashurst & Co., for appellant company; Solicitor of Inland Revenue, for respondent.

[IN THE COURT OF APPEAL.]

1881. } HORNBY v. CARDWELL.
Dec. 19, 20. } HANBURY (third party).*

Practice—Third Party—Costs of all Proceedings—Discretion of Court—Appeal—Judicature Act, 1873, ss. 24 (sub-s. 3) and 49—Order XVI. rule 18—Order LV. rule 1—Sub-lease—Implied Contract of Indemnity.

The plaintiff let certain premises to the defendant by a lease, which contained a covenant to repair. The defendant under-

* *Coram* Jessel, M.R.; Brett, L.J.; Cotton, L.J.

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let the premises to H. by an agreement made "subject in all respects to the terms of the existing lease and the covenants and stipulations contained therein." The plaintiff sued the defendant for breaches of the covenant to repair; and notice of the plaintiff's claim was given by the defendant to H., who was subsequently made a third party under Order XVI. rule 18. The two cases were tried separately by an official referee, who reported that 54l. 2s. 6d. was due in each case as damages for non-repair. Judgment was given for the plaintiff for that sum against the defendant, who, in his pleadings, claimed from the third party the amount of the judgment and the costs of defending that action. The third party demurred to the claim for costs, but the Divisional Court overruled the demurrer, and also ordered the third party to pay all the costs of the action, including the costs of the proceedings between the plaintiff and defendant:—Held (affirming the decision of the Divisional Court), that the demurrer was properly overruled; and that, as H. had been duly made a third party to the action under the Judicature Act, 1873, s. 24. sub-s. 3, and Order XVI. rule 18, the costs of all the proceedings, including the costs of the proceedings brought by the plaintiff, were in the discretion of the Court within the meaning of Order LV., so that there was no appeal by reason of section 49 from an order dealing with those costs. Held also (per BRETT, L.J., and COTTON, L.J.), that the defendant could recover these costs from the third party as damages, since the agreement between them amounted to an implied contract to indemnify him against such costs.

Appeal by the third party from a decision of the Divisional Court overruling a demurrer, and ordering the third party to pay all the costs of the action.

The action was originally brought against the defendant to recover damages for breaches of covenant to repair. The plaintiff let a house to the defendant by a lease which contained a covenant to repair. The defendant under-let the house to the third party, Hanbury, by an agreement, which was made "subject in all respects to the terms of the existing lease, and the covenants and stipulations contained

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Now it has been held that where there is a warranty such as this, and the ship being by perils of the sea placed in such a position as to be exposed to capture is captured, the loss is to be assigned to the proximate cause, the capture, and not to the remote cause, the perils of the sea, and is so within the exception—*Livie v. Janson* (6), *Green v. Elmslie* (1).

In *Livie v. Janson* (6) there was a warranty "free from American condemnation." The master sailed out of port in breach of an American embargo, and, having sustained partial sea damage, was seized and condemned by the American Government for the breach, and this was held a total loss by the excepted peril, Lord Ellenborough saying that the substantive loss was imputable to such latter peril only, and not to the previous sea damage.

The consideration of these authorities, and the application of the well-known principle that a contract of insurance is one of indemnity and indemnity only, leads me to the conclusion that the loss in the present case is imputable to the excepted peril.

It was correctly alleged by Mr. Cohen on the argument that "capture and seizure" are not in terms enumerated perils, but are or may be included in, or caused directly or remotely by, a great many of the perils actually enumerated; *e.g.*, perils of the sea may be the remote cause, as in the case of *Green v. Elmslie* (1), or more frequently perils by men-of-war or enemies or pirates.

In these or similar cases, to hold that a capture caused by or the direct result of any of these perils is not within the exception, would, it seems to me, be to deprive the latter of its whole or at least a good part of its effect and value.

As Mr. Cohen pointed out, the warranty is not an extension but a limitation of the contract of assurance. Capture and seizure, therefore, although not specifically included in the catalogue of perils insured against, must be found in some of them, and may be found in many, and, amongst others (as this case shews), they may be the consequence of barratry which led to the act by which in truth the loss happened.

Until the seizure by the Spanish autho-

rities, although a barratrous act had been committed, there had been no loss, and had the captain not been overhauled there probably never would have been any. It was the seizure that brought the loss into existence.

The true mode of construction is, I think, to read the clause in which the perils are enumerated and the warranty together, and then it will stand thus: "Assurer liable for loss by barratry except such barratry as ends in or causes capture and seizure." This construction gives effect to all the words used. There is capture and seizure as found in the warranty, and there may be many cases of barratry which do not result in seizure, and are therefore properly assured against without exception.

Mr. Myburgh, on the contrary, asks us to read it thus: "Free unless caused by barratry;" but if so, why not also read in it all the other perils capable of producing seizure, and so render the exception nearly or absolutely nugatory. I think, therefore, that reading the whole policy the true construction is that, if there is a loss directly caused by capture and seizure, as was the case here, the loss is not the less imputable to the excepted peril because it might remotely have been due to a barratrous act. My judgment is therefore for the defendant with costs.

CAVE, J.—I also am of opinion that the defendant is entitled to succeed. The master was clearly guilty of barratry which led to the seizure of the vessel, and there was, therefore, a loss by barratry, but a loss which *prima facie* was within the warranty. It was, however, contended on behalf of the plaintiffs that, there having been a loss by barratry, they were entitled to recover, although the proximate cause of the loss arose from seizure, and in support of this contention *Vallejo v. Wheeler* (4) was cited. In that case the vessel was assured by a voyage policy, and the master having barratrously deviated, it was held that the insurer was liable for a loss by perils insured against, whether such loss happened during the fraudulent deviation or afterwards. The ground on which it was held that the insurer was liable for loss by a peril happening after the fraudulent deviation was, that as there was a

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deviation the owner, if not secured against the barratry of the master, would have lost his insurance by the fraud of the master. Now if in this case it could have been shewn that the owner could not have recovered upon a policy against loss by seizure by reason of the barratrous conduct of the master, the principle of *Vallejo v. Wheeler* (4) would have applied. But it was clear from the cases of *Arcangelo v. Thompson* (3), *Heyman v. Parish* (2) and *Blyth v. Shepherd* (7), that the law is not so, and that, under the circumstances of this case, the insurer would have recovered under a policy against loss by seizure.

The case of *The American Insurance Company v. Dunham* (5) was also cited on behalf of the plaintiffs. In that case it was held that upon a policy against (amongst other perils) barratry of the master, the assured was entitled to recover damages sustained in consequence of the seizure and detention of the vessel and cargo by reason of prohibited goods having been found on board belonging to the master, shipped by him for the purpose of being smuggled, notwithstanding a clause in the policy that the insurer should be free from charge in consequence of seizure or detention for or on account of any illicit or prohibited trade. The ground of that decision, which was founded on *Havelock v. Hamill* (8), was that the warranty extended only to the acts of the assured and of those acting with his knowledge and consent. It is clear that that ground cannot apply here, and if because perils from barratry are insured against it is to be held that the warranty against seizure does not extend to a seizure which is barratrous or which is the natural result of barratry, it might equally be contended that because perils from enemies are insured against the warranty against capture does not extend to capture by an enemy.

In *Kleinwort v. Shepherd* (9) there is an *obiter dictum* of Lord Campbell which supports the view I take. In that case there was the same warranty as here, and Lord Campbell in his judgment, while discussing what is a seizure within the warranty,

(7) 9 Mee. & W. 763; 11 Law J. Rep. Exch. 293.

(8) 3 Term Rep. 277.

(9) 1 E. & E. 447; 28 Law J. Rep. Q.B. 147.

says, "If the crew, intending to turn pirates, were to murder the captain and to run away with the ship, would not this be a loss by seizure?" And it is evident from the context that in his opinion it would have been. If, therefore, a seizure which is in itself the barratrous act is within the exception, why is not a seizure which is not a barratrous act, but only a result and consequence of it?

Judgment for the defendant.

Solicitors—H. C. Coote, agent for Adamson, North Shields, for plaintiff; Waltons, Bubb & Walton, for defendant.

1881. } MEEK v. CHAMBERLAIN AND
Nov. 29. } WIFE.

Dower, Release of—Mortgage of Land—Redemption—Revival of Dower.

A right to dower in favour of a widow attached to land of which her son was seised in fee. The son mortgaged the land, the widow joining in respect of her right to dower. The deed of mortgage witnessed that the son granted and conveyed, and "for the purpose of extinguishing her right or title to dower," the widow granted and released, the said land to the mortgagee "discharged from all right and title to dower." The mortgage was subsequently paid off and the land reconveyed to the son:—Held, that the widow released her right to dower only for the purposes of the mortgage; that the right therefore, was merely suspended for the time and revived on reconveyance of the land.

Dawson v. The Bank of Whitehaven (46 Law J. Rep. Chanc. 884; Law Rep. 6 Ch. D. 218) distinguished.

Action for recovery of land remitted for trial to the County Court.

Enoch Meek, the father of the plaintiff, was at the time of his death seised in fee of land in the county of Gloucester. He died intestate in October, 1859, and the plaintiff thereupon became seised in fee as his eldest

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son and heir at-law, and entered into possession of the land.

On the 18th of November, 1869, the plaintiff by indenture of mortgage, made between himself of the first part, the defendant Ann Chamberlain (then Ann Meek, widow of Enoch Meek, and mother of the plaintiff) of the second part, and the trustees of the Stroud Provident Benefit Building Society of the third part, conveyed the said land to the society by way of mortgage for the purpose of securing an advance of 30%.

The deed, after reciting that the trustees ordered the advances to be made to the plaintiff on his executing the security thereafter contained, and "on the said Ann Meek joining in these presents for the purpose of releasing her right and title to dower in the hereditaments intended to be hereby conveyed," witnessed that in consideration, &c., "he, the said Thos. Meek (the plaintiff), doth grant and convey, and the said Ann Meek, for the purposes of extinguishing her right or title to dower in the said hereditaments, doth at the request of the said Thomas Meek, grant and release unto the said trustees, their heirs and assigns, the hereditaments, &c., to hold the said hereditaments and premises unto and to the use of the said trustees, their heirs and assigns, discharged from all right or title to dower of the said Ann Meek therein, but subject to the proviso for redemption hereinafter contained."

The mortgage was paid off on the 30th of November, 1878, and the property was reconveyed to the plaintiff.

The defendant Ann Chamberlain continued in occupation of the land after her husband's death. She afterwards married the defendant Joseph Chamberlain, and they remained in possession of the land, and refused to quit when requested to do so by the plaintiff, for which action was now brought.

The defendants, by way of defence, pleaded that by the permission of the plaintiff, the defendant Ann Chamberlain continued to occupy the land by right of dower in lieu of dower. By way of counterclaim, the defendants claimed that dower of all the lands of which the said Enoch Meek was in his lifetime seised for an estate of

inheritance might be assigned to the defendant Ann Chamberlain.

The County Court Judge gave judgment for the plaintiff, holding that the defendant Ann Chamberlain had forfeited her right of dower by the mortgage of the 18th of November, 1869.

A rule was subsequently obtained by the defendants, calling on the plaintiff to shew cause why the judgment entered for him should not be set aside and a new trial had on the ground that the County Court Judge was wrong in holding that the defendant Ann Chamberlain had forfeited her right to dower by executing the deed of mortgage of the 18th of November, 1869.

A. T. Lawrence shewed cause.—The widow's right to dower did not revive on the reconveyance of the estate. As a general rule no doubt on redemption of a mortgage the estate is reconveyed for the benefit of the persons whose estates are mortgaged, but that rule does not apply in the present instance, because the widow had no estate; she was entitled to property in the estate for the time being, but it had not been assigned by metes and bounds. She was therefore not entitled to an equity of redemption—*Dawson v. The Bank of Whitehaven* (1). Equity does not recognise a right to dower in an equitable estate—*Co. Lit.* 31 A. The Dower Act (3 & 4 Will. 4. c. 105) first created dower in equitable estates, but only in those estates of which the husband died possessed. When once released, the right of dower is extinguished for ever—*Altham's Case* (2). *Dawson v. The Bank of Whitehaven* (1) shews that when once the wife has joined in a mortgage for the purpose of releasing her dower, her right is extinguished.

Anstie, in support.—The widow has released no more than is necessary to satisfy the mortgage, and on reconveyance of the property her right to dower revived—*Jackson v. Innes* (3). *Dawson v. The Bank of Whitehaven* (1) is not in point: in that case the husband had died seised of an

(1) 46 Law J. Rep. Chanc. 545; Law Rep. 4 Ch. D. 639; reversed on appeal, 46 Law J. Rep. Chanc. 884; Law Rep. 6 Ch. D. 218.

(2) 4 Co. Rep. 440.

(3) 1 Bligh, H.L. Rep. 104.

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equitable estate. Equity does regard dower, but did not give dower in an equitable fee—*Chaplin v. Chaplin* (4). In *Hamilton v. Mohun* (5) it is said that if a husband seised in fee mortgages for years and marries, and the mortgagee never enters, the wife on the death of the husband shall be endowed. Reference is there made to *Banks v. Sutton* (6), where it is laid down that the widow of a person entitled to the equity of redemption of a mortgage in fee has a right to redeem on account of her dower, and the reason given is a quotation from a judgment of Lord Somers, to the effect that a mortgage is looked upon as a personal contract, and the mortgagee has no interest beyond his money.

GROVE, J.—The only difficulty I have had in this case was in consequence of the decision in *Dawson v. The Bank of Whitehaven* (1), for I did not, until it was pointed out by the counsel for the defendants, see the distinction between that case and the present. The material distinction is that in *Dawson v. The Bank of Whitehaven* (1) the husband had not at the time of his death the legal estate; he had only an equitable fee; and as the Courts of Chancery did not recognise a right to dower in an equitable fee, the claim of the wife to have the value of her dower made good to her out of the surplus of the proceeds of the sale of the estate failed. In the present case the husband had the legal estate at the time of his death. The heir-at-law had mortgaged the land, the widow joining in the deed of mortgage in respect of her right of dower; the legal estate had been reconveyed, and the question for our decision is, whether the widow is estopped by the mortgage-deed from claiming her right to dower. In my opinion she is not. The position in which a mortgagee is regarded in Chancery is stated in the passage referred to in *Banks v. Sutton* (6) to be that of a person whose only interest in the property is his money interest. The only purpose of the mortgage-deed is to give him a title, and it is not to be regarded in the same light as an ordinary conveyance. There is nothing in the present deed to

take the mortgage out of this general rule. The widow relinquished her right to dower, but only for the purpose of giving the mortgagee a good title to the property to which her right of dower would otherwise attach. On reconveyance of the property everything, including the widow's right to dower, is restored. In my opinion the widow's right to dower attaches, and this rule must be made absolute.

LOPES, J.—It is a mistake to suppose that the Court of Chancery would not give any effect to a wife's claim for dower. It is true that Chancery did not recognise a right to dower in a mortgaged estate, because dower does not attach to an equitable estate, and it is in this respect that *Dawson v. The Bank of Whitehaven* (1) is distinguishable. In that case the husband died seised of an equitable estate, but in the present case he died seised of the legal fee. It would not be a bad test of the present case to suppose that a bill had been filed to recover the dower. The answer, and the only answer that could be made, would be that the right to dower was absolutely released, but the validity of that answer depends upon the construction of the mortgage-deed. Did the widow intend absolutely to release the estate from her right to dower, or did she release it only for the purpose of the mortgage? In my opinion she released her right merely for the purpose of the mortgage, and that her right to dower was only suspended during the continuance of that security.

Rule absolute.

Solicitors—Wilkins, Blyth & Dutton, agents for Carter, Newnham, for plaintiff; Hughes & Beadles, agents for J. Robinson, Mitcheldean, for defendants.

1881. } THE MAYOR, &C., OF ROCHDALE v.
Nov. 15. } THE JUSTICES OF LANCASHIRE.

Highway—Liability to Repair—Main Road—Portion of a Road ceasing to be a Turnpike Road—41 & 42 Vict. c. 77. s. 13.

[For the report of the above case, see 51 Law J. Rep. M.C. 1.]

(4) 3 P. Wms. Rep. 229.

(5) 1 ibid. 118, at 121.

(6) 2 ibid. 700.

[IN THE COURT OF APPEAL.]

1881. } WILLIAMS AND OTHERS v.
June 20, 21. } PHILLIPS AND OTHERS.*

Landlord and Tenant—Lease—General Words—Common Rights—Extinguishment, Effect of—The Commons Enclosure Act, 1845 (8 & 9 Vict. c. 118), ss. 69, 93, 94.

T. was owner in fee in possession of a farm with common rights attached to it. An order to enclose the common having been made under the Commons Enclosure Act, 1845, all the common rights were extinguished under section 69 of the Act, and T. thereupon sent in his claim for an allotment. T. died, and the tenant-for-life under his will demised the farm, "together with all commons, ways, watercourses, rights, privileges, easements, commodities and appurtenances whatsoever to the said hereditaments, or any part thereof, belonging or usually held or enjoyed therewith," to W. for sixty years. The lessee entered into possession, and three years later an allotment of lands in respect of T.'s claim was made to the defendants, who were his successors in title to the freehold of the farm. In an action of ejectment brought by W.'s executors to recover possession of the lands so allotted,—Held, that no right to the allotment, when made, passed to W. either under the lease or by virtue of the Commons Enclosure Act, 1845, and therefore that the plaintiffs were not entitled to maintain their action.

Appeal from a judgment of J. Brown, Esq., Q.C., Commissioner, after trial without a jury.

Action of ejectment.

In 1857 William Thomas was seised in fee of a farm called Werfa Farm, in the county of Glamorgan, and was possessed of and entitled to certain commonable rights attached to the farm, over a common called Hirwain Common.

On the 4th of June, 1857, a Provisional Order for enclosing Hirwain Common was made under the 8 & 9 Vict. c. 118, and on the 10th of August, 1857, an Act was passed confirming the Provisional Order, and authorising the enclosure to be made.

* *Coram* Bramwell, L.J.; Brett, L.J.; and Cotton, L.J.

By an order duly made under section 69 of the 8 & 9 Vict. c. 118, the commonable rights over Hirwain Common attached to Werfa Farm were extinguished on and from after the 2nd of May, 1859.

William Thomas died on the 25th of June, 1858, having duly sent in his claim for an allotment in lieu of his commonable rights over Hirwain Common.

In 1859 Richard Thomas, who was tenant-for-life under the will of William Thomas, entered into possession of Werfa Farm.

By a lease dated the 1st of May, 1866, Richard Thomas, in pursuance of a power given to him by the will, demised to William Williams, his executors, administrators and assigns, Werfa Farm, with the farmhouse and other buildings thereon, "together with all commons, ways, watercourses, rights, privileges, easements, commodities and appurtenances whatsoever to the said hereditaments, or any part thereof, belonging or usually held or enjoyed therewith" (with certain exceptions not material) for a term of sixty years from the date of the lease at a yearly rent of 60*l.* The lessee entered into possession of the farm shortly afterwards.

In 1869 an allotment in respect of William Thomas's claim was made of several pieces of land situated at some distance from the farm (being the lands sought to be recovered in the action), to Richard Thomas and to two of the defendants, C. H. James and T. H. Dyke, who were devisees in trust under William Thomas's will. William Williams died in 1878, and the plaintiffs, who were the executors and executrix of his will, commenced the action of ejectment against the defendants (other than C. H. James and T. H. Dyke) who were tenants in possession of the lands in question. C. H. James and T. H. Dyke thereupon obtained leave to defend as landlords.

At the trial the learned Commissioner gave judgment for the plaintiffs.

The defendants appealed.

McIntyre, Q.C., and *Evans*, for the defendants.—The right to an allotment when made did not pass under the general words of the lease of 1866. The effect of section 69 of the Enclosure Act, 1845 (8 & 9 Vict.

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c. 118) (1), was to extinguish all commonable rights attached to the farm, and to

(1) Section 69 of the 8 & 9 Vict. c. 118 provides that it shall be lawful for the valuer, acting in the matter of any enclosure under the Act, before the making of the award, when the commissioners shall think necessary for the purpose of the enclosure, and by order under their seal, authorise or direct by notice on the church door, "to order all or any part of the rights of . . . common or other rights in or over the land to be enclosed or any part thereof, to be extinguished from such time, or the exercise thereof to be suspended during such time as shall be expressed in such notice, and from the time mentioned in such notice such rights shall be extinguished or suspended accordingly."

Section 93 enacts that "nothing in this Act contained shall extend to revoke, make void or alter any will, settlement, uses or trust, or to prejudice any person having any right or claim of dower, jointure, annuity, portion, debt, charge, rent or encumbrance upon or affecting any of the land to be enclosed, or which shall be exchanged or given in partition in pursuance of this Act, but the land allotted, and the land given in exchange or partition shall, immediately after such allotment, exchange or partition be and enure, and the several persons to whom the same shall be allotted or given in exchange or partition, as aforesaid, shall thenceforth stand and be seised and possessed thereof respectively to and for such and the same estates, uses, trusts, intents and purposes, and subject to the same conditions, charges and encumbrances as the several lands, rights or undivided shares thereof in respect whereof such allotments, exchanges and partitions shall have been made, would have stood limited to and for, or been subject to, in case the same had not been allotted, exchanged or given in partition as aforesaid, and as if this Act had not been made, save and except such leases and tenancies at rack rents as shall become void by virtue of this Act, and any joint tenancy which may have been severed by partition, as aforesaid, and such rights of common and other rights as are intended to be extinguished by the enclosure, and subject nevertheless to all such mortgages and sales as shall be made by authority of this Act."

Section 94 enacts that "all such land as shall be taken in exchange or on partition, or be allotted by virtue of this Act, shall be held by the person to whom it shall be given in exchange or on partition, or allotted under the same tenures, rents, customs and services as the land in respect of which such land shall have been given in exchange, or on partition or allotted, would have been held in case no such exchange, partition or enclosure had been made; and the land . . . allotted in respect of freehold shall be deemed freehold, and the land . . . allotted in respect of copyhold or customary land

vest the right to an allotment in lieu of them in the owner of the farm. The allotment is severable from the demised lands, and would not pass under the lease without express words—*Dart's Vendors and Purchasers* (5th ed.), p. 116; *Fife v. Clayton* (2). Where once extinguished, old common rights cannot be recreated by general words in a lease—*Hall v. Byron* (3). No right in the nature of a common right existed when the lease was made. In order to succeed the plaintiffs must shew either that they were entitled to the common rights at the time they were extinguished, or that they have a grant from the persons who were entitled. *Doe v. Willis* (4) and *Doe v. Hellard* (5), which may be relied on for the plaintiffs, have no application to the present case.

B. T. Williams, Q.C., and Brynnor Jones, for the plaintiffs.—The right to an allotment in respect of Werfa Farm passed under the general words of the lease. No severance, either by act of parties or by virtue of the statute, has been shewn. The statute only affects the character of the enjoyment of the estate. An extinguishment under section 69 is an extinguishment for the purposes of the enclosure only. The latter part of section 94 preserves the right of a lessee to an allotment made in respect of the land under lease, and the combined effect of that section and of section 16 is sufficient to pass the allotment, even if it would not pass under the words of the lease. *Fife v. Clayton* (2) is quite different from the present case. *Doe v. Willis* (4) is an authority in favour of the plaintiffs, and in *Sugden's Vendors and*

shall be deemed copyhold or customary land, and shall be held of the lord of the same manor under the same rent, &c. . . . And the land . . . allotted in respect of leasehold land shall in like manner be deemed leasehold, and shall be held under the same rents and covenants as the land in respect of which it may have been allotted was held, and the remainder or reversion thereof shall be vested in the same lessor respectively as the remainder or reversion of such other land was vested before the . . . allotment, except where otherwise particularly directed by this Act."

(2) 1 Coop. Miscel. Cas. 351.

(3) 46 Law J. Rep. Chanc. 297; Law Rep. 4 Ch. D. 667.

(4) 5 Bing. 441.

(5) 9 B. & C. 789.

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Purchasers (14th ed.), p. 374 (where *Doe v. Willis* (4) is cited), the law is thus stated: "Where the estate in respect of which the allotment is made is itself conveyed, of course it carries the right to the allotment with it, and it requires no special clause in the Act to give legal validity to such a conveyance." *Dart's Vendors and Purchasers* (5th ed.), p. 164, states the same general proposition.

BRAMWELL, L.J.—I am of opinion that the judgment should be reversed. I do not think any right to the allotment when made passed by the lease. There is an antecedent improbability that it should. It is not probable that the parties intended the lease to pass lands at a distance from the farm. It is difficult to see how the rent could be calculated when they could not know when the land allotted would come into possession. The general words of the lease are, to a certain extent, unnecessary and idle words, which, nevertheless, are always used. I think it is clear that they refer to the rights usually enjoyed by an occupier, and are not apt words to include a right to an allotment. If that view is correct, I am satisfied that the statute never intended that a lessee of land, under a lease made after common rights belonging to the owner in respect of his ownership of the land had been extinguished, should nevertheless gain possession of the allotment in lieu of the common rights. I am certain that the Act of Parliament has no such operation as that. I am of opinion, therefore, that the judgment should be reversed.

BRETT, L.J.—To consider the Act of Parliament first. Werfa Farm had a right of common attached to it in the sense that a conveyance of the farm would pass the right of common, and the right of common could not have been passed without conveying the farm. Then, by the operation of the Enclosure Act of 1845, the right of common was extinguished whilst the farm was in the hands of the owner. The effect of such an extinguishment is to give the owner a right to an allotment when made, but that right is not attached to the farm in the same way as was the right of common—certainly not where the extinguish-

ment was made whilst the farm was in the hands of the owner. He then has a very different right. When the extinguishment took place, the owner had a right to an allotment which he could at once have sold without selling the farm. His right to an allotment, therefore, has become much more separated from the farm than was his right of common. On the true construction of the statute, I am of opinion that upon extinguishment the right of common is altogether gone, and the right to an allotment when made is given, not as belonging to the farm, but as belonging to the person who owned the farm at the time the right of common was extinguished. Looking at the lease, it is a lease in terms of the farm with all rights of common, but it is obvious that no rights of common existed when the lease was granted. Now, does the right to an allotment when made pass under the words "rights, privileges, easements, commodities and appurtenances whatsoever to the said hereditaments belonging or usually held or enjoyed therewith"? Upon the true construction of the statute the right to an allotment when made did not belong to the farm when the lease was granted, and therefore did not pass under the words of the lease. I am therefore of opinion that the plaintiffs are not entitled to recover. The same result is arrived at if the lease is looked at first and then the statute. I think the judgment cannot be supported.

COTTON, L.J.—The plaintiffs claim to be entitled to the allotment under the terms of the lease and under the statute. Taking the lease first, the only material facts are these: Previous to 1859 certain rights of common appertained to Werfa Farm, which was owned by Richard Thomas or his predecessors in title. In that year those rights were extinguished by the commissioners acting under the statute. It is clear that after the extinguishment no right of common "belonged or appertained" to the farm; but the owner was entitled to an allotment in respect of the rights of common he formerly had. It is clear, therefore, that the right to an allotment could not pass under the general words of the lease; it

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was not a right "belonging" to the farm; it belonged to the owner in fee. It was not a right capable of being "held or enjoyed" by the occupier of the farm. It was a right given to the owner in fee instead of the right of common; and it might be included, no doubt, in the lease by apt words, had such been used. I think it was not included by the words of the lease. Indeed, it would be strange if it had been included, being a right to a thing which might not come into possession for an uncertain number of years. In my opinion, therefore, the words used in the lease—which are the ordinary words used between landlord and tenant—do not pass the right to an allotment. With respect to the statute, section 93 is relied upon for the plaintiffs. Possibly that section comes nearest to what they require, but the effect of it is no more than that where lands to which a right of common is attached are in settlement, land allotted in respect of the right of common shall go with the limitations of the settlement of the estate. Here the lessee never had, under his lease, any right of common in respect of which an allotment could be made. Section 93, therefore, does not apply. Nor, in my opinion, does section 94. That section only applies where the lessee is entitled to make a claim in respect of a right of common, and, having made his claim, obtains an allotment, which belongs to him during the continuance of his lease, and afterwards goes to the landlord. Here no right of common passed under the lease; and the lessee was, therefore, not entitled to claim any allotment. The passage in *Sugden's Vendors and Purchasers* (14th ed.), p. 374, which has been relied on, does not help the plaintiffs' case. The author was dealing with the case of a purchase of land when the right of common passed with the land; and says that the allotment, when made, is substituted for the right of common, and goes to the purchaser. In the present case, the right of common had been extinguished before the allotment was made. That distinction makes the passage of no authority here. The report of *Doe v. Willis* (4) is imperfect; and the case is, therefore, no authority. If what I conceive to have been the

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true circumstances of the case had appeared, it would be found to have no bearing whatever upon this case. I am of opinion that the judgment should be reversed.

Judgment reversed.

Solicitors—Bell, Brodrick & Gray, agents for Linton & Kenshole, Aberdare, for plaintiffs; J. H. Wrentmore, agent for James & Co., Merthyr Tydvil, for defendants.

1881. }
Nov. 3, 7, 25. } KING v. SPURR.

Hackney Carriage—Cab Proprietor and Driver, relation between—Bailor and Bailee—Negligence—Master and Servant—Hackney Carriage Act (6 & 7 Vict. c. 86).

The Hackney Carriage Act (6 & 7 Vict. c. 86) does not, under all circumstances, create the relation of master and servant between the cab proprietor and the driver.

The plaintiff was injured through the negligent driving of a cab driver, and brought his action for damages against the cab proprietor. By the terms of arrangement between the proprietor of the cab and the driver the proprietor let the cab to the driver by the week, the driver providing the horse and harness, and paying 10s. a week for the hire of the cab:—

Held, that the proprietor was not liable for the negligent driving of the cab driver, for that the relation between them was that of bailor and bailee, and the relation of master and servant was not created between them by the statute 6 & 7 Vict. c. 86.

Powles v. Hider (6 E. & B. 207; 25 Law J. Rep. Q.B. 331) and *Venables v. Smith* (46 Law J. Rep. Q.B. 470; Law Rep. 2 Q.B. D. 279) distinguished.

Appeal by motion under 38 & 39 Vict. c. 50. s. 6, from the County Court at Southwark.

Action for negligence. The plaintiff's pony and cart were run into and injured through negligent driving on the part of a cab driver. The plaintiff brought his

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action against the defendant, who was the proprietor of the cab.

The defendant was the owner of fifty or sixty cabs, which he let on hire. The cab driver, through whose negligence the accident had happened, was a licensed driver, and the defendant had let to him a cab for 10s. a week, the driver providing the horse, harness and whip. The action came on for trial before the deputy County Court Judge, when, on proof of the above facts, the County Court Judge nonsuited the plaintiff, holding that the relationship of master and servant did not exist between the defendant and the driver, and that the defendant was not therefore responsible for the negligence of the driver.

The plaintiff having obtained a rule to set aside the nonsuit,

Lamaison shewed cause.—The relationship between the defendant and the cab driver was that of bailor and bailee, and not that of master and servant—*Laugher v. Pointer* (1), *Quarman v. Burnett* (2) and *Fowler v. Lock* (3).

He was stopped by the Court.

Macrae, in support of the rule.—By the provisions of the Hackney Carriage Act (6 & 7 Vict. c. 86) the owner of the cab is civilly liable for the negligence of the driver. By section 8 the driver has to take out a licence on which shall be specified, besides his own name and address, that of the proprietor "employing" him. By section 21 the proprietor is to retain the licence of the driver while the driver "shall remain in his service," and to produce it on complaint. Section 28, after prescribing the punishment to be inflicted on the driver for furious driving or misconduct, gives power to the Justice to adjudge compensation not exceeding 10*l.* to be paid by the proprietor to the person damaged or aggrieved. By section 35, on any offence against the provisions of the Act, the proprietor may be summoned to appear and produce the driver. In *Powles v. Hider* (4) Lord

Campbell, in referring to the Hackney Carriage Acts, says that they "always regard the proprietor and driver of the hackney cab as employer and employed or master and servant, and clearly contemplate that the party who engages the cab under the care of the driver shall have a remedy against the proprietor." The whole of the judgment in that case supports the contention of the plaintiff that the proprietor is liable. The reasoning of this judgment was followed in *Venables v. Smith* (5). Cockburn, C.J., after holding the relationship of the proprietor and driver to be that of bailor and bailee, says that in his judgment the provisions of the Acts of Parliament alter what would otherwise be the relation of the proprietor and the driver to that of master and servant.

Lamaison, in reply.—The object of the Hackney Carriage Acts is to provide a proper carriage and a competent driver, and the provisions rendering the proprietor liable are for affording the public the means of ascertaining the driver: they are mere police regulations, and leave the civil liability untouched. Both in *Powles v. Hider* (4) and *Venables v. Smith* (5) the horse as well as the cab belonged to the proprietor.

Cur. adv. vult.

GROVE, J. (on Nov. 28).—This was a rule to set aside a nonsuit in a case tried before the County Court Judge, which was argued before my brother Bowen and myself on the 3rd and 7th of November. We have had considerable difficulty in coming to a conclusion upon it, not from any difficulty in the case as first presented to us, but in consequence of the judgments in the Queen's Bench to which we were referred, and by which we have been somewhat embarrassed. After considerable doubt I have come to the conclusion that the judgment of the County Court Judge was right, and that the rule must therefore be discharged.

From the facts of the case there is no doubt but that, at common law, the only relation between the proprietor and the driver was that of bailor and bailee, not

(5) 46 Law J. Rep. Q.B. 470; Law Rep. 2 Q.B. D. 279.

(1) 5 B. & C. 547.

(2) 6 Mee. & W. 499; 9 Law J. Rep. Exch. 308.

(3) 41 Law J. Rep. C.P. 99; Law Rep. 7 C.P. 272.

(4) 6 E. & B. 207; 25 Law J. Rep. Q.B. 331.

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master and servant. The cab and horse were entirely under the control of the person hiring the cab, and the proprietor had no control over the person driving. The counsel for the plaintiff submitted that the matter was *res judicata*, and cited *Powles v. Hider* (4) and *Venables v. Smith* (5). If these cases were substantially *ad idem* we should, though with doubt, be bound by them, since they are decisions of Courts of concurrent jurisdiction with this. But there is a sufficient distinction to relieve us from following them, for in both cases both cab and horse belonged to the proprietor of the cab. This forms a broad distinction, since both the vehicle and the horse were under the control of the proprietor. What has embarrassed us is not the decisions, but the remarks contained in the judgment of the Court, which fairly seem to imply that, by the Acts of Parliament, the relationship of master and servant is always created between the cab proprietor and the cab driver. [His Lordship here read Lord Campbell's judgment.] It would not become me to criticise the language of Lord Campbell, but I do not read these Acts of Parliament as speaking as strongly as he does. In *Venables v. Smith* (5), Chief Justice Cockburn adopts the reasoning of the Court in *Powles v. Hider* (4), but in *Venables v. Smith* (5) both cab and horse belonged to the cab proprietor, and not the cab alone as in the present case.

The question for us to determine is whether we are to hold that the Act imperatively declares that the relation of master and servant is always to exist between the cab proprietor and the cab driver. Viewing those cases with regard to the subject-matter before the Court, *non constet* that if the Judges had had to decide a case like this where no relation of master and servant has been found to exist, they would have decided as they did. Indeed, if the Act is imperative, the whole of the first part of Lord Campbell's judgment in *Powles v. Hider* (4) referring to the question of wages would have been unnecessary. Certainly his language does go to the extent of saying that that Act constitutes the relation of master and servant between proprietor and cabman.

But we do not consider ourselves bound by that *dictum*, and I have come to the conclusion that, giving fair scope to the previous decisions, but still exercising my own judgment, I could not say that the County Court Judge was wrong.

Certain arguments were attempted to be deduced from the language of the statute, the provisions of which were said to shew that the relationship of master and servant was intended to be enacted. Section 21 shews, it was contended, that proprietors are to have a certain control over cabmen; but on the other hand it was said that this only provided a means to the public of ascertaining who the driver is, and does not constitute the relation of master and servant. Section 35 no doubt makes proprietors responsible for the production of the driver, but does not conclusively constitute the relation of master and servant, and render the proprietor liable for negligence. Section 28 was much relied on by the counsel for the plaintiff—[Reads]. It was contended that this constituted a statutory liability to the extent of 10*l.*, and therefore a relation of master and servant. But on the other hand it seems plain that this is intended only to provide a summary mode of obtaining compensation; and it may be said, if the Act intended to create such a relation why should it limit the liability?—a sentence making all proprietors liable as a master for his servant's acts would have sufficed. This section tends to shew that the Act did not contemplate that relation, but only created a kind of guaranty in case the driver should abscond or not pay. This, in fact, is the main ground of our decision, namely, that if the Act intended to make a licensed proprietor in all cases and for all purposes liable for the acts of his driver, it would not have been necessary to discover that intention merely by inference, but it would have been clearly stated. To hold otherwise would be to legislate, not to interpret the law. *Powles v. Hider* (4) and *Venables v. Smith* (5) are decided on distinguishable facts, and do not bind us.

His Lordship then read the following written judgment of

BOWEN, J.—Owing to an unexpected duty which has called me this morning to another Court, I am unable, as I had

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intended, to be present during the delivery of my brother Grove's judgment and to supplement it by an oral judgment of my own. I can only add a few words to explain generally the grounds on which I concur in his decision.

Putting statutes aside, the relation of the proprietor and driver in this case would be simply that of bailor and bailee. Ought we then to say that the learned County Court Judge was wrong in holding such to be their true relation? Only—so it seems to me—if, as a matter of law, the Act of Parliament of necessity and under all circumstances has created between the proprietor and driver the relation of master and servant. Has the Act of Parliament done so in express terms? It certainly has not. Has it done so by necessary implication? To hold this would be to read a new section into and engraft it on to the Act. It is true that the Act of Parliament uses in several places the terms "service" and "employment," but it uses them, I think, only for the purposes of the construction of the Act, as sufficiently descriptive of the relation of the two persons, and not with the object of enacting that for all purposes outside the Act such is always to be their true relation. And, indeed, in many cases the effect of the Act taken in connection with the circumstance is, in my opinion, to bring about this very relation. I go further. I think there is a *prima facie* presumption that such is their relation in consequence of the respective positions in which the Act of Parliament has placed the proprietor on the one hand and the driver on the other. But to say that in all circumstances the Act of Parliament, as a matter of law, necessarily creates such a relation, is to go, in my opinion, too far, and to make Acts of Parliament, not to interpret them.

The embarrassment I have felt arises really from the previous decisions of the Court, in which (though not strictly obliged to do so for a basis of their decision) Lord Campbell, C.J., and Chief Justice Cockburn do in my opinion employ language which puts forward the proposition in its extreme form. It does not, perhaps, follow that they would have used expressions so wide, had the case before them been such as to suggest the expediency of laying

down the principle in a less broad shape. The judgment in both cases can be supported by adopting the view which I have above expressed of the true effect of the Act of Parliament, and on consideration I think we are not disregarding their judgment, but only qualifying the expression with which they have accompanied their judgment, in holding that in the present instance the County Court Judge was reasonably entitled to come to the decision at which he has arrived.

Judgment for the defendant. Leave to appeal.

Solicitors—J. W. Few & Co., for plaintiff;
Crafter & Burton, for defendant.

[IN THE COURT OF APPEAL.]

1881. } *In re JOHNSON (a solicitor);*
Dec. 8. } *ex parte EDWARDS.**

Solicitor and Client—Agency—Claim to Retain Money of Client on a General Lien against Country Agent—Exercise of Summary Jurisdiction.

A London solicitor received, as agent for a country solicitor, a debt and costs recovered in an action brought through him by a client of the latter. The country solicitor was at this time indebted to his London agent on a general account in an amount equal to the sum so received; but he had no claim against the client:—Held (affirming the judgment of the Queen's Bench Division), that the Court would, on the application of the client, order the London agent to pay the amount of the debt to her, for that he could not claim to retain it in satisfaction of the general account between himself and the country solicitor, and that in such a case the Court would, although there was no suggestion of fraud, exercise its summary jurisdiction over one of its officers.

Appeal from the Queen's Bench Division. The case is reported 50 Law J. Rep. Q.B. 541. An application was made by Miss

* *Coram* Jessel, M.R.; Brett, L.J.; and Cotton, L.J.

In re Johnson; ex parte Edwards, App.

Edwards for an order directing one Johnson, a solicitor of the Supreme Court, to pay over to her a sum of 33*l.* 5*s.*

It appeared from the Master's report that Johnson was instructed by Raynes, a country solicitor, to commence an action, as his London agent, at the suit of Miss Edwards. Judgment was recovered in this action, and Johnson received the sums of 33*l.* 5*s.* the debt, and 9*l.* 16*s.* 6*d.* the costs. At this time Raynes was indebted to Johnson on a general account for agency charges in a sum exceeding the amount so received, and Johnson claimed to retain the amount in part settlement of his general account. Raynes had no claim against Miss Edwards.

The Queen's Bench Division made absolute a rule ordering Johnson to pay the sum of 33*l.* 5*s.* to Miss Edwards.

Johnson appealed.

Tatlock, for the appellant.—There is no relation of principal and agent, and no privity of contract between the town agent and the client Miss Edwards; there is no evidence that the client really desires the money to be paid to her.

[BRETT, L.J.—The order of the Queen's Bench Division is headed "on hearing counsel for Miss Edwards."]

There is no allegation of fraud and the Court will not exercise its summary jurisdiction over a solicitor unless fraud be proved—*Robbins v. Fennell* (1). The question is whether there is a right of general lien—*Lawrence v. Fletcher* (2), *Hanley v. Cassam* (3).

Cyril Dodd, for the respondent, was not called on.

JESSEL, M.R.—I have the strongest opinion that this appeal should not have been brought. The case is a very simple one as to the facts. The application was made by a plaintiff in an action in which she had recovered a debt and costs; she owed nothing to the country solicitor Raynes, so that she was entitled to receive the amount of the debt so recovered; but the town agent of Raynes

declines to pay it over on the ground that on a general account between him and Raynes, money is due from Raynes to him. Two questions arise: the first is whether the town agent of the country solicitor is entitled to keep the lady's money; the second is whether, if he is not, a summary application can be made against him to order him to pay it over. I am clearly of opinion that the town agent cannot retain the money, and I am equally clear that a summary application can be made in respect of this money.

The town agent received the money as solicitor on the record and agent for Raynes the country solicitor. It was his duty to pay it over unless the country solicitor had a lien on it against the client, but he cannot retain it in such a case as this where the country solicitor has no claim against the client. Even if there had been no decision on the point I should have a clear opinion on this question. The practice has been clear on this point in Courts of equity, and the case of *Hanley v. Cassam* (3), and the report of the Master in the case now before us, shew what has been the general practice in the profession.

Then there is the question whether the Court will exercise the summary jurisdiction which it possesses over its own officers in a case of this nature. It is suggested that it will not do so unless there is fraud. But the decision in *Hanley v. Cassam* (3) is distinctly in point. There was in that case no suggestion of fraud; the circumstances of that case were similar to those now before us, so that if authority be wanting, we have it there; that case decides, as doubtless the law is, that if a London agent receives money as an attorney, or as we now say, a solicitor, he must account for it like any other agent.

In such a case the Court will order its officer acting in a professional capacity to pay money over. It has a general jurisdiction on a summary application over its own officers, and this jurisdiction is exercised as much for the benefit of the solicitor as for the benefit of the public. Such a proceeding is more speedy and cheaper than an action, and thus all parties are the gainers by the exercise of this jurisdiction.

The appeal consequently fails.

(1) 11 Q.B. Rep. 248; 17 Law J. Rep. Q.B. 80.

(2) Law Rep. 12 Ch. D. 858.

(3) 11 Jur. 1088; 10 Law Times (o.s.) 189.

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BRETT, L.J.—I am of the same opinion, and to the same extent. I think there is no colour for the appeal. The town agent of the country solicitor does not allege that the country solicitor has a lien on this money against Miss Edwards, the client, but he assumes to hold the money recovered by Miss Edwards in the action brought by her instructions in respect of a general account between himself and Raynes, the country solicitor. It is urged that the Court will not and cannot order the town agent to pay over this money on a summary motion, on the ground that there is no privity of contract between the town agent and Miss Edwards, and that the relation of principal and agent does not exist between them. That may be so, but it is no bar to the exercise by the Court of its jurisdiction over a solicitor, the officer of the Court. The rule is laid down by Lord Tenterden in *Ex parte Bayley* (4), "that the Court exercises a jurisdiction over solicitors, and that is to be exercised according to law and conscience and not by any technical rules," and I would say not according to any other rules whatever.

Then it is said the Court will not exercise this jurisdiction save in case of fraud. Now I have a clear opinion that there is no fraud in this case, but I am equally clear that the Court has exercised and will exercise this jurisdiction even though there is no fraud. *In re Lord* (5) only decides that the Court will not exercise its summary jurisdiction over one of its officers unless the transaction complained of was carried on by him as a solicitor. *Hanley v. Cassam* (3) is an authority against this appeal, and *Robbins v. Fennell* (1) was based upon *Hanley v. Cassam* (3), so that it is also an authority against the appellant. On all grounds therefore this appeal must be dismissed.

COTTON, L.J.—The appellant makes two points, and I am of opinion against him on both. One contention is that the appellant can pay a debt due to himself from the country solicitor with money belonging to some one else. I agree with Lord Justice Brett that there is no fraud in this case,

(4) 9 B. & C. 691.

(5) 2 Scott, 131.

but I am also of opinion that the Court can exercise the summary jurisdiction over its officer even when there is no fraud. The town solicitor was agent for Raynes the country solicitor. If in this case the country solicitor had a right against this fund, then the town agent would have the same, but he has not and the country solicitor makes no claim on the money. The indorsement on the writ is, "This writ was issued by George Johnson, of No. 126 Fenchurch Street, in the City of London, agent for W. R. Raynes, of Potton, in the county of Bedford, solicitor for the said plaintiff." Now if in this case the country solicitor had a right against this fund then the London agent would have the same right, but the country solicitor has no such right and makes no such claim.

Appeal dismissed.

Solicitors—George Johnson, the appellant, in person ; J. W. Sykes, for respondent.

1881. }
Nov. 15. }

BARKER v. PALMER.

County Court Rules, 1875 (Order VIII. rule 7)—Practice—Procedure—Action to recover Land—Delivery of Summons to Bailiff—Time—Appeal—Prohibition.

The County Court Rules, 1875 (Order VIII. rule 7), provide that "the summons in an action brought under section 11 of the County Court Act, 1867, to recover lands, shall be delivered to the bailiff forty clear days at least before the return day, and shall be served thirty-five clear days before the return day thereof."

The plaintiff brought an action under section 11 of the above Act to recover land. It was admitted that the summons had not been delivered to the bailiff forty clear days before the return day, though the bailiff had served such summons upon the defendant more than thirty-five clear days before the return day. The defendant objected to the hearing, on the ground that the summons had not been delivered in proper time to the bailiff; but the objection was overruled

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by the County Court Judge, and judgment given for the plaintiff:—

Held, that the provision contained in Order VIII. rule 7, as to the time of delivery of the summons to the bailiff, was obligatory and not directory only, and that the defendant's proper remedy was by way of appeal from the judgment in the County Court, and not by prohibition.

Appeal from the decision of W. H. G. Bagshawe, Q.C., Judge of the County Court at Hitchin.

This was an action of ejectment, brought under section 11 of the County Courts Act, 1867, to recover land under the annual value of 20*l.*, and was tried in the County Court at Hitchin. At the hearing, upon the return day, the solicitor for the defendant appeared under protest, and objected that the provision in the County Court Rules, 1875 (Order VIII. rule 7) (1), as to service, had not been complied with. It was admitted by the plaintiff that the summons had not been delivered to the bailiff forty clear days before the return day, though it had been served on the defendant thirty-five clear days before the return.

The County Court Judge ruled that the service was sufficient, and after hearing the case, gave judgment for the plaintiff.

A rule *nisi* was afterwards obtained to set aside the judgment, against which

Lindsell, on behalf of the plaintiff, shewed cause.—If the defendant's contention is correct, the County Court Judge has exceeded his jurisdiction. In such a case the proper way to proceed is in prohibition, and not by appeal.

He cited on this point *Jackson v. Beaumont* (2), *The Liverpool Gas Company v. The Overseers of Everton* (3) and *The Earl of Harrington v. Ramsay* (4).

(1) By Order VIII. rule 7 of the County Court Rules, 1875, it is provided that the summons in an action brought under section 11 of the County Courts Act, 1867, to recover lands, shall be delivered to the bailiff forty clear days at least before the return day, and shall be served thirty-five clear days before the return day thereof.

(2) 11 Exch. Rep. 300; 24 Law J. Rep. Exch. 301.

(3) 40 Law J. Rep. C.P. 104; Law Rep. 6 C.P. 245.

(4) 8 Exch. Rep. 879; 22 Law J. Rep. Exch. 326.

Again, even if the defendant is right in appealing, the decision of the County Court Judge was correct. The service upon the defendant was in time, and the only object of the rule in requiring the summons to be delivered to the bailiff five days before it was served on the defendant was to give the bailiff reasonable time within which to serve it. The former part of rule 7 was for the benefit of the bailiff only; he was the only party entitled to raise the objection which was taken here, and any objection on his part was waived by service on the defendant within the prescribed time.

Guiry supported the rule.—This is a mere question of procedure involving the interpretation of a rule. The subject-matter of the action was admittedly within the jurisdiction of the County Court Judge, but the latter was wrong in his interpretation of the rule, which has all the force of an Act of Parliament, and which the Judge had no power to alter—see the Judicature Act of 1881, s. 27, *Tennant v. Rawlings* (judgment of Lord Coleridge, C.J.) (5) and *Williams v. The Swansea Canal Navigation Company* (6).

GROVE, J.—This appeal must be allowed. The County Court Judge was wrong in hearing the case, and though one is naturally unwilling to refuse to hear a suit where no real injustice is worked, still the provisions of an Act of Parliament must be observed. Now, as far as I am aware, the directions in a statute as to time are always considered obligatory unless some power of extension is given, which admittedly is not the case here. The rule is, therefore, binding which provides that the summons in an action brought under section 11 of the County Courts Act, 1867, shall be delivered to the bailiff forty clear days, at least, before the return day, and shall be served thirty-five clear days before the return day thereof. Now, in the present case, it is admitted that the latter part of the rule has been complied with, but the summons was not delivered to the bailiff within the time required. There is no difference in the

(5) Law Rep. 4 C.P. D. at p. 135.

(6) 87 Law J. Rep. Exch. 107; Law Rep. 3 Exch. 158.

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language employed in both parts of the rule, the word "shall" occurring in both instances, and I see no reason for giving a different interpretation to this word in each case. It has been argued that such a difference ought to be drawn because the object of requiring the forty days was only to give the bailiff reasonable time to serve the summons, and therefore that this part of the provision concerns the bailiff, and the bailiff only, and that he is the only party who can take the objection. We cannot, however, speculate on the reasons for statutory provisions in this kind of way and interpret the word "shall" to have two different significations in the same rule. The only question we have to decide is, what is the law on this matter; and I can see no difference between the provisions for delivery to the bailiff and service upon the defendant, the words used being the same and peremptory.

It has also been argued that prohibition was the proper remedy here, and that therefore an appeal does not lie. A reference to *Comyn's Digest*, tit. "Prohibition," under the heading "At what time granted," tends to shew that there may be jurisdiction in appeal, where there is also a power of prohibition. Here the appeal is given in the most general terms, and, even assuming that prohibition would lie at all, I see nothing to take away the power of appeal. But I am rather inclined to think that prohibition would not lie—certainly I never heard of its doing so—in what is merely a matter of procedure, and I should be sorry in any way to alter the practice in that respect. A good deal contained in *Comyn's Digest* applies to Courts which had no jurisdiction at all over the subject-matter of the suit; here the County Court had jurisdiction subject to certain provisions contained in the rules. But even if prohibition does lie in such a case as this, I am of opinion that it did not take away the right of appeal. I therefore hold that the Judge's decision was wrong, and that the judgment given in the County Court must be set aside.

LOPES, J.—I am of the same opinion. The question arises upon the construction of Order VIII. rule 7 of the County Court Rules, and the proper construction of the rule seems to me to be perfectly

clear. It seems to me to be impossible to hold that the former part of rule 7 is merely directory and the latter part obligatory, where the same language is applied in both cases. It has been contended that the question before us can only be raised by prohibition; it appears to me, however, that a matter of procedure is no ground for prohibition, but of appeal only.

Rule absolute, without costs.

Solicitors—Philpot & Son, agents for Hawkins & Lindsell, Hitchin, for plaintiff; Brown, Donaldson & Woolnough, agents for Dumville, St. Albans, for defendant.

1881. }
Dec. 6. }

MOYLE v. JENKINS.

Employers' Liability Act, 1880 (43 & 44 Vict. c. 42), ss. 4 and 7—Accident to Workman—Presence of Employer when Injury sustained—Whether Notice required—Form of Notice—Waiver.

In order to maintain an action against an employer under 43 & 44 Vict. c. 42, the workman must in all cases give a written notice within the time specified in the 4th section, containing his name and address, the cause of the injury, and the date at which it was sustained.

Section 4 of 43 & 44 Vict. c. 42 merely deals with the time within which a notice must be given. Section 7 contains the requisites of such notice.

This was a rule to set aside a nonsuit of a County Court Judge in an action brought by the plaintiff under the provisions of the Employers' Liability Act against the defendant to recover damages for injuries sustained in his service. The injuries in question were admittedly caused by an explosion of dynamite at the defendant's works, where the plaintiff was employed as a workman; and the defendant himself was present at the scene of the accident immediately after its occurrence, and had assisted and given £l. to the plaintiff. The County Court non-

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sued the plaintiff, on the ground that no notice in writing had been given to the plaintiff as required by the statute (43 & 44 Vict. c. 42) (1). A rule *nisi* was afterwards obtained to set aside the nonsuit, against which

W. Evans appeared to shew cause, but was stopped by the Court.

Crump, on behalf of the plaintiff, appeared to support the rule.—The 4th section says nothing about the notice being required to be in writing, nor can there be any reason for giving a written notice where the employer has either witnessed the accident or arrived on the spot immediately afterwards. The 4th section has an operation quite independent of the 7th section; the latter deals with cases where a written notice is given by the injured person. Where the provisions of a statute require a notice in writing to be given, it is expressly so enacted.

Again, even if a notice in writing was required, it was waived by the conduct of the employer in paying a sum of money, thereby acknowledging his liability to the party injured.

GROVE, J.—This rule must be discharged. Our duty is simply to construe this statute according to the usual rules of

(1) The Employers' Liability Act, 1880 (43 & 44 Vict. c. 42), entitled, "An Act to extend and regulate the liability of employers to make compensation for personal injuries suffered by workmen in their service, provides, by section 4, that "an action for the recovery, under this Act, of compensation for an injury shall not be maintainable unless notice that injury has been sustained is given within six weeks." By section 7: "Notice in respect of an injury under this Act shall give the name and address of the person injured, and shall state in ordinary language the cause of the injury and the date at which it was sustained, and shall be served on the employer. . . . The notice may be served by delivering the same to or at the residence or place of business of the person on whom it is to be served. . . . A notice under this section shall not be deemed invalid by reason of any defect or inaccuracy therein, unless the Judge who tries the action arising from the injury mentioned in the notice shall be of opinion that the defendant in the action is prejudiced in his defence by such defect or inaccuracy, and that the defect or inaccuracy was for the purpose of misleading."

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interpretation. If we were to adopt Mr. Crump's contention we should be legislating, and not interpreting the statute. If the 4th section stood alone, the defendant's argument would no doubt be worthy of grave consideration. But there is the 7th section, containing the essential requisites of a notice, which means the notice required to be given under the 4th section. The 4th section deals with the time for giving a notice; the 7th section contains the requisites of the notice, and its terms clearly shew that a written notice was necessary. There can be no question here as to any inaccuracy in the notice, because there was no notice at all. The County Court Judge was quite right in nonsuiting the plaintiff, and this rule must therefore be discharged.

LOPES, J.—I agree. It is clear that the Legislature thought it desirable that notice of an accident should be a condition precedent to the commencement of a legal proceeding; but the contention on the part of the plaintiff is that a written notice is not necessary—or, in other words, that section 4 may be looked at by itself, and, so regarded, the notice was, under the circumstances of the case, sufficient. But the 4th section only provides for the time within which a notice is to be given, and the 7th section lays down what are the requisites of such a notice. So regarded, it is quite plain that the notice must be a written one; the terms of the 7th section are too clear to admit of any ambiguity. It is argued that upon such facts as are proved here, unnecessary hardship may be inflicted by requiring a written notice to be given. Perhaps so; but such a consideration is for the Legislature and not for us.

BOWEN, J., concurred (2).

Rule discharged.

Solicitors—*J. J. & C. J. Allen*, agents for *Tennant & Jones*, Aberavon, for plaintiff; *Wrentmore*, agent for *W. H. Morgan*, Pontypridd, for defendant.

(2) See *Wilson v. Nightingale*, 8 Q.B. Rep. 1034; 15 Law J. Rep. Q.B. 309.

[IN THE COURT OF APPEAL.]

1881. } THE MERSEY DOCKS AND HAR-
Dec. 6, 7. } BOUR BOARD v. LUCAS.*

Income-Tax—"Profits"—Statutory Restrictions—Corporation.

The Mersey Docks and Harbour Board were constituted, by Act of Parliament, a corporation for the management of the Mersey Dock Estate. Under the Act the surplus revenue of the board, which was derived from dock dues, &c., after payment of interest on moneys borrowed, was to be applied towards a sinking fund for the extinguishment of the principal moneys spent in the construction of the dock, and for no other purpose whatsoever:—Held (reversing the judgment of the Queen's Bench Division), that the surplus moneys which remained after payment of the expenses of earning the same, and which under the statute could only be applied in a particular manner for the purpose of reducing the past debt, were available as "profits," and could be assessed to the income-tax.

Appeal by the Crown from a judgment of the Queen's Bench Division upon a Special Case, reported 50 Law J. Rep. Q.B. 449, where the facts and the material sections of the Acts of Parliament relied upon are fully set out.

The Solicitor-General (Sir F. Herschell, Q.C.) and Dicey, for the Crown.

Bigham (with him Benjamin, Q.C.), for the board.

The following cases were referred to in the course of the argument: *The Glasgow Corporation Water Commissioners v. The Solicitor of Inland Revenue* (1), *The Attorney-General v. Black* (2), *The Mayor of Worcester v. The Assessment Committee of the Droitwich Union* (3), *The Mersey Docks and Harbour Board v.*

Cameron (4), *The Queen v. The Churchwardens and Overseers of Chirton* (5) and *The Coltness Iron Company v. Black* (6).

JESSEL, M.R.—The two questions we have to consider in this case are—first, whether any profits at all are earned by this board within the meaning of the Income-Tax Act; and secondly, if there are any profits earned, whether the terms of their local Act are such as to exempt them from liability to pay the tax which, but for such special provisions, would be chargeable.

As regards the first question, I am clearly of opinion that the board do earn profits which are taxable under the Income-Tax Act. Before discussing the question of profits, it is necessary to say a few words about the constitution of this board. It is a board with very large powers, for it is both a Board of Conservancy of the River Mersey and also a Pilot Board. Sections 31, 32 and 33 of the Act of 1857 shew that these additional powers belong to this board, and that it is constituted not merely for the management of the docks, but for other important public purposes. Then by sections 26 and 27 of the Act of 1857 certain property, real and personal, at Birkenhead, and all docks, lights and buoys, &c., at Liverpool were vested in the board, "subject to all charges and liabilities affecting the same;" and various other powers and liabilities are conferred and imposed upon the board, especially by sections 30 and 34 of that Act, the latter of which, after providing for the salary of an acting conservator, says that "all other expenses that are now incurred or payable by the corporation in respect of the conservancy of the Mersey, shall be paid and borne by the board." That is the position of the board. Then section 284 of the Act of 1858 shews that all moneys which shall be collected, levied, &c., by the board, under or by virtue of the Act of 1858 or the Act of 1857, are to be applied by the board, first, in payment of all the expenses and charges

* *Coram* Jessel, M.R.; Brett, L.J.; and Cotton, L.J.

(1) Court of Session Cas. (4th ser.) vol. ii. p. 708.

(2) 40 Law J. Rep. Exch. 194; Law Rep. 6 Exch. 78, 808.

(3) 46 Law J. Rep. M.C. 241; Law Rep. 2 Ex. D. 49.

(4) 20 Com. B. Rep. N.S. 56; 35 Law J. Rep. M.C. 1.

(5) 28 Law J. Rep. M.C. 131; 1 E. & E. 516; *sub nom. The Tyne Improvement Commissioners v. The Overseers of Chirton.*

(6) Law Rep. 6 App. Cas. 315.

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of collecting the rates, and in payment from time to time of all interest accruing due on moneys borrowed, and in payment of the Mersey Docks annuities; in the construction of certain works, and "in carrying into execution all the provisions of this Act and of the Mersey Docks and Harbour Act, 1857." These words, therefore, include the working of the dock as well as the maintenance of the navigation, the duties of the conservancy, the duties of the Pilot Board and various other things. Then come the words, "and in the general management, conducting, securing, preserving, improving, amending, maintaining and protecting the Mersey Dock Estate." Now these words relate to the Mersey Dock Estate, and do not include the working of the docks, which is provided for under the prior words of the section. Then we come to the words, "and the residue or surplus of all such moneys which shall remain after such application" are to be applied towards the foundation of a sinking fund, and, "except as aforesaid, such moneys shall not be applied by the board for any other purpose whatsoever." The only other section to which it is necessary to refer is section 285, which provides that "nothing in this Act contained shall alter or affect the question of the liability of the docks or works vested in the board to parochial or local rates." The question is, What is the meaning of those sections?—and that embraces the second point raised as to the liability to pay income-tax, if such tax was otherwise payable by the board but for the existence of section 284. The words of that section—subject of course to the provisions of the former Act—seem to shew that whatever tax was properly payable under the former Act is still payable, and there is nothing in this Act to discharge them from their liability to pay such taxes. I do not rest my judgment on that ground alone, because I should have arrived at the same conclusion even if there had been no such provision in the former Act, or no such reference to the former Act as is contained in section 284 of the Act of 1858. I think that conclusion may be arrived at first of all upon general grounds applicable to all similar local Acts, which cannot be better expressed than by the words of Mr. Justice

Blackburn in *The Mersey Docks and Harbour Board v. Cameron* (7), that "enactments directing that the revenue shall be applied to certain purposes and no others are directory only"—he is speaking of local Acts—"and mean that after all charges imposed by law on the revenue have been discharged, the surplus or free revenue, which otherwise might have been disposed of at the pleasure of the recipients, shall be applied to these purposes." That applies to all local Acts; and for the good reason that persons who obtain local Acts are not checked by the public, nor by the representatives of the kingdom at large; they are dealing with their own property, and not with the public right to obtain payment of taxes from that property, or in respect of it.

That would put an end to the whole argument on the part of the board, whatever the words of the section might have been. It is, therefore, immaterial whether the words "shall not be applied for any other purpose whatsoever" are or are not in the Act, because if the Act deals only with the surplus legally available at the passing of the Act it could not absolve the board from liability to pay taxes, if such liability then existed.

There is also another ground which I think would govern this case. This tax is granted to the Crown, and it is part of the prerogative of the Crown that it is not bound by any local Act of Parliament—subject to certain exceptions which need not be mentioned because they do not apply to this local Act—unless named or expressly referred to in the Act. The prerogative of the Crown has nothing to do with the mode of applying the tax. Formerly the Sovereign had control over the revenues, and applied them both to public and to private purposes. It was as much the duty of the Sovereign then, if I may say so, as it is now to apply the public revenues to public purposes; and the only difference now is that those public purposes are defined and controlled by Parliament, whereas such was not formerly the case.

It has been held on that very ground by the Court of Appeal in *Ex parte The*

(7) 35 Law J. Rep. M.C. at p. 15.

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Postmaster-General; in re Bonham (8), that the privileges of the Crown in this respect extend to the Postmaster-General; and there seems to be as much reason for applying this doctrine to the case of the Crown when the revenue received is applicable to public purposes as when it is applicable to the private purposes of the Sovereign, because the public at large require this protection. The private purposes of the Sovereign might be looked after by an officer appointed for that purpose, but as a general rule there is no one to look after the interest of the public. It is, therefore, most material that the attention of those who act on behalf of the public should be drawn to the provisions of any local or private Act which affect the rights of the Crown. It is not, however, necessary to rest my judgment upon this ground, because the second ground is sufficient to support the view that this local Act of Parliament does not relieve the board from liability to pay income-tax. There is another ground which seems to have escaped the attention of the Court below, but is one upon which I should have arrived at the same conclusions, and that is that the Income-Tax Act in question is subsequent in date to the local Act. And assuming my view of the operation of the local Act to be incorrect, I should still hold that the local Act was repealed to the necessary extent by the special provisions of the Taxing Act, which refers back to rule 3 of schedule A in section 60 of 5 & 6 Vict. c. 35. In this case the income is to be paid into a sinking fund for the benefit of the creditors; and then there is an enactment which says that this tax subsequently imposed shall be paid before and in priority to any creditors or other persons having a claim upon the profits. The words "any creditor or other person" include everybody in the kingdom, and would, in my opinion, be sufficient to make this a prior charge even if the construction of the local Act were different to the one already put upon it. For these reasons I think that there is nothing to exempt this corporation from paying the tax if it can be levied.

(8) 48 Law J. Rep. Bankr. 84; Law Rep. 10 Ch. D. 695.

The next question is, Is this tax leviable? The tax is said to be a tax upon profits, and it was argued on behalf of the board that these sums were not profits at all. It is, therefore, necessary to consider the meaning of the word "profits" in the Income-Tax Act, because it has a different meaning in law to that which it has in common parlance. The expression "rents, issues and profits of land" is constantly used by conveyancers, but those profits are the profits got out of the land, after deducting the expenses of getting them. Then the "profits of a farm" in that sense are not quite the same as the profits of the farmer, but may be fairly described as the "net produce of the land." It is plain that that is the meaning to be attributed to the word in rules 2 and 3 of schedule A. The profits mentioned in rule 2 are not the profits of a person, but are profits arising from lands, and an examination of that rule shews that the word "profits" is used in its technical sense. Then we come to rule 3, under which this tax is charged—"Rules for estimating the lands and tenements: The annual value of all the properties hereinafter described" (the tax being on the annual value) "shall be understood to be the full amount for one year or the average amount for one year of the profits received" (that is, from the properties) "within the respective times herein limited." The word is here used in exactly the same sense as that I have already mentioned. The "profit" may be received from the property in a rather different way, but it is the amount got from the property *minus* the cost of getting it. These observations apply to the properties described in the two first clauses of the rule. Then we come to the thing sought to be charged—"Third, of ironworks, gasworks, salt springs or works, alum-mines or works, waterworks, streams of water, canals, inland navigations, docks . . . and other concerns of the like nature, from or arising out of any lands, tenements, hereditaments or heritages on the profits of the year preceding." Now, of what kind are the profits? Tolls or dock rates are got on a dock or a navigation, and the net proceeds, after deducting the expenses of carrying on the docks, are the profits mentioned in the

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Act. I have no doubt, therefore, that directly the amount received for the dock rates exceeds the expenses, the difference is "profits" within the meaning of the section.

The next question is, Who is to pay the duty? Having ascertained what the profits are, the statute says that "the duty in each of the last three rules is to be charged on the person, corporation . . . carrying on the concern." Now this board, being a corporation carrying on the concern, are to pay duty upon these profits. It is immaterial under this part of the section whether any other person is beneficially interested, or to what purpose the profits are applied. It was suggested that the word "profits" is not the correct one where the net proceeds, which I call profits, are applicable to public or charitable purposes. But there is nothing to support that suggestion in the Act which treats "profits" as the thing earned from the carrying on of the concern. The Act does not regard either the person who carries on the concern, except for the purpose of saying who is to pay the tax, or the purposes to which the profits are applied, except in certain cases. Thus certain allowances are made in clause 6 for privileged persons, who would otherwise be within the previous section or rule—for instance, colleges, halls in universities, hospitals, public schools and almshouses are exempt; so also all trustees for charitable purposes, are exempt to the extent to which the rents are applied to such charitable purposes, and this shews that if it had not been for these exemptions they would have been liable to pay on the profits, although in the ordinary sense of the word, as used in trade, they took nothing, because they were all expended in charitable purposes. *The Attorney-General v. Black* (2) is an authority to shew that this is the true construction of the Act. It was argued on behalf of the board that a man cannot make a profit by selling to himself, and so far I agree; but it was then said that because twenty-four of the members of this board are elected by the ratepayers, the remaining four being appointed by the conservators, the ratepayers are to be treated as persons who pay the rates to their own nominees; so that if

they pay too much the surplus is to go to them and is not therefore a profit earned by carrying on the concern. Even if that is the meaning of the word "profits," the argument would be unsound, because the board is created, as I have already pointed out, for certain public purposes besides those of carrying on the docks; and, moreover, it is not composed exclusively of nominees of the ratepayers, because four out of the twenty-eight members are appointed by the conservators. In addition, the ratepayers who elect the board and the ratepayers who pay the rates are not the same persons; and the persons who pay the rates one year might not be exactly the same persons who would pay them the following year, so that an entirely new body of ratepayers might arise during the next year who would have taken no part in the election of the members of the board, and consequently the profits earned by the board by charging a larger sum than the expenses do not belong to the ratepayers in any sense. That part of the argument therefore fails, because it is not the fact that the persons who pay the rates are the same as those who elect the board; and even if that were the fact, this would not be the less a profit, because it is not a sum paid by one man to another. For these reasons, I think that this appeal must be allowed.

BRETT, L.J.—I am also of opinion that this appeal must be allowed. The question is whether this board, which is a corporation, is bound to make a return under the Income-Tax Act, and whether it is bound to pay income-tax. It was urged on behalf of the Crown that this corporation was bound to do so, because it is enacted generally by 5 & 6 Vict. c. 35 that persons who are owners of or in possession of a dock shall pay income-tax upon the profits actually received therefrom; that the word "profits" there means the difference between the amount actually received for the use of the docks and the expenses of maintaining them; that this corporation did receive money for the use of the docks and were subject to pay the expenses incident to the earning of that money; and that they were therefore liable to pay income-tax upon such profits. It was also

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argued on behalf of the Crown that the Mersey Docks and Harbour Board Consolidation Act, 1858, did not contain any enactment which in express terms relieved the board from liability to pay such a tax; and that even if it did contain such an enactment the board would still be liable to pay the tax, because the general taxing Act was passed after the Act of 1858. Another ground which was suggested by the Master of the Rolls in his judgment—and I think it is my duty to say whether I agree to it or not—is that, because any relief from this tax is not named expressly in this private Act, the Crown is not bound by it. As regards the question whether, assuming that the private Act did relieve the corporation from the payment of income-tax, the general words of a subsequent Act would make them liable, I say with deference that I am clearly of opinion that the subsequent Act did not impose this tax upon this corporation. A taxing Act is to be construed upon the same principle and by the same rules as any other Act; and the rule to be applied is that if the particular provisions of the private Act absolved this corporation from paying this tax, then the general words of the subsequent Act would not impose that tax and would not repeal the provisions of the private Act. I could not, therefore, agree to the judgment of my Lord upon that ground. With regard to the first suggestion made by my Lord, I again, with great deference, differ, and say that the Crown has no prerogative with regard to taxes until they have been granted by Parliament; and the question being whether this tax has been imposed upon this corporation, the ordinary construction of the Act could not be limited by asserting in any way any prerogative of the Crown. I think, however, that this general Act, provided there is nothing in the private Act to take the corporation out of its operation, does impose a tax upon the difference between the receipts for the use of the docks and the expenses of maintaining them. The question is not what is the annual value of the docks, as in the case of poor-rates, where the annual value of the property is not determined by what the person in possession of that property receives a year, but by a hypothetical pro-

position as to what a responsible tenant would pay for the property if he held it upon a lease from year to year. The Income-Tax Act takes the present case out of that doctrine and provides that the annual value under this Act shall be the full amount for one year or the average for one year of the profits received therefrom. If, in this case, there were no profits in fact, then there would not be any tax. It was not argued on behalf of this corporation that the word "profits," upon a true construction of 5 & 6 Vict. c. 35, would have any other meaning than that ordinarily given to it in trade, namely, the difference between the receipts and the expenses incurred in order to obtain those receipts. But it was argued that, by reason of the constitution of this corporation under the Mersey Docks and Harbour Acts, there were not any profits received; and that if there were any profits received in the sense that there was a difference between the actual receipts and expenditure, this corporation was, under the provisions of the Act of 1858, absolved from paying any tax. But, after careful consideration, I have come to the conclusion that I am unable to agree with that argument. It was said, in the first place, that no profits at all were earned or received, because this corporation and the ratepayers are identical, and consequently that the money received by the corporation is money really paid by the ratepayers and is not profit at all, but merely contribution between the same persons. Two hypothetical cases were put by Mr. Bigham—first, where there was nothing but contribution between the parties; and, secondly, where there was a receipt of what might fairly be called "profits." In the latter case it would be difficult to make all the parties pay income-tax, because some of them would have received no profit at all; and in the former there could be no tax to be paid because it would all be contribution. But Mr. Bigham has failed to bring the present case within the two hypothetical cases. Here the corporation is authorised to receive the rates, and the ratepayers, as has been already pointed out, are not the same persons as the corporation. The analogy therefore fails. The corporation are in possession of the docks, and are the persons

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who maintain them, who receive money for their use and who incur the expense of maintaining them in order to earn those receipts. They are therefore persons, within the meaning of the general Act, who are liable to make a return, and to pay income-tax, if not otherwise relieved by the special Act. It was, however, said that the corporation was relieved from liability to pay this tax because their special Act has directed affirmatively that they are to make certain payments, and then negatively declares that the moneys are not to be applied for any other purpose whatsoever. I think that the liability to pay income-tax is included in the affirmative enactments of that statute, and I should be sorry to base my judgment upon any former Acts referred to in this present Act, and which have not been brought before us, especially as it is stated in the Special Case and was admitted by counsel on both sides that those Acts were not material to the present case. I do not, however, say that they might not give these affirmative powers by reference, but I think there is sufficient on the face of this Act to impose this liability. The Act itself, amongst other things, provides that the corporation may pay for the carrying into execution of all the provisions of the Act, and then section 31 gives them power to pay everything which an ordinary dock board would have to pay; and even if that were not so, I incline to agree with the Solicitor-General that such a tax as this might be included under the words "and in the general management, conducting, &c., the Mersey Dock Estate," including also the Mersey Docks concern. The Act, therefore, by this affirmative enactment, seems to empower the board to pay all taxes, including the income-tax. Mr. Bigham, however, relies upon the negative part of the section, which says that "except as aforesaid, such moneys shall not be applied by the board for any other purpose whatsoever." If the construction put upon the affirmative parts of the section be the true one, then the negative part would not apply to what is contained in the affirmative parts, because the affirmative power and direction to pay these taxes would be pointed at by the words "except as aforesaid," and there would be no prohibition against paying

them. Besides, if I were of opinion that these words were not directory but prohibitory, and that the power to pay these taxes was not contained in the former part of the statute, I should agree with Mr. Bigham that no profits were received by the corporation which could be brought within the later Income-Tax Act, and that this corporation is not a corporation in possession of a dock within the meaning of the general Act which imposes income-tax. I also think that the proposition enunciated by Mr. Justice Blackburn on behalf of the Judges in the House of Lords, in *The Mersey Docks and Harbour Board v. Cameron* (7), is a true proposition and one which was really adopted by the House of Lords in the judgment of Lord Chelmsford.

I am of opinion that the words at the end of section 284 are merely directory and not prohibitory words; and there is nothing therefore to take this corporation, in respect of these docks, out of the general rule. The corporation are consequently within the general Act, and must pay income-tax upon receipts to be ascertained according to the ordinary rules applying to a trading company, namely, upon the difference between the receipts arising from the dock dues and the expenses of earning those receipts, including, amongst other expenses, this very income-tax, which they are bound to pay. I do not think that *The Glasgow Waterworks Case* (1) applies here; but I think, if I may say so, with deference, that it was rightly decided upon the facts then before the Court.

COTTON, L.J.—The question in this case is, whether the commissioners have rightly held that this board are liable to be surcharged by a sum which represents the net receipts from the dock. I will first consider whether, independently of sections 284 and 285 of the special Act of 1858, they are liable to be so surcharged. The Income-Tax Act, under which this board is sought to be charged, was passed subsequently to the Act of 1858, but it refers back to 5 & 6 Vict. c. 35. sched. A, which gives for "all lands, tenements and hereditaments in Great Britain, in respect of the property thereof, for every twenty shillings of the annual value thereof

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the sum of sevenpence." We have, however, to determine the annual value in respect of which the board are to be charged by reference to another portion of the Act, and general rules are there given for estimating the value of the lands, tenements or hereditaments mentioned in schedule A. It is only necessary to refer to that portion of rule 3 which relates to the property—namely, docks—in respect of which the board are sought to be charged. That rule says that "the annual value of all the properties hereinafter described shall be understood to be the full amount for one year . . . of the profits received therefrom within the respective times herein limited." It was said that there could be no profits here, because the persons who contribute that from which the net income arises are the persons to whose nominees the money is paid, and that therefore, as a man cannot make a profit out of himself, there is no profit in this case. Now, even assuming that the whole of the board is nominated by the ratepayers, and that their nominees are to be considered as being the same persons as themselves, the persons who nominate the board are not the same as those who in each year pay the rates from which the net income arises, because they are persons who are on a certain list of voters which does not include all those who in any year pay rates, nor all the persons who in the particular year when the assessment is made pay the same to the board who are said to be their nominees. It is, however, unnecessary to consider that, because we must consider the meaning of the word "profits" in this section of the Income-Tax Act. The profits here do not accrue to any person, as under schedule D, but are profits received from real property, the annual value of which is to be ascertained by reference to another portion of the Act. In my opinion the word "profits" means the difference between the gross sums received from that property and the expenses of receiving those sums—in other words, the net receipt from that property in any particular year.

I also am of opinion, without going further into that question, that there are profits here arising from these docks which are assessable under the Act, without re-

ference to the purposes to which they are to be applied.

It was then said that, nevertheless, certain provisions in the special Act precluded the board from being charged under the Income-Tax Act. The special Act was not passed in order to give certain powers and exemptions to the board, but, as is shewn by the recital in that Act, to consolidate certain Acts which existed previously to the year 1857, and to regulate the charges to be made by the board, and to give them power to raise certain further sums of money. Independently of that, the Act also deals with the powers of the board as regards the persons from whom they are to receive the rates, and their rights against those persons. In dealing with a private Act like this, which is intended to give additional powers to a body constituted for certain purposes, one must treat the clauses, if they do prohibit the revenues of that body from being applied in any other way but that specified in the Act, and those did not include taxes, not as being intended to deprive the Crown of the right to collect those taxes, but as dealing with the application by that board of such revenues as they had after paying the obligations imposed upon them by Parliament. It would be a wrong construction (even if the Act did not contain any words which authorised the payment of this tax) to say that general words in such an Act would take away the right to collect for public purposes any tax which otherwise would be chargeable against that body. I am not careful, therefore, to consider whether there are any terms in the previous parts of section 284 which would authorise the board to apply any of their revenues towards the payment of this tax. Even if there were not any such provision, the words "such moneys shall not be applied by the board for any other purpose whatever" cannot be taken to prevent the collection of taxes which the board would otherwise be liable to pay in respect of the property which they hold. Section 5 of the Act of 1858 moreover shews that it was not intended that the board should be exempted from taxes which the general public would have to bear but for this Act. That section, which deals with the land-tax, assumes that,

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both before and during the construction of the docks, the land might not be sufficient to provide for the assessment, and it makes provision for the board to pay the deficiency during that period; but it leaves untouched what is to be done afterwards, because the land would undoubtedly be sufficient to pay the assessment after the docks were made. That clearly assumes that section 284 does not exempt the board from any taxes which otherwise they would be liable to pay.

The principle upon which I base my judgment is, that the general terms contained in such an Act are not to be taken to exempt a body, to whom it has given certain powers for certain purposes, from the general public burden of paying taxes.

Appeal allowed.

Solicitors—Gregory, Rowcliffes & Co., agents for A. T. Squarey, Liverpool, for the board; the Solicitor of Inland Revenue, for the Crown.

[IN THE COURT OF APPEAL.]

1881. *In re An Arbitration be-*
Nov. 25, 26. *tween THE CORPORATION*
OF DUDLEY AND THE TRUS-
TEES OF THE EARL OF
DUDLEY.*

Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 4, 15, 16, 175, 308, 334—Sewer constructed upon Land—Duty on Land-owners to preserve Subjacent Support—Right to work Mines under the Sewer—Compensation for Loss of such Right and for Risk of Percolation from Sewer.

The Public Health Act, 1875 (38 & 39 Vict. c. 55), requires by section 15 certain local authorities to make all necessary sewers, authorises them by section 16 to carry such sewers under or through any land within their district, empowers them by section 175 to purchase lands (which term by section 4 includes easements) and by section 308 gives to any person who sustains damage by reason of the exercise

* *Coram* Brett, L.J.; Cotton, L.J.; and Lindley, L.J.

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of the powers of the Act compensation, the amount to be settled by arbitration. By section 334, nothing in the Act is to be construed to extend to mines so as to interfere with or obstruct the efficient working of the same.

A local authority carried under this Act a sewer through private lands. It did not purchase any lands or easement, and an arbitration was held to determine the amount of compensation. The owner of the land claimed compensation for the loss caused by his being obliged to leave his land under and adjacent to the sewer in such a condition as to give support to the sewer, and for being thus prevented from working the mines and minerals in that land; he also claimed compensation for the risk of injury to the mines caused by percolation from the sewer into the mines:—

Held, that the local authority was entitled to support for the sewer, that such a right must be implied even though not expressly given by the statute, and that the owner of the land was therefore entitled to compensation for the burden thus imposed upon his land, and for the limitation thus imposed upon the user by him of his land. Held also, that this being so, injury from percolation could only be caused by a wrongful working on the part of the owner, and that, therefore, he was not entitled to compensation for any injury so caused.

Appeal from the judgment of the Queen's Bench Division on a Special Case stated in an arbitration between the Corporation of Dudley and the Trustees of the late Earl of Dudley.

On the 6th of March, 1880, the mayor, aldermen and burgesses of the borough of Dudley gave notice to the trustees of the late Earl of Dudley, that they, as the urban sanitary authority of the borough of Dudley, would, under the Public Health Act, 1875 (1), after the 6th of July, 1880,

(1) The following sections of the Public Health Act, 1875, were referred to during the argument:—

38 & 39 Vict. c. 55. s. 4: "Lands" and "premises" include messuages, buildings, lands, easements and hereditaments of any tenure.

Section 15: "Every local authority shall keep in repair all sewers belonging to them, and shall cause to be made such sewers as may

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enter upon certain lands of the trustees in order to make a sewer as part of a general scheme of sewerage which was then being carried out by them as such sanitary authority. A dispute having arisen as to the amount of compensation to be paid to the trustees by the sanitary authority, an arbitration was held pursuant to the provisions of the Public Health Act, 1875 (1), and the umpire made his award determining that 1,100*l.* was the amount of compensation to be paid "in respect of all permanent and temporary damage or injury which may arise or be sustained" by the trustees through the "construction or maintenance of the said respective sewers, or the execution of the said works or things incidental thereto," but "exclusive of any permanent or tem-

porary damage or injury which may at any time arise or be occasioned to the several mines and minerals situate and being in or under lands through, under or upon which the said sewers are respectively carried, or in or under lands adjacent, by reason of the construction or maintenance of the said sewers, or the works incidental thereto."

The arbitrator also found that there were mines and minerals under the lands through which the sewer would run, and that in consequence of the construction and maintenance of the sewers and works incidental thereto, the mines and minerals under the lands taken could not be worked according to the customary method without causing the subsidence of the surface, risk of injury to the sewers, and risk of percolation of sewage into the mines; and he stated the following questions for the opinion of the Court:—

Whether the said mayor, aldermen and burgesses were entitled to have the said sewers supported by the land under the same, or adjacent thereto, or the said trustees were entitled to work the said minerals as freely as if the said sewer had not been made.

Whether the said mayor, aldermen and burgesses would become so entitled by twenty years user, or the said trustees or other owners would be so entitled to work the said mines and minerals for all time.

Whether, in case the said sewer should leak in consequence of the working of the mines, and sewage and water should percolate into the said mines and damage the same, the said trustees would have any cause of action against the said mayor, aldermen and burgesses for such injury and damage.

The arbitrator also awarded 3,000*l.* on the assumption that the trustees would be liable for damage by withdrawal of support from the sewers within twenty years, assuming them to have no claim for damage by percolation; but if they would have a claim for such damage, then he awarded 1,500*l.* If the trustees would be liable for damage by withdrawal of support after twenty years, assuming them to have no claim for damage by percolation, 2,000*l.*; but if they would have such a claim, then 1,000*l.* If the trustees would never be

be necessary for effectually draining their district for the purposes of this Act."

Section 16: "Any local authority may carry any sewer through across or under any turnpike road, or any street or place laid out as, or intended for a street, or under any cellar or vault which may be under the pavement or carriage-way of any street, and after giving reasonable notice in writing to the owner or occupier (if on the report of the surveyor it appears necessary), into through or under any lands whatsoever within their district."

Section 26: "Any person who in any urban district without the written consent of the urban authority (1) causes any building to be newly erected over any sewer of the urban authority" shall pay a penalty, and the section further empowers the urban authority to pull down such building.

Section 175: "Any local authority may for the purposes and subject to the provisions of this Act, purchase or take on lease sell or exchange any lands, whether situated within or without their district. . . ."

Section 308: "Where any person sustains any damage by reason of the exercise of any of the powers of this Act in relation to any matter as to which he is not himself in default, full compensation shall be made to such person by the local authority exercising such powers, and any dispute as to the fact of damage, or amount of compensation shall be settled by arbitration in manner provided by this Act. . . ."

Section 334: "Nothing in this Act shall be construed to extend to mines of different descriptions, so as to interfere with or obstruct the efficient working of the same, nor to the smelting of ores and minerals, nor to the calcining, puddling and rolling of iron and other metals, nor to the conversion of pig iron into wrought iron, so as to obstruct or interfere with any of such processes respectively."

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liable for withdrawal of such support at any time and would have no claim for damage by percolation, 1,500*l*.

The Queen's Bench Division gave judgment that the trustees were entitled to compensation both for loss incurred from their being unable to work the mines and for the risk of percolation.

The Corporation of Dudley appealed.

Jelf, Q.C., and *A. T. Lawrence*, for the appellants.—The question is whether the corporation, acting as the local urban sanitary authority, have a right of subjacent support for the sewer which they have constructed under the powers of the Public Health Act, 1875 (1); and secondly, whether the owners of mines in the soil under the sewer are entitled to compensation for the risk of percolation from the sewers into their mines. It is submitted that no right to support is gained by the local sanitary authority, so that the respondents can have no claim for compensation on that ground. By section 4 (1) the word "lands" includes easements, and by section 175 (1) any local authority may purchase or take on lease any lands; the local authority, therefore, can purchase an easement if it thinks fit. By section 15 (1) the local authority must keep in repair all sewers belonging to them. Section 308 (1) gives compensation for any damage caused by reason of the exercise of any powers of the Act, and section 334 (1) excepts mines from the operation of the Act, but that section only refers to mines which are being actually worked as mines, not to lands from which minerals may be hereafter extracted—*Dunn v. The Birmingham Canal Company* (2), *Whitehouse v. The Wolverhampton Railway Company* (3), *The Metropolitan Board of Works v. The Metropolitan Railway Company* (4), *Roderick v. The Aston Local Board* (5), *The North London Railway Company v. The Metropolitan Board of Works* (6) were cited.

(2) 42 Law J. Rep. Q.B. 187; Law Rep. 8 Q.B. 217.

(3) 39 Law J. Rep. Exch. 1; Law Rep. 5 Exch. 6.

(4) 38 Law J. Rep. C.P. 172; Law Rep. 4 C.P. 192.

(5) 46 Law J. Rep. Chanc. 802; Law Rep. 5 Ch. D. 328.

(6) 28 Law J. Rep. Chanc. 909.

The Solicitor-General (Sir F. Herschell, Q.C.) and *Anstie*, for the respondents, cited *The Caledonian Railway Company v. Prott* (7), *Uttley v. The Todmorden Local Board* (8).

Jelf, Q.C., in reply.

BRETT, L.J.—In this case the parties have left it to the Court to say what, without regard to the form in which the questions are stated in the Special Case, the law is as it affects the rights and liabilities of the two parties to this litigation. The local authority—that is, the Mayor and Corporation of Dudley—has, in pursuance of the provisions of the statute, made a sewer through the lands belonging to Lord Dudley's trustees. The trustees claim compensation, and they allege that they have a right to such compensation by virtue of the same statute.

The matters in respect of which this claim for compensation was made are two: One claim was made in respect of the burden put upon the land by the fact that the sewer has been made in the position in which it is, so that there is a necessity that it should, having been made under the statute, be supported by land. The second claim is made because the trustees allege that they are entitled to compensation by reason of the risk of percolation from the sewer—that is, of possible percolation into the mines.

Now the argument against this claim is that no burden is placed on the trustees so to use their land as to give support to the sewer, or, in other words, that there is nothing which gives the corporation a right to support for any sewer; and as to the claim for percolation, that there can be no such claim, either by action for damage done or by way of proceedings for compensation, if the trustees are bound to give support to the sewer; as in such a case percolation could only take place if it were caused by workings by the trustees on their land, carried on in such a way as to lead to percolation, in which case they would be wrongful as against the corporation.

The first question seems to be, whether

(7) 2 Macq. H.L. 449.

(8) 44 Law J. Rep. C.P. 19.

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the statute on which this case turns gives to a local authority which constructs a sewer any right against the owners of the land through which it runs, so as to entitle the local authority to claim that support shall be given to the sewer so constructed, and if it does give any right, what is that right. It is admitted that there are not any express words in the statute which give a right to support, so that the question is, whether there is any such implication to be made from the statute as to lead the Court to say that such a right is to be taken as written into the statute. I am of opinion that it may be taken as a general rule, that in cases where the Legislature gives power to a public authority to do something or to exercise some power, then there must necessarily be implied that it was intended to give to that authority such rights as are necessary rights, without the existence of which the power given would be wholly useless. A right, however, cannot be implied which is only necessary to the exercise of the power in some accidental circumstances, but the implication which I have described ought to be made in cases not arising out of accidental circumstances, unless there is something in the statute giving the power which is of necessity contrary to such implication. Here the question is as to a sewer made on or brought into land. The local authority has power to make such a sewer; and more than this, there is or may be an obligation to make it; for the Local Government Board may insist that the local authority shall make drains, if after enquiry the Board is satisfied there has been a default in the matter, for this is the effect of section 299. Section 16 (1) provides that "any local authority may carry any sewer, . . . after giving reasonable notice in writing to the owner or occupier, . . . into, through or under any lands whatsoever within their district;" and by section 15 (1) "every local authority shall keep in repair all sewers belonging to them, and shall cause to be made such sewers as may be necessary for effectually draining their district for the purposes of this Act."

On one side it is said that there is a necessary implication that the landowners on whose land or next whose land a sewer

is made must so use their land as not to take away the necessary support from the sewer. Certainly, if such persons might take away all the subjacent support from the sewer which the land belonging to them would naturally give, it would be impossible that the sewer should remain in a satisfactory condition.

Not all the land, however, which may be said to be vertically under the sewer gives it subjacent support; but it is clear that no sewer can stand if the necessary subjacent support be taken away. Then can it be supposed that the Legislature would give powers which are adverse to the right of the landowner and yet allow the landowner to act so as to make those powers abortive, ridiculous and illusive? This cannot be the case, and if there is nothing in the Act which gives in clear terms the right to the necessary support, then I think we are bound to imply in the Act a right not only against an owner of land in whose land the sewer may be made, but also against the owners of adjoining land, if such land is necessary for the subjacent support of the sewer. It is urged that subjacent support is support in a mathematical vertical line under the sewer, but I am of opinion that statutes and practical men do not deal in questions of this nature with mathematical problems, but with the substance of the matter. The support necessary for a sewer may be wider than the width or diameter of the sewer; and if the sewer be constructed at the edge of two properties, then it is possible that the land of the owner on whose property the sewer is not, may be required for the support of the sewer as subjacent support. If this be so, then such a landowner cannot use his land as freely as he did before, and he is entitled to compensation.

I do not think it is necessary judicially to determine in this case whether a right to necessary lateral support is to be implied as having been given by this statute. Lateral support is a well-known phrase, but it seems to me that sewers do not, as sewers are made as a rule, require more lateral support than the land through which they run required in its original condition. If any accidental strata of the land rendered lateral support more neces-

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nary to a sewer in a particular instance, I am not prepared to say that an implication to that effect ought to be inserted in this statute, or that such a right ought to be implied as having been given in any particular instance. It is not necessary to decide this now, but the inclination of my opinion is against implying such a right.

Then it is urged that the statute contains stipulations which must prevent the Court from making such an implication. It is said that section 175 (1) provides that a local authority may purchase lands, and that by the interpretation section the word "lands" includes easements, so that the local authority has a right to purchase the land necessary for the due support of the sewer, or that they can purchase an easement, and so that this case was foreseen and provided for.

It is true that the right is given, but that fact does not exclude the possibility that the local authority may not desire to exercise that right; the local authority is not obliged to purchase, nor is the landowner compelled to sell that right. Against this argument, too, must be set the provisions of section 308 (1), which provides for compensation for any damage sustained by reason of the exercise of any of the powers of the Act; because, if we hold that the Legislature has made the implication which we decide it has made, then it has not imposed an unjust burden on a property without the consent of the owner, for which no payment is to be made, for which there is no compensation if the local authority do not purchase; for if the implication is made, then compensation can be made by agreement, or else there can be purchase. It was then said that compensation was not to be given until a particular time, but it appears to me that no time is fixed, so that, if compensation be claimed as soon as the work is done, it must be given prospectively in this sense, that regard must be had to what will probably happen.

The result then of the implied power being read into the statute is, amongst other things, that the landowner is burdened to this extent—that he cannot take away the subjacent support, and that he is obliged to use the land so as to leave that support untouched. In most cases I believe

that would be a slight burden, but in the case of building land the duty to give subjacent support would hamper the power of building, and the owner would thus be entitled to compensation. If, again, he owned mines, and the obligation laid on him by this construction of the statute hindered him in working those mines, that again would be a tangible injury for which the statute gives compensation. So, again, in the case of trustees who may be unable to work mines in the ordinary way owing to the imposition of this burden there would be a right to compensation. This disposes of the main point on which the principal argument took place: our judgment is that the local authority has a right to subjacent support for the sewer, and has a right to impose this burden on the land of Lord Dudley's trustees; and those trustees being thus hampered in working their mines and minerals, have in consequence a right to receive compensation in the mode directed by the statute—that is, by arbitration. There remains the subsidiary question as to the injury which may be caused by percolation. This is not a question of principle, it is an accidental circumstance in this particular case; the claim is for injury to mines by percolation; but we gather that if there is a right to subjacent support, as we think there is; if there is a burden imposed on the land, as we think there is; if there is a right to compensation, as we think there is;—no such percolation as that in respect of which the claim is made could be the foundation of claim upon which the trustees could succeed either by action or by a claim for compensation under the statute. Such percolation could only result from their own wrongful working, and that could not be the ground of a claim for compensation.

It appears to me that the arbitrator meant to state that if the burden of subjacent support was imposed on the trustees they were entitled to such compensation as he has assessed, but with regard to the damage which might result from percolation we think that he could not give compensation for that, even though there may be no right of action. The judgment therefore will be in favour of the trustees, the respondents, for the sum of 1,500*l.* plus 1,100*l.*

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I would add that I do not think this judgment is inconsistent with the case of *The Metropolitan Board of Works v. The Metropolitan Railway Company* (4). The distinction is that there the Court declined to draw the inference which we draw here, and that because there was in the statute then under consideration no compensation clause; and therefore if the Court had there drawn the inference it would have in fact said that the Legislature had committed an injustice in that it imposed a burden, and gave no compensation. That being the ground of that decision it does not apply to this case.

On the point chiefly argued before us our decision is substantially against the corporation, the local authority, and they ought therefore to pay the costs of the appeal.

COTTON, L.J.—The questions are, first, whether there is a right to compensation for support; and, secondly, whether there is a right to compensation for percolation. It is not disputed that Lord Dudley's trustees are entitled to compensation for such interference as is caused by the sewer being taken through their land; the question is whether there is also a right of compensation for support. I am of opinion that there is. That sewer has been made by virtue of a statute which not only authorises, but in certain circumstances requires, the local authority to make the sewer and to maintain it. I assume that as regards subjacent support there is a greater amount of support required than would be needed if the land had been left in its natural state. I am then of opinion that by necessary implication the statute giving the local authority that power, and imposing on it that duty, gave them that which under ordinary circumstances is necessary in order to enable them to discharge that duty. It seems to me that under ordinary circumstances the same support would be necessary for the stratum of land, through which the sewer goes, in its natural state as for the sewer when made. I think it is impossible to suppose that the statute gave the local authority power to take that sewer through the land of these trustees, and put upon them the duty of maintaining it, without at the

same time giving them the right to say to the landowner that he shall not withdraw the land under or about the sewer so as to let the sewer down, or to interfere with the discharge of the duty imposed by statute; that is, I think, Parliament by imposing the duty has also given the right against the landowner to have sufficient earth left to support the additional burden which the sewer puts upon the land. It is said that here there was that which precludes us from implying that the right of the local authority in the particular stratum in which the sewer is made gives them a right to have that stratum supported by the subjacent stratum, because there is a power given by the local authority to acquire by purchase the right to support either by easement or by purchase of the land; but in my opinion that does not rebut the implication which I think there is—an implied power to require support, even though they might find it more for their advantage to buy the land out and out than to pay compensation for putting the sewer on or through another man's land; but this does not prevent the implication from arising.

Section 26 was referred to. It has special reference to putting buildings on the land, and it was said that it contains a special provision dealing with injury by surface weight, and therefore that it affords an argument against implying a right to support below. I do not think so; that section does not give a right not to be injured by pressure, but simply gives a summary remedy, a penalty against anyone who puts a building on the land, because such a building would probably injure the sewer. First there is a penalty, and then a right to have it removed immediately.

Then it was said that section 334 (1) refers to mines, and prevents the right of support from accruing. It was also urged that that section did not exclude mines altogether, and that the general power of purchase included mines, but that the making of the sewer was not to prevent the mineowner from working his mines. But the latter part of section 334 (1) shews how the earlier part is to be read. The Act refers in a distinct portion to nuisances, and looking to that fact and to the latter

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part of section 334 (1), we must read section 334 (1) as joined on to the nuisance part of the Act, and it is to be considered as applying to such nuisances as arise from the working of the mines, or to the other matters referred to in the latter part of section 334 (1).

There is then nothing in the statute which can properly prevent us from making the implication which I have said ought to be made. It was strongly urged that there must be also a right to lateral support. The question does not arise in this case, and the support required is not strictly lateral support, but support from lateral owners—that is, support from land through which the sewer does not actually run. It may well be, though it is not necessary to decide the question, that there is such a right from the mere authority to construct and maintain the sewers, as against the owners of land through which the sewer is made. The owner of the land through whose land the sewer is made was, before it was made, the absolute owner of every part of that land, so that he could bring down the surface; but as soon as the sewer is made his right to work his land is limited, for the local authority becomes the owner of the stratum in which the sewer is, so that the landowner is entitled to compensation not only for the loss of the piece of land, but for his altered position in not being any longer the owner of all the strata, and therefore not at liberty to deal with the whole of his land as he could before do. This damage is caused by the exercise of the powers of the Act, which throws obligations both on the landowner and on the owner of adjacent land, if the sewer requires lateral support from his land; but if it does not then he suffers no damage from the exercise of the powers of the statute. With regard to an adjacent owner, his neighbour is entitled to support for his land, and unless the sewer throws additional weight on the land, and causes the land to require additional lateral support, the adjacent owner suffers no damage whatever by the exercise of the powers of the Act, and in that case there is no additional burden of support imposed on him.

A sewer may be constructed on an embankment above the surface, so as to

throw additional burden on an adjacent owner. This is an exceptional case, and it may be the statute does not meet it, but I give no decision on this point. It may be this is met by the power given to the local authority to buy an easement, or to buy land, and it may be, as Lord Justice Brett has said, that the statute gives by necessary implication a right to support as against the owner of the land, and therefore gives a right to compensation in respect of support both subjacent and lateral, but that in the exceptional cases where support may be required from an adjoining or lateral owner, the Act does not by necessary implication give a right to compensation by the mere fact of giving power to make and maintain a sewer. That need not be decided now; the question now is whether the trustees are entitled to compensation, and I think they are. I agree with what Lord Justice Brett has said with regard to *The Metropolitan Board of Works v. The Metropolitan Railway Company* (4). Reference was also made to *The North London Railway Company v. The Metropolitan Board of Works* (6), which comes to this, that the sewer authority is not bound—as railway companies acting under the Lands Clauses Act are—to buy land before the works are begun, or to make the deposit required by section 85 of the Lands Clauses Act, but that it has a power given to it independent of the right to take and purchase the land for the sewer, that it need pay no compensation before the works are begun, or until the necessity for compensation appears. So that judgment does not bear on this case.

The first question must be answered by saying that the local authority is entitled to support; the next question is whether any compensation is to be paid in respect of percolation. That question must be answered in the negative, because any such percolation could only be caused by wrongful workings on the part of the trustees. As the parties leave to us to determine what this award means, we cannot interfere with the amount of compensation the arbitrator intended to give. I think Lord Justice Brett has given the explanation, and that we ought to say that as in law there is no claim for compensation for damage in respect of percolation caused by

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working the minerals, the only sum payable to the trustees other than 1,100*l.* is the sum of 1,500*l.*, which is the value of the burden by necessity imposed upon the trustees of giving sufficient support for the sewer.

LINDLEY, L.J.—I am of the same opinion. The first substantial question is whether the local authority has a right to have the sewer supported by the land on which it rests. *Prima facie* one would say there was such a right, but it was said that the true construction of the Act left the local authority to acquire that right to support when they required it, that they might get it for nothing in ninety-nine cases out of a hundred, for nobody would raise the question, and in the hundredth case they could buy the land when necessary under their compulsory powers, and so it was said that the local authority had not got the support because they had not bought it. The true construction of the Act negatives this view. There is power to make a sewer through a man's land, and a duty to maintain that sewer, and I think it would be a startling proposition to say that no right to support is acquired. It seems to me on the ground stated by Lord Justice Brett there must necessarily be implied that which is essential to the existence of the sewer as a sewer—that is to say, it must have that support without which it cannot exist at all. It seems to me there is no authority to the contrary. The case of *The Metropolitan Board of Works v. The Metropolitan Railway Company* (4) is not an authority to the contrary. That case turned on this, that the Court there would not say that there was an implied right to lateral support because there was no compensation clause. That reasoning does not apply here. I do not decide the question of lateral support, but it appears to me to follow from the necessity of the case that where there is a power to construct a sewer, and a duty to maintain and repair it, and a vesting of the sewer in the local authority, then the local authority is entitled to support—to such vertical support, at all events, as will secure the safe maintenance of the sewer.

Section 334 (1) it was said would not prevent a mine-owner from working his mines so as to leave the sewer alone. Now that section apparently puts mines out of the Act altogether. No doubt there is a difficulty in the construction, but when it is observed that there are certain portions of the Act to which if this section is attached the section becomes insensible, then I have no hesitation in putting a construction on the section which makes it sense by making it belong to those sections which deal with nuisances. That disposes of the right to support; the question as to what is the amount awarded remains. I think the amount is 1,500*l.* The award would be then bad, but the parties have left the whole matter to the Court, and we must deal with the costs as though the appeal had failed.

BRETT, L.J.—I would add that my view of section 334 (1) is the same as that which Lord Justice Cotton has expressed.

Appeal dismissed.

Solicitors—G. S. Warmington, agent for E. M. Warmington, Dudley, for appellants; Benbow, Saltwell & Tryon, for respondent.

[IN THE COURT OF APPEAL.]

1881. } PEAT v. JONES AND
Dec. 20, 21. } COMPANY.*

Bankruptcy — Set-off — Unliquidated Damages for Breach of Contract—Mutual Dealings—Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), s. 39.

To an action by a trustee in liquidation for a debt due under a contract made by the defendant with the liquidating debtor, the defendant can set off a claim for unliquidated damages arising out of a breach by the liquidating debtor of the same contract, and not exceeding the amount sought to be recovered in the action.

Appeal from the Queen's Bench Division.

The action was brought by the plaintiff

* *Coram* Jessel, M.R.; Brett, L.J.; and Cotton, L.J.

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as the trustee in liquidation of one Hill for 150*l.*, the balance of the price of iron sold by Hill to the defendants before he went into liquidation. The defendants delivered a counter-claim by which they claimed 300*l.* as damages for default made by Hill in delivering the iron under the contract. At the trial the defendants admitted that they could only recover against the trustee the sum of 150*l.*, and the jury found a verdict for the defendants on their counter-claim for that amount.

A rule having been obtained in the Queen's Bench Division for a new trial, the verdict was, on the argument of it, set aside, and judgment was entered by the Queen's Bench Division for the plaintiff for the 150*l.* claimed in the action.

The defendants appealed.

At the conclusion of the arguments, which turned upon the correspondence between, and the conduct of, the parties, the Court desired to have argued the question whether the defendants could counter-claim against the plaintiff, who was the trustee in liquidation of the person with whom the contract was made.

R. V. Williams (with him *Gully*), for the defendants.—This counter-claim can be maintained by way of set-off or defence to this action, even though the action is brought by a trustee in liquidation. It is true that a defence founded on any of the common law statutes of set-off could not be sustained against a trustee in liquidation, nor do the provisions of Order XIX. rule 3 assist the defendants; the question turns on section 39 of the Bankruptcy Act of 1869 (1). This section is wider in its

(1) 32 & 33 Vict. c. 71. s. 39: "Where there have been mutual credits, mutual debts or other mutual dealings between the bankrupt and any other person proving or claiming to prove a debt under his bankruptcy, an account shall be taken of what is due from the one party to the other in respect of such mutual dealings, and the sum due from the one party shall be set off against any sum due from the other party, and the balance of such account, and no more, shall be claimed or paid on either side respectively. . . ."

5 Geo. 2. c. 30. s. 28 (now repealed) provided that "where it shall appear . . . that there hath been mutual credit given by the bankrupt and any other person, or mutual debts between the bankrupt and any other person, . . . the

terms than any section in the previous Acts, and the tendency has always been to enlarge the mutual credit clause in successive statutes. The provisions of the Act of 1849 were, as regards this point, in force till 1869, and section 171 (1) of that statute provided for setting off mutual debts and mutual credits; the Act of 1869 has added to that "other mutual dealings."

[CORRON, L.J.—That is between the bankrupt and "any other person proving or claiming to prove." Is a trustee such a person?]

The Act of 1849 did not contain those words, but it contemplated the taking the account in the Court of Bankruptcy, and the allowing in the taking of that account a set-off of mutual debts and credits. The word "mutual" acquired by decisions an established meaning, and transactions which could not come under mutual credits and debts will be included in mutual dealings; the tendency has ever been to enlarge the class of provable debts. A plea of set-off of debts due from the bankrupt was allowed as a defence to an action by the assignee of a bankrupt.

[JESSEL, M.R.—Is that so? Was it not necessary to apply for an injunction?]

Alsager v. Currie (2) and *Gibson v. Bell* (3) shew that this was so, and *West v. Baker* (4) is an authority for the defendants here, as there the plaintiff stood in the same position as a trustee in bankruptcy, and a plea of set-off was allowed.

He was stopped by the Court.

Forbes (with him *H. Collins*), for the plaintiff.—The two questions which arise on this point are whether this is a mutual dealing within the statute, and then whether the defendant can avail himself of it against the plaintiff, a trustee in liqui-

assignees . . . shall state the account between them, and one debt may be set against another."

12 & 13 Vict. c. 106 (repealed by the Act of 1869), s. 171 enacted "that where there has been mutual credit given by the bankrupt and any other persons, or where there are mutual debts between the bankrupt and any other persons, the Court shall state the accounts between them, and one debt may be set against another."

(2) 12 Mee. & W. 751.

(3) 1 Bing. N.C. 753.

(4) 45 Law J. Rep. Exch. 113; Law Rep. 1 Ex. D. 44.

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dation. The judgment of Malins, V.C., in *Booth v. Hutchinson* (5) is against the contention of the plaintiff, but that decision can be reviewed in this Court; and the opinion of Lord Selborne, L.C., in *Ex parte Barnett* (6) is that the rule as to mutual dealings is to be determined in bankruptcy. A mutual dealing is something which will end in a debt; it does not include a claim for unliquidated damages for a breach of contract, for such cannot be called a debt until they have been ascertained. Moreover, a set-off at common law was a defence to an action, but this counter-claim is really a cross action, and it is clear from *Ex parte Dickinson* (7) and *Ex parte Musgrave* (8) that the defendant could not set this off in the Court of Bankruptcy, for that it is really a cross action and not a plea by way of defence. It makes all the difference whether the damages sought to be recovered are liquidated or unliquidated, and it is a condition precedent to the right to sue that the person claiming to sue should be able to prove the debt in bankruptcy; the debt must be estimated in bankruptcy in order to satisfy the requirements of the statute. If bankruptcy be substituted for administration in *Newell v. The National Provincial Bank* (9) that case will be found to be an authority for the plaintiff.

JESSEL, M.R.—This action was originally commenced by Hill, but before the claim was delivered Hill went into liquidation and an order was made that the action should be continued by his trustee, the plaintiff whose name now appears on the record. The action was so continued, and in complete oblivion of that fact, the defendants, although the action was brought for 150*l.*, delivered a counter-claim by which they claimed, as against the now plaintiff, the trustee, the sum of 300*l.* Of course this could not be recovered, and the

defendants at the trial reduced this claim and limited their demand to the sum of 150*l.*, and I proceed to consider the case as though this demand was raised by plea or defence, so as to get for the defendants the benefit of a set-off. The question is whether, when a trustee in liquidation or in bankruptcy sues for a sum of money due to the liquidating debtor or bankrupt, the defendant can avail himself by way of set-off of a claim against the debtor for liquidated or unliquidated damages.

The solution of this question must depend on the statute which applies to this case, and on the history of the general legislation on this branch of the law; and I may say that I should not arrive at the conclusion at which I have arrived if there had been no decisions on the subject.

The clauses which relate to mutual credits are old and have been gradually expanded since the time of George 2, when they are found in the statute passed in that reign—5 Geo. 2. c. 30 (1). The provision originally included mutual credits, then mutual debts were introduced, and now by section 39 of 32 & 33 Vict. c. 71 (1) the words are, "Where there have been mutual credits, mutual debts or other mutual dealings between the bankrupt and any other person proving or claiming to prove a debt under his bankruptcy." The whole tendency, therefore, of legislation has been in the direction of extending the powers of pleading a set-off in bankruptcy, and the same tendency has existed with regard to the debts which may be proved in liquidation or bankruptcy; and now by section 31 of the Act of 1869 all debts and liabilities, except those which do not arise out of a contract, are deemed to be debts provable in bankruptcy. No doubt the statutes which relate to the right of set-off are statutes which contemplate proceedings in a Court of bankruptcy, but if the assignee of a bankrupt, as he was then called, brought an action against one who owed the bankrupt a debt, and the defendant had a right to a set-off against the claim so made, he could apply for and obtain an injunction against the continuance of the action until an account had been taken, and that account would be taken in a Court of Bankruptcy. It appears, however, from the decisions that

(5) 42 Law J. Rep. Chanc. 492; Law Rep. 15 Eq. 30.

(6) 43 Law J. Rep. Bankr. 87; Law Rep. 9 Ch. App. 29.

(7) 48 Law J. Rep. Bankr. 36; Law Rep. 8 Ch. D. 377.

(8) 48 Law J. Rep. Bankr. 39; Law Rep. 10 Ch. D. 94.

(9) 45 Law J. Rep. C.P. 285; Law Rep. 1 C.P. D. 496.

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the common law Courts, regarding what is called the equity of the statute, allowed the defendant in such a case to plead the facts and to get the benefit of them and of the set-off without compelling him to apply for an injunction. There being, then, a series of decisions relating to this question, the Act of 1869 was passed, so that the framers of that Act knew what the law and practice were, and it is clear that there was no intention to alter the law as settled by those decisions. Having regard to these considerations, I am of opinion that we are bound to hold that the defendants in this case are entitled to the benefit of their set-off. Against this, however, it is urged that the course of decisions to which I have referred only applied to mutual credits and mutual debts, and not to the case of unliquidated damages, and it is urged that it would be hard upon the trustee if it were otherwise, and if he were to be subjected to the costs of a trial with a jury. The answer to that argument is found, I think, in considering what is the subject of a set-off. Claims for damages are the subject of a set-off, and I am of opinion that the phrase "mutual dealings" includes such a set-off as this. I do not think the insertion of the word "mutual" makes the section any clearer, but I think a contract of sale and purchase is a "mutual dealing": it puts obligations both on the vendor and the purchaser, so that matters which may be the subject of a set-off may arise out of such a contract, and damages which are provable in bankruptcy or liquidation proceedings may arise from the same contract or dealings. It is then, in my opinion, no hardship to extend the principle of the older decisions to questions of ordinary dealings. Section 72 of the Act of 1869 points out the mode of ascertaining the amount of damages, and enables a question of fact to be tried by a jury before the Chief Judge in Bankruptcy, so that the argument of hardship fails, and a claim by way of set-off is properly allowed if it is properly pleaded. In this case, as I have said, it is to be taken that any amendment was made which it is necessary should be made, so that this appeal must be partially allowed and the damages reduced to the sum of 53*l.* 15*s.*

BRETT, L.J.—Two difficulties arose in this case—one in consequence of the plaintiff being a trustee in liquidation, and the second because it is said that the money which the defendants claimed to set off was not the result of a mutual debt or a mutual dealing. I do not feel pressed by any difficulty arising from the introduction of the word "mutual." I think that mutual debts and credits mean debts and credits arising between two parties acting in similar capacities, and that mutual dealings must arise in the same way. The introduction of the phrase "mutual dealings" gets rid of any question as to whether transactions between the parties would end in a debt; and I agree with Vice-Chancellor Malins, that the words "mutual dealings" "give a more extended right of set-off than previously existed." The provisions of section 39 of the Act of 1869 (1) refer to and include proceedings in bankruptcy, but it is said that they do not apply to actions at law. The decisions under the old Acts shew that anything was allowed to be set up as a defence to an action which would diminish the claim made by the insolvent in the proceedings in bankruptcy. The reason of this was, that a trustee in bankruptcy was only able to sue in the old common law Courts by virtue of the Bankruptcy Acts; and being so admitted the Courts held him to the burden as well as to the benefit of the statute, and allowed that to be set up as an answer to his claim which would have been admitted for that purpose in taking the account in the Court of Bankruptcy. As it seems to me, that principle is applicable to the Act of 1869 as well as to the older statutes, and a defendant who insists on his right to damages has a right to claim those by way of set-off, inasmuch as they arise out of "mutual dealings." Then it has been said that in the present case the matter relied on was pleaded as a counter-claim, and that a counter-claim is a cross action, and that as a cross action could not be maintained against this plaintiff, a trustee in liquidation, this counter-claim cannot be maintained against him. But if the matters alleged do really form a matter of set-off, it matters not that the pleading is called a counter-claim; and if so, then the defendants can set them up, and if they are a

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defence to the action, they can be relied on as arising out of "mutual dealings." The form of pleadings may have an effect on the costs, but this must be treated as a defence, and the verdict entered for the plaintiff must be reduced.

COTTON, L.J.—I am of the same opinion. I agree that this counter-claim cannot be sustained as a counter-claim; but the matters alleged in it may be relied on by way of defence if they are properly raised. A succession of cases has decided that a plea of set-off will be allowed to be raised against an action by a trustee in bankruptcy in cases in which, under the Bankruptcy Acts, a set-off would have been allowed in taking the account in a Court of Bankruptcy; and I think that a defence by way of set-off ought not to be rejected on the ground that the statute itself applies in form only to a Court of Bankruptcy. Section 39 (1) of the Act of 1869 is, doubtless, more pointed than were the earlier Acts to shew that it only applied to the Court of Bankruptcy; but still all statutes applied to bankruptcy proceedings, and yet the pleas to which I have referred were allowed by a long series of decisions. In *Gibson v. Bell* (3) Chief Justice Tindal said, "The principle which the bankrupt laws seemed to have had in view from the earliest times to the last provisions made therein is this, that where two persons have dealings with each other on mutual credits, and one of them becomes bankrupt, the account shall be settled between them, and the balance only payable on either side. That this was the practice of the Commissioners of Bankruptcy, long before any statutory provision on the subject, appears clear." It must be also remembered that a Court of equity would interfere in such a case as this, and that we are a Court both of law and of equity. Such a defence as this might well not be within a mutual credit clause; but the Act of 1869 contains the additional phrase "mutual dealings," and it would seem that it was intended to apply to mutual dealings the principles previously laid down with regard to mutual credits and mutual debts. The matters alleged in this counter-claim arise out of mutual dealings, and the damages claimed are damages provable under the Bank-

ruptcy Act. Then it is said that not all damages are provable under the Bankruptcy Acts, and that is true; but the statute provides that a party who is not satisfied with the decision in the Bankruptcy Court can have the question tried by a jury; the amount will then, as here, be ascertained by a jury, and that amount is capable of being set off in the Court of Bankruptcy: so here, the defence of damages due can be set up by way of set-off, and the amount to be allowed is ascertained by a jury.

Judgment for the plaintiff.

Solicitors—Van Sandau & Cumming, agents for J. T. Belk & Parrington, Middlesborough, for plaintiff; Clapham & Fitch, for defendants.

[IN THE COURT OF APPEAL.]

1881. { THE CHINA TRANS-PACIFIC STEAM-
Dec. 12. { SHIP COMPANY v. THE COM-
 { MERCIAL UNION ASSURANCE
 { COMPANY.*

Practice—Discovery—Ship's Papers—Marine Insurance—"All persons interested"—Form of Order.

In an action on a policy of marine insurance to recover the amount of a particular average loss the defendant is entitled without an affidavit and under the old practice, which has not been affected by the Judicature Act, to an order staying proceedings until the ship's papers and other documents have been produced by the plaintiff and all persons interested in the proceedings and in the insurance the subject-matter of the action.

Appeal from a decision of the Queen's Bench Division (Grove, J., and Lindley, J.) affirming an order for discovery of ship's papers in an action to recover the amount of a particular average loss upon a policy of marine insurance.

The plaintiffs were shipowners, and effected a policy with the defendants, who were underwriters, on the ship *Vancouver* for twelve months. After the policy was

* *Coram* Jessel, M.R.; Brett, L.J.; and Cotton, L.J.

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effected the ship had her stern-post fractured and was otherwise damaged, the cost of repairing her being about 2,308*l*.

The action was brought to recover 83*l*. 18*s*. 8*d*., being the proportion of the above-mentioned sum alleged to be due from the defendants.

A Master made an order staying proceedings in the action until the plaintiffs "and all persons interested in the proceedings, and in the insurance the subject-matter of the action" should produce the ship's papers, &c., in their possession. The order in question, with the exception of the above-mentioned words, followed the form of order for production in actions upon marine insurances, prescribed by the Rules of Court, 1880, app. H, No. 17.

The Judge at chambers and the Queen's Bench Division affirmed this order.

The plaintiffs appealed.

Shiress Will (with him *A. H. Todd*), for the plaintiffs.—The defendants are only entitled to discovery from parties to the action, but not from third persons; and such discovery must also be confined to material documents which are or have been in their possession—Order XXXI. rules 11 and 12. It is, moreover, provided by Order LXI. a rule 12, that the forms contained in the schedule are to be used with such variations as circumstances may require; and then form 17 of appendix H prescribes a form of order for production in insurance cases. The words now objected to are not to be found in that form. The policy here is a time policy, and as there are also some twenty different policies effected on the ship with other underwriters it would be almost impossible to give the discovery asked for. The effect of allowing the order to stand would be to produce an absolute stay of proceedings, because it could not be complied with—*Fraser v. Burrows* (1). In *The West of England Bank v. The Canton Insurance Company* (2) an order was made staying proceedings until the plaintiffs and all interested in the proceedings should produce the ship's papers, but none of the books of practice before that decision laid it down

that discovery is to be granted against "all persons;" at the most they only shew that discovery can be given.

[JESSEL, M.R.—The practice is laid down by Chief Justice Cockburn in *Rayner v. Ritson* (3), where he points out that the underwriter is so much at the mercy of the assured as to the circumstances under which the loss has happened that he is entitled to the fullest information.]

There is nothing in the books of practice to justify the insertion of the words objected to.

[JESSEL, M.R.—The objection is founded upon a misconception, for the order has nothing to do with documents in the possession of the underwriters. BRETT, L.J.—The judgment of Baron Cleasby, in *The West of England Bank v. The Canton Insurance Company* (2) shews that the plaintiff has only to satisfy the Court that he has done what he can to produce the ship's papers.]

Hollams, for the defendants.—It is not contended that this order includes discovery from underwriters, but it is convenient and saves expense to have a form like the present one. This kind of order is invariably granted in practice without any affidavit being made by the defendants, and the underwriters are entitled to see all papers in order to guard against fraud, and the like.

JESSEL, M.R.—This appeal appears to me to have been brought under a misapprehension. The plaintiffs allege that they are the only persons interested in this ship, and they bring this action against the underwriters to recover a share of a particular average loss done to their ship. The order which has been made seems to be the common form used in insurance cases. Before the Judicature Act, the common law Judges had given very large discovery to underwriters in insurance cases for the reasons which are stated by Chief Justice Cockburn in *Rayner v. Ritson* (3). The underwriters in fact and in practice know nothing about the ship, and as the shipowner and captain know all the circumstances under which the loss occurred they are bound, when suing the

(1) 46 Law J. Rep. Q.B. 501; Law Rep. 2 Q.B. D. 624.

(2) Law Rep. 2 Ex. D. 472.

(3) 6 B. & S. 888; 35 Law J. Rep. Q.B. 59.

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underwriters, to give them much larger discovery than is given in the Court of Chancery. That led to the rule that not only parties to the action, but all persons interested, should give discovery of all documents in their possession, and that the action should be stayed until such discovery was given. This, as was explained in *The West of England Bank v. The Canton Insurance Company* (2), does not mean an absolute stay of proceedings, for if the plaintiff shewed that he had endeavoured to produce the documents, but was unable to do so, the Court would, upon application, take off the stay, and allow him to proceed with the action. It was suggested in this case that although the plaintiffs were the persons solely interested in the ship, the words "all persons interested" would also include the other underwriters. But that is a mistake. The action here is brought only for a small share of the loss sustained, and the other underwriters are not persons interested in these proceedings within the meaning of the order. The only doubt in my mind was whether the defendants ought not to make an affidavit before the order is granted, but that is not the practice, and the order, moreover, will do no harm in this case. With regard to the effect of the Judicature Act, it has been decided (2), and I agree with that decision, that the old practice as to making this kind of order has not been affected by that Act. It has been declared in affirmative words in the Rules of Court that production of documents may be ordered; and then the preface to the Rules says that where no other provision is made by the Act or Rules the old practice is to remain. Upon these grounds I think that this order should be affirmed.

BRETT, L.J.—Long before the Judicature Act, and owing to the peculiarity of insurance business, much larger discovery was given to the defendants than was given by the ordinary practice either in Chancery or at common law, and the reasons are not far to seek. The contract of insurance is a very peculiar one, because the underwriters have no means of knowing what is going on amongst the assured; and as the loss generally takes place abroad, when the ship is entirely under the control of

the assured, the underwriters are entitled to have the fullest information on the subject. The form of the policy shews that it is made on behalf of the plaintiffs and all persons interested in whole or in part, and it is impossible for the underwriters to know who are the persons interested at the time of the loss. For these reasons it has been the established practice to make these orders of discovery on the plaintiffs and without affidavits. After the Judicature Act, the question was raised whether the Rules of Court did not alter that practice, and for the reasons given by the Master of the Rolls I think it has not been affected by that Act. As to the question of the hardship of the rule pointed out by Chief Baron Kelly in *Fraser v. Burrows* (1), the judgment of Baron Cleasby in *The West of England Bank v. The Canton Insurance Company* (2) states how it is to be met, for the plaintiff may shew that there is no other person interested; or, if there are other persons interested, he must shew that he has made every effort to comply with the order, and then the Court will remove the stay of proceedings. It was then said that, because this insurance was on the ship alone, the words in the order relating to the cargo ought to be struck out. I do not agree to that; this is a common form of order, and the documents might be very material, for it might be shewn that the voyage was wholly illegal. All these are matters about which the underwriter has no information at all, and consequently it ought to come from the assured. It is therefore wise and right and according to law to maintain a form which existed long before the Judicature Act was passed.

COTTON, L.J.—I agree. My principal doubt was whether the underwriters ought not to make an affidavit shewing that there were not any other persons interested besides the plaintiffs, but that doubt is now removed. I think on the whole that we ought not to disturb the old practice which existed before the Judicature Act.

Appeal dismissed.

Solicitors—G. M. Clements, for plaintiffs; Hollams, Son & Coward, for defendants.

[IN THE COURT OF APPEAL.]
 1881. } THE ATTORNEY-GENERAL v. NOYES
 Dec. 5. } AND OTHERS.*

Revenue—Succession Duty—Voluntary Settlement of Property—Payment of Income for Fixed Period to Settlor, if he live so long—Remainder in Trust after Fixed Period, or on Death of Settlor within Period—Death of Settlor within Period—Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 2.

*Conveyance, by two separate deeds, of certain Government annuities, and also a sum of 16,000*l.* consols to trustees, on trust to pay the annuities and the current income arising from the consols to B. for the period of four years from the date of the respective deeds, if he should so long live, and then immediately from and after the expiration of such period, or the death of B., whichever event should first happen, on trust to pay the same as directed to certain of his nieces. B. died before the expiration of the period of four years:—Held (reversing the judgment of the Queen's Bench Division), that succession duty at three per cent. was payable under 16 & 17 Vict. c. 51. s. 2, not on the amount of income accruing between the death of B. and the expiration of the period of four years, but in respect of the entire annuities and the whole amount of 16,000*l.* consols.*

This was an information claiming succession duty at three per cent., which it was alleged became payable upon the death of James Blundell in respect of the succession of his niece Sarah Haighton Noyes, and his great-nieces Sarah Catherine Noyes and Ellen Haighton Noyes to certain Government life annuities, under an indenture dated the 1st of April, 1875, of which the defendants are the trustees, and in respect of the succession of James Blundell's great-nieces, Margaret Alice Noyes, Amy Noyes (now the wife of Harry Elliot), Charlotte Emily Noyes and Constance Noyes, to a sum of 16,000*l.* Consolidated Three per Cent. Bank Annuities, under an indenture dated the 18th of June, 1875, of which the defendants are also the trustees.

* *Coram* Jessel, M.R.; Brett, L.J.; and Cotton, L.J.

By indenture, dated the 1st of April, 1875, James Blundell directed certain Government life annuities which had been purchased in the names of the defendants, to be held by them immediately from and after the execution of the indenture "in trust to pay the same to or permit the same to be received by the said James Blundell or his assigns for his or their use and benefit for the period of four years commencing with the day or date of the indenture, if the said James Blundell should so long live, and immediately from and after the expiration of the said period of four years, or if the said James Blundell should die within that period, then immediately from and after his death" in trust for his niece Sarah Haighton Noyes and his great-nieces Sarah Catherine Noyes and Ellen Haighton Noyes respectively for life, for their separate use, and without power of anticipation.

By indenture dated the 18th of June, 1875, James Blundell transferred the sum of 16,000*l.* Consolidated Three per Cent. Bank Annuities into the names of the defendants to hold the same and the current income thereof in trust "to pay such annual income to or permit the same to be received by the said James Blundell or his assigns for the period of four years from the day of the date of the indenture, if the said James Blundell should so long live, and immediately from and after the expiration of the said period of four years, or the death of the said James, whichever event should first happen, in trust" over to Margaret Alice Noyes, Amy Elliot, Charlotte Emily Noyes and Constance Noyes, in four equal shares.

James Blundell died on the 15th of January, 1878, before the expiration of either of the two above-mentioned periods of four years, and the persons above mentioned became beneficially entitled to their respective shares in the annuities, and the sum of 16,000*l.* consols.

The information prayed a declaration that succession duty at three per cent. was payable on the death of James Blundell, on the value of the annuities and the sum of 16,000*l.* consols.

The defendants, by their answer, admitted that James Blundell's niece and great-nieces became beneficially entitled

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upon his death to the respective annuities, and to their respective shares of the sum of 16,000*l.*, but further contended that the only succession conferred by his death was the right to the annuities and income respectively during the interval between the death and the expiration of the respective periods of four years; and that succession duty at three per cent. became payable on the value of the annuities and the sum of consols in respect of that interval only.

At the hearing of the information in the Queen's Bench Division the following judgments were (on April 11, 1881) delivered:—

LINDLEY, J.—In this case we have to consider the principle on which succession duty is to be assessed, under circumstances which, in substance, are as follows:—

A settlor, after 1853, by deed containing no power of revocation, settled personal property upon trust for himself, for a term of four years, if he should so long live, and at the end of the term, or at his death, whichever should first happen, upon trust for other persons. Before the end of the term, the settlor died; the persons entitled in remainder then came into possession of the settled property, and the question is whether they ought to pay succession duty assessed on the whole of the settled property, or on some less sum, the income of it for the period between the death of the settlor and the end of the term.

The remainder-men did in fact come into possession of the trust property. Had the death not occurred before the four years had elapsed, no succession duty would have been payable. They had, however, during the life of the settlor a vested interest which must have fallen into possession at the end of the four years' term; and but for this fact there would be no doubt as to succession duty being payable upon the whole of the trust property.

The Succession Duty Act (1) in some

(1) 16 & 17 Vict. c. 51. s. 2: "Every past or future disposition of property by reason whereof any person has or shall become beneficially entitled to any property or the income thereof upon the death of any person dying after the time appointed for the commencement of this Act, either immediately or after any interval, either certainly or contingently, and either

of its sections uses the expression "property," and in others "increase of benefit"

originally or by way of substitutive limitation, and every devolution by law of any beneficial interest in property or the income thereof upon the death of any person dying after the time appointed for the commencement of this Act to any other person, in possession or expectancy, shall be deemed to have conferred or to confer on the person entitled by reason of any such disposition or devolution a succession." . . .

Section 5: "Where any property shall at or after the time appointed for the commencement of this Act be subject to any charge, estate or interest determinable by the death of any person, or at any period ascertainable only by reference to death, the increase of benefit accruing to any person or persons upon the extinction or determination of such charge, estate or interest, shall be deemed to be a succession accruing to the person, or the persons if more than one, then entitled beneficially to the property or the income thereof, according to his or their respective estates or interests therein, or beneficial enjoyment thereof; and the person or persons from whom such successor or successors respectively shall have derived title to the property so charged shall be deemed to be the predecessor or predecessors, as the case may be."

Section 8: ". . . Where any Court of competent jurisdiction shall declare any disposition to have been fraudulent, and made for the purpose of evading the duty imposed by this Act, it shall be lawful for such Court to declare a succession to have been conferred on such person at such time and to such an extent as such Court shall think just; and such last-mentioned person shall be deemed to have taken a succession accordingly, derived from the person making such disposition as predecessor."

Section 10 sets out the several duties to be levied and paid on different successions.

Section 20: "The duty imposed by this Act shall be paid at the time when the successor, or any person in his right or on his behalf, shall become entitled in possession to his succession or to the receipt of the income and profits thereof." . . .

Section 31: "Where it shall be required to calculate, for the purposes either of this Act or of the Legacy Duty Acts, the value of any annuity, or of any interest chargeable with duty as an annuity, such value shall, after the time appointed for the commencement of this Act, be calculated according to the tables in the schedule annexed to this Act, and not according to the tables in the schedule annexed to the Act of 36 Geo. 3. c. 52, and such annuity or interest shall be chargeable with duty accordingly."

Section 32: "The following provisions relating to the assessment and payment of duty on personal estate, and the exemption thereof from duty in certain cases—namely, the 8th, 10th,

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accruing to a person, and imposes the duty on such property, or increase of benefit, as the case may be.

The duty on successions, which is imposed by section 10, whatever it may be, or on whatever succession it may be imposed, is never payable (unless previously compounded for) until such succession falls into possession (see section 20), and then it is payable, according to the interest of the successor in it, either in one sum or by instalments, as prescribed by other sections of the Act.

In the case of a limitation to A for life, with remainder to B absolutely, sections 2, 10 and 20 would be applicable. During A's life, B has a vested remainder, the value of which depends on the value of the property and the age of A. During A's life, B pays no duty. When A dies, B pays duty on the whole property, which then falls into possession. He does not pay on the difference between the value of the property in possession and the value of the remainder when it first vested in him; and yet in one sense this difference in value is the utmost beneficial interest which accrued to B on A's death. That B in the case supposed pays on the whole property which falls into possession is quite plain, if the case falls within section 2; for in that section the word "property" is used, and no ambiguity is created by the use of the expression "beneficial interest," or "increase of benefit," and it is known as a matter of fact that remainders and reversions have always been dealt with on this principle ever since the Act has been in operation.

The 3rd section of the Act deals with joint tenants, and any beneficial interest

11th, 12th, 14th and 23rd sections of 36 Geo. 3. c. 52—shall be applicable to the personal property comprised in any succession, and to the assessment and payment of duty thereon, as if such personal property were a legacy bequeathed by the predecessor to the successor, and were subject to the said provisions, and as if the tables in the said Act referred to were the tables in the schedule annexed to this Act."

Section 38: "Where any successor upon taking a succession shall be bound to relinquish or be deprived of any other property, the commissioners shall, upon the computation of the assessable value of his succession, make such allowance to him as may be just in respect of the value of such property."

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in property accruing to any one of them by the death of any other of them is declared to be a "succession" chargeable with duty. Sections 10 and 20 must be read with section 3, and it is plain that what is meant in section 3 by beneficial interest accruing is the share of the property which on the death of one joint tenant accrues in possession to his survivor. The beneficial interest accruing is not the value of the estate or interest of the deceased whilst he lived, nor the difference between the value of the survivor's chance of succession to the share of the deceased when he was alive, and the value of that share when it falls into possession, but is the whole share which on the death of the deceased accrued to the survivor in possession. It is obvious that any other principle would involve the possibility of one of many joint tenants succeeding by the death of his co-tenants to a very large property, and paying next to nothing for succession duty. The 5th section relates to property, subject to some charge, estate or interest, determinable on death; and enacts, in substance, that the increase of benefit accruing on the determination of such charge, estate or interest to the person beneficially entitled to the property subject thereto shall be a succession—that is to say, property chargeable with duty under the Act. This section must also be read with sections 10 and 20; and here again it appears to me that "increase of benefit" means that which is set free and accrues in possession to the owners of the property which was, but is no longer, subject to the charge, estate or interest, which has ceased. The principle underlying the whole statute appears to be that when a person comes into possession of property on a death, the beneficial interest in it, or the increase of benefit which then accrues to him, is the whole property which he so comes into possession of, and not the difference in value between that property and the value of any estate or interest he may have had in it before he came into possession of it—*The Lord Advocate v. McDonald* (2), *Harding v. Harding* (3), *Wilcox v. Smith* (4).

(2) 24 Scotch Sess. Cas. 1175.

(3) 2 Giff. 597.

(4) 4 Drew. 40; 26 Law J. Rep. Chanc. 596.

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In the event which happened, the defendants, who in this case came into possession of a certain trust fund on the death of the settlor, are chargeable with duty accordingly, and can, in my opinion, derive no benefit from the fact that if he had not died so soon they would have obtained the same property free of duty. It was contended that the defendants were entitled to some allowance under section 38, on the ground that they had upon coming into the trust property on the death of the tenant-for-life been deprived of their reversion expectant on the expiration, by effluxion of time, of the term created by the settlement. But that section appears to me to contemplate two properties, one of which is gained and the other lost, and not two alternative titles to the same property, one of which takes effect and thereby excludes the operation of the other. The defendants, it is true, are deprived of the chance of not having to pay succession duty, but it is obviously absurd to say that they are deprived of that property into the possession of which they have come and to which they are absolutely entitled.

My opinion in favour of the Crown is not based on section 8, which relates to schemes to evade the Act. Although this settlement may have been made to evade the Act, there is nothing secret or fraudulent in it. Moreover, the conclusion at which I have arrived is applicable to all limitations for terms of years (whatever the length may be) determinable on a death. In my opinion there ought to be judgment for the Crown as prayed by the information.

GROVE, J.—I regret that I take a different view from that entertained by my brother Lindley. For the Crown it is contended that as the nieces got into possession of the property by the settlor's death, they are bound to pay succession duty upon the whole property. The argument on the other side is, that as all they got or could get by his death was a succession for a year and a-half, they, having the property in them by an irrevocable settlement before, are only bound to pay duty for that period. I am of opinion they are only bound to pay that amount of duty. It was argued for the Crown

that this was in fact an evasion of the Act within section 8; and had that section applied, succession duty would clearly have been payable upon the whole; but I agree with my brother Lindley that this case cannot be, and in fact it was not seriously argued that it could be, brought within the section which merely has reference to a fraudulent disposition made by a testator for the purpose of evading the Act. The section does not apply, because in due course the settlor would have got rid of his power of disposing of his property if, as it is here admitted, this were a *bona fide* settlement.

Now assuming this settlement does not come within that section, but is a *bona fide* absolute conveyance of the property, then we come to consider, how would this case stand, supposing there had not been this relationship between the settlor and the persons upon whom he settled it, but that it was done by other people, or done by him under other circumstances? Section 2, upon which my brother Lindley relies, uses not only the word "property," but the words "by reason whereof a person has or shall become beneficially entitled to property;" and also afterwards, "and every devolution by law of any beneficial interest in property," &c.; and it then goes on to say that such person shall be deemed to be a successor or predecessor. Then by the interpretation clause the term "real property" is to include "all freehold, copyhold, customary leasehold and other hereditaments and heritable property, whether corporeal or incorporeal, in Great Britain and Ireland, except money secured on heritable property in Scotland, and all estates in any such hereditaments." The term "property" therefore does not appear in any way to involve in all cases the whole fee-simple of the property, but an estate in property, and seems to mean the kind of thing upon which succession duty is to attach. And my view is that it is not to attach in respect of the whole property when it first comes into possession by death—it does so in some cases—but substantially in respect of the beneficial interest.

Now section 5 shows that the word "property" in section 2 does not mean the whole *corpus* of the property, but the

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beneficial interest into which the successor comes; so, again, sections 35, 36 and 37 give the mode of estimating the value.

There are also other sections in the Act which tend to shew that the payment of succession duty is in respect of the beneficial interest which the successor gets by the death of the person. When he does not get the property by death he pays no succession duty. It is true that in certain cases in the Act the first successor, who gets the property which coalesces with a subsequent reversion, but all of which comes upon the death of the testator, has to pay succession duty upon the whole; but to my mind those cases do not apply to this case, where a person has got it by an independent conveyance totally irrespective of the death of the predecessor, and the party therefore gets nothing by his death except the intermediate term or period which would elapse before he could otherwise get into possession of the property, but which would not in any respect alter his claim to the property after, as in this case, the lapse of four years.

Now section 10, which relates to the thing upon which succession duty is to be paid, seems also to shew that it is not to be paid upon the property in any sense as a whole, but according to the value of that to which the party succeeds.

Assuming in this case, as we are bound to assume, that this was a *bona fide* conveyance, there is an absolute vested reversion in the nieces at four years from the date of the settlement. The property can be sold in the market. It is to all intents property which can be dealt with as far as purchase and sale goes. It is true they cannot enter upon it, but it has all the incidents of property which is not liable to succession duty if the four years elapse.

Now I cannot discover a substantial difference between the present case and that of the nieces having obtained or purchased an estate from another source—not from their uncle but from somebody else—subject to a four years' lease determinable with the uncle's or some other person's lifetime. There is nothing in the Act to the effect that the persons who bought and paid for the property are to pay succession duty because there is a four years' lease dependent upon the life of the lessee, and

because the lessee dies a day or two, or a week, before the time at which they would become absolute owners in possession of the property. The case now put would, it seems to me, come directly within section 5, but it may be that the present case does not come within that section. If the successors here are liable to pay duty on the whole estate, I see no reason why, in the case of a sale by A to B of a reversionary estate for value, subject to a lease for four years, if the tenant shall so long live, the purchaser should not be liable to succession duty upon the whole if the tenant dies within four years; and the Act would, but for section 12, apply by parity of reason to such a case as this. In the present case, the nieces do not get into possession, nor succeed at the time of the settlement, to the whole property—by virtue of the death they only obtain an earlier possession of it; I cannot avoid thinking there is a fallacy underlying the argument for the Crown which arises from the tacit assumption that this is, in fact, an evasion of the Succession Duty Act. The meaning of the Act, as I read it, is that the successor is to pay duty upon that which he gets by the succession. In this case the successors get into the whole estate that they have got before, but they get the enjoyment of it a year and a-half earlier than they otherwise would have done, and upon that alone is succession duty payable. My judgment must therefore be against the Crown.

Judgment was then entered for the defendants, and the Crown appealed.

The Solicitor-General (Sir F. Herschell, Q.C.) and W. W. Karlake, for the Crown.—Succession duty is payable on the whole of this property under section 2 (1). If the period of four years had elapsed, then no duty would have been payable.

[JESSEL, M.R.—The whole question turns upon the meaning of the word “property” in section 2.]

The Act does not apply to the case of sales or conveyances. This was a voluntary disposition, and on the happening of the event—the death of the settlor—the defendants became entitled to the whole of the property. By section 2 (1) the duty imposed by the Act is to be paid when the

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successor shall "become entitled in possession" to his succession or to the receipt of the income—that is, succession duty must be paid on the full value of the property into which the successor has come. Section 38, which was relied on by the other side, does not apply here, but where a person who comes into a certain property has to relinquish other property; and then that is to be taken into account. So also sections 1 and 10, which together give a definition of "succession," do not aid in ascertaining what is the "property" to which a person becomes entitled under section 2. Grove, J., in the Court below thought that section 5 threw some light upon the intention of the Act.

[JESSEL, M.R.—That section applies to the case of a tenant in possession, whose possession is subject to some partial interest outstanding.]

The defendants had only a reversion in this property, and until the death of the settlor or the happening of the other event, were not "entitled in possession." But on the death of the settlor they became entitled to the whole property and the income, upon the whole of which they are liable to pay succession duty.

Sections 31 and 32 were also referred to.

Benjamin, Q.C., and *Dryden*, for the defendants.—The defendants are only liable to pay succession duty on the income that would accrue between the date of the settlor's death and the determination of the four years. The settlor before his death parted with the whole of his interest, except a certain one, in this property. It was vested as a reversionary interest in his nieces, to whom it belonged absolutely at the expiration of the four years. It is admitted that this is a succession, and section 32 points out how the assessment of personal property is to be made.

[JESSEL, M.R.—The governing words of that section—"personal property comprised in any succession"—do not help you.]

That section, which refers to the Legacy Duty Act (36 Geo. 3. c. 52), deals exclusively with the mode of valuing annuities which come on the death of any person, and not with the gift of the *corpus*. The effect of the alternative event which happened was simply to give the additional

intervening interest, namely, the intervening income. The capital already belonged to and was in the possession of the nieces; it was held for them by the trustees from the moment of the settlement. Section 5 is directly in favour of this contention.

[JESSEL, M.R.—Is there not a distinction between "possession" and "title" ?]

The possession of the trustees is the possession of the nieces.

[JESSEL, M.R.—The trustees were not in possession in that sense. No doubt they had the legal possession, but the equitable possession was in the tenant-for-life or the tenant for four years determinable by death.]

The capital value of the annuities was given in advance, and that value is to be calculated under 36 Geo. 3. c. 52, according to the term or interest which a person gets by the death. The controlling language of the whole of that Act is the "benefit" derived by the person who receives the legacy by reason of the death, and that language was adopted by Grove, J., in the Court below. Assuming this to be a legacy of annuities, the calculation of the benefit is to be based upon the number of years the successor is likely to receive it by reason of the death. A "succession" throughout all the Succession Duty Acts is the actual benefit conferred by death. The question here is, whether the actual benefit conferred can be more than the intervening interest.

Le Marchant v. The Commissioners of Inland Revenue (5) was also cited.

The Solicitor-General was not called on to reply.

JESSEL, M.R.—The question we have to decide is, whether the Crown is entitled to duty on the whole of this property, or only on the income for the period which elapsed between the death of Dr. Blundell and the expiration of the four years. The Court below held that the Crown was only entitled to duty on the amount of income accruing between the death of Dr. Blundell and the expiration of the four years.

It is clear that this is a "succession" within the terms of section 2 of 16 & 17 Vict. c. 51. The death of Dr. Blundell

(5) 45 Law J. Rep. Exch. 247; Law Rep. 1 Ex. D. 185.

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was, by reason of the disposition of the property, the event by which his nieces became entitled as beneficiaries, and the predecessor was Dr. Blundell himself.

Then section 32 says that certain provisions of the Legacy Duty Act (36 Geo. 3. c. 52) shall be applicable to personal property comprised in any succession as if such personal property were a legacy bequeathed by the predecessor to the successor; and section 10 gives the amount of duty to be paid on different successions. That is the result of the Act.

Section 5 is the only other one which will aid the construction of section 2. The effect of that section is that, if, where a person is in possession of property, any other estate or charge upon the property comes to an end by reason of death, the increase of income is to be charged with duty. So that the whole of the property, the subject of succession, is to be charged as mentioned in section 32. On the death of Dr. Blundell the event happened by which the successor became entitled, and the whole of the property—that is, the personal property, which is to be treated as if it were a legacy bequeathed by the predecessor to the successor—is the property comprised in the succession. The section undoubtedly applies to the whole of this property, and a title accrued to the defendants at and from the period only when Dr. Blundell died. It was said that the defendants only gained by his death the amount of income that accrued in the four years; but the Succession Duty Act does not apply merely to the increase of benefit which would accrue to the successor, but also to the property which is acquired on the happening of the event. This appears to be as much within the spirit as within the letter of the Act. It cannot be said that the fact that an alternate event might possibly happen could make any difference. The event upon which the defendant's title accrued has already occurred.

In the course of the argument I put the case of an estate limited to a person during widowhood: if the widow married again the successor would not have to pay duty; but if she died before she married again, then duty would be payable. In the same way, an estate might be limited in twenty different ways, one of which might be

death; and if that event happened, succession duty would be payable because the title had accrued upon the death, although there were numerous other events, upon the happening of any one of which it might have accrued. It was suggested in argument that it might so happen that a very old man who could not possibly survive a given number of years might settle his property as was done in this case, and then the person who on his death becomes entitled would pay no duty, or next to no duty, to the Crown. That might undoubtedly be called an avoidance of the Act; but still, if the spirit of the Act was that persons who by free gift acquired property from another should not pay duty on that property, that would be a case which the Act was not intended to cover. I prefer, however, to rest my decision upon the letter of this Act, although the letter and the spirit are the same. I think, therefore, that the judgment of the Court below should be reversed.

BRETT, L.J.—It is not doubted that this case is within section 2, that there has been a succession, and that some succession duty is payable. The question is, How is that section to be applied to a case where the disposition contains alternative conditions? It seems to me that the decision in all these cases depends upon a consideration of the application of the disposition in question at the moment of the death of the settlor; and that, where by reason of a voluntary disposition a beneficial interest takes effect in favour of one person on the death of another, succession duty must be paid on the full value of the property without regard to the consideration that the same interest in the same property might, on the happening of some other event, have come to the same person at another time than on the death of the settlor. One alternative condition—the lapse of a period of four years before the death of the settlor—did not happen at all. The only condition which did happen was the death of the settlor within the four years. Immediately at and from his death the whole of the interest was to pass into the possession or take effect in favour of these nieces. The other alternative which never happened is to be

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regarded as if it never had been in the settlement at all. That seems to be the true construction of section 2, and our decision must be in favour of this appeal. It was argued that section 32 would help us to come to a different construction; but that section does not apply until the thing to which it does apply has been determined. Now that depends upon the application of section 2 to the disposition in question. With regard to section 38 any argument that is founded thereon seems to me to be wholly unsupportable.

COTTON, L.J.—I also agree that the judgment of the Court below must be reversed. The difficulty that arises is as to the meaning of the word "property" in section 2 of the Succession Duty Act. Now under the terms of the settlements, there were two alternatives, upon the happening of either of which the defendants would become entitled to the property. The event which has happened is the death of the settlor within the four years.

It was said that the defendants became entitled to the property before the expiration of the four years; but the fallacy of that argument consists in treating the defendants as being entitled by an independent settlement to the remainder in the property after the expiration of the four years, and also as if the effect of a settlement of the term of four years to the settlor for life, and afterwards to the defendants, was under consideration. The case comes, in my opinion, within section 2, and the defendants became beneficially entitled to the property upon the death of the settlor.

It was also said that the defendants, as regards their ultimate interest in this property after the term of four years, were in fact in possession, because they were in possession of the 16,000*l.* consols by means of their trustees during the four years. But that was not so. The trustees held the property not for the defendants only, but for all persons interested; and if their possession is to be regarded as the possession of the *cestui que trusts*, I am unable to see how any settlement could come within section 2. I am of opinion that the defendants did, upon the death of the

settlor, become beneficially entitled to the 16,000*l.* consols and the annuities within the meaning of the section. The other sections of the Act which were relied on by the defendants do not help us to construe this section.

Appeal allowed.

Solicitors—The Solicitor of Inland Revenue, for the Crown; S. F. & H. Noyes, for the defendants.

1881. { THE QUEEN v. THE LICENSING
Dec. 7. { JUSTICES OF CUMBERLAND; *ex parte* WAITING.

Licensing Acts—Grounds of refusal of Licence specified in writing, but only orally communicated to the Applicant—Qualification—3 & 4 Vict. c. 61. s. 1—Beerhouse Act, 1869 (32 & 33 Vict. c. 27), s. 8—Licensing Act, 1872 (35 & 36 Vict. c. 94), s. 45—Construction.

The appellant applied to the Justices for the county of Cumberland, at the general licensing sessions, for an off-licence, but his application was refused by the Justices on the ground that he had not a sufficient qualification, as required by 3 & 4 Vict. c. 61. s. 1. After having heard the evidence the Justices retired to consider the appellant's among other applications, and the clerk of the Court made a minute of the grounds of the refusal of the appellant's, among other applications refused. These minutes were read by the clerk on the Justices returning into Court, and the appellant was present when the same were read, but no copy in writing was asked for by him or given to him:—Held, that the minute made by the clerk of the grounds of the Justices' refusal was a sufficient specification in writing to satisfy the requirements of the Beerhouse Act, 1869, s. 8. And, further, Held, that section 45 of the Licensing Act, 1872, does not repeal 3 & 4 Vict. c. 61. s. 1.

This was a motion on the part of one Waiting for a *mandamus* to the Justices of Cumberland to hear and determine his application in writing, made at the general

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licensing sessions, holden on the 1st of September, 1881, for a licence to sell intoxicating liquors to be consumed off his premises. The said application was refused by the Justices on the ground that the premises for which the licence was sought were not rated on a rent or annual value of 15*l.* in a place the population of which exceeded ten thousand, and that therefore the said house was not duly qualified, as by law required, and that the licence must be refused on the fourth of the grounds of refusal set out in the Wine and Beerhouse Act, 1869 (32 & 33 Vict. c. 27), s. 8 (1). The Justices having retired to consider applications for licences, the Clerk made a minute of the grounds of the refusal of all those licences not granted, and among them the appellant's, which minute was subsequently read out in the presence of the applicants, but no copy was made or given to them. Thereupon the applicant obtained a rule *nisi* for a *mandamus*, calling on the Justices to hear and determine the application, on the ground that the Justices did not specify the grounds of their decision in writing, as required by the Wine and Beerhouse Act, 1869 (32 & 33 Vict. c. 27), s. 8 (1), and that the qualification required by 3 & 4 Vict. c. 61. s. 1 (2) is no longer required, because that

(1) 32 & 33 Vict. c. 27. s. 8: "No application for a certificate under this Act in respect of a licence to sell by retail beer, cider or wine, not to be consumed on the premises, shall be refused except on one or more of the following grounds: 1. . . . 2. . . . 3. . . . 4. That the applicant, or the house in respect of which he applies, is not duly qualified as by law is required.

"When an application for any such last-mentioned licence is refused on the ground that the house in respect of which he applies is not duly qualified as by law is required, the Justices shall specify in writing to the applicant the grounds of their decision."

(2) 3 & 4 Vict. c. 61. s. 1: "No licence to sell beer or cider by retail under the said recited Acts, or this Act, shall be granted to any person who shall not be the real resident holder and occupier of the dwelling-house in which he shall apply to be licensed, nor shall any such licence be granted in respect of any dwelling-house which shall not, with the premises occupied therewith, be rated in one sum to the rate for the relief of the poor of the parish, township or place in which such house and premises are situate on a rent or annual value of

section is repealed by the Licensing Act, 1872 (35 & 36 Vict. c. 94), s. 45 (3).

James Paterson shewed cause.—The grounds of the decision were in fact specified in writing, namely, the minute made by the clerk, and that writing was communicated to the applicant by the clerk reading the minute in his hearing. The Justices are not bound to give a copy of the writing to the applicant—certainly not unless it be asked for, and there is no evidence that it ever was asked for. The object of the Legislature in passing section 45 of the Licensing Act, 1872, was to enact fresh provisions as to the qualifications of those to whom thereafter licences to sell intoxicating liquors for consumption on the premises were to be granted, but not to alter the law as to off-licences.

C. F. Wright (with him *A. Henry*), in support.—No duty is cast on the applicant to ask for a copy. The words are, "shall specify in writing to the applicant the grounds of their decision." Section 45 of the Licensing Act, 1872 (2), contains two parts, the second of which clearly refers to on-licences. The first part, therefore, presumably deals with off-licences, for the section contemplates some licence being attached to the premises; that licence is in terms not an on-licence, and it must therefore be an off-licence; and by the words of the section the grant is not to be "subject to any of the qualifications now in force." This, therefore, practically repeals section 1 of 3 & 4 Vict. c. 61 (2).

FIELD, J.—I think good cause has been shewn against this rule, and therefore it

15*l.* per annum, at the least, if situated in the cities of London or Westminster, or within any parish or place within the bills of mortality, or within any city, cinqueport, town corporate, parish or place, the population of which, according to the last Parliamentary census shall exceed ten thousand, . . . " &c.

(3) 35 & 36 Vict. c. 94. s. 45: "Premises to which at the time of the passing of this Act no licence under the Acts recited in the Wine and Beerhouse Act, 1869, 'authorising the sale of beer or wine for consumption thereupon' is attached, shall not be subject to any of the provisions now in force, prescribing a certain rent or value or rating as a qualification for receiving any such licence."

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must be discharged. It was said in support of it that the magistrates did not sufficiently hear and determine the application in question. The applicant asked for an off-licence, and according to the provisions of the statute such an application can only be refused on one of four grounds mentioned in section 8 of 32 & 33 Vict. c. 27. The magistrates in this case took evidence on the point, brought their judgment to bear on it, and in the result came to the conclusion that that evidence did not satisfy them that the house of the applicant was of a greater annual rateable value than 15*l*. No evidence was put before them that the population was less than 10,000; and they therefore refused the licence on the ground of want of qualification as by law is required. But it is said that all that was necessary was not done, because there was no specification in writing of the grounds of their refusal. Now it appears that the magistrates retired to consider their decision, in the result determined to refuse the licence, and their clerk made a minute in writing of their refusal and the grounds of it, which minute was read out by the clerk of the Court in the presence of the applicant. It is difficult to know what more they could have done. If the applicant had said "Give me a copy," and they had refused, it may be that he might then think that they had not done all they should have done. The reason of their refusal was, however, specified in writing and read out to the applicant; and I cannot help thinking that where an applicant does not ask for a copy there is no duty cast on the magistrates to give him one. The rule, therefore, fails on that ground.

The remaining point contended for is that the effect of section 45 of the Licensing Act, 1872 (35 & 36 Vict. c. 94), is to do away with the necessity for the qualification mentioned in section 1 of 3 & 4 Vict. c. 61, in a person applying for an off-licence. The learned counsel for the appellant relies in support of the contention on the well-known principle of construction, that where two Acts are inconsistent in any of their terms and provisions, the older has, to that extent, to give way to the younger. The 45th section of the Licensing Act, 1872, is not happily

drawn; and the language lends a colour to such a contention: but I think that is not the intention of the Act, which is making a new code for granting on-licences, there being already certain qualifications rendered necessary by 3 & 4 Vict. c. 61, which this Act is intended to augment in certain cases.

I think what is really meant may be put thus: "We won't disturb any existing on-licence; but if you come to us for a fresh one, you must have further qualification." This, I think, is consistent with the scope of the Act; and I cannot give the effect sought on the appellant's behalf to be given to section 45. The rule, therefore, fails on this ground, and must be discharged.

CAVE, J.—I am of the same opinion. The statute requires a specification in writing of the grounds of refusal of an off-licence; and that provision is, I think, introduced for the benefit of the applicant. I think it is enough for the purposes of this case if we hold that the magistrates are only bound to give a writing to the applicant if it is asked for, provided that the objection is made in writing, though communicated orally to the applicant. As regards the second point, the generality of the words of the section furnishes some ground for the contention made on the applicant's behalf. The section is not clearly drawn, but I think must be limited in a certain way; and the only limitation consistent with the purposes of the Act is to hold that the section means, "If you are going to ask for an on-licence, not having one already, you must be subject to" the qualification thereafter enjoined. The rule must therefore be discharged.

Rule discharged with costs.

Solicitors—Helder, Roberts & Gillett, agents for Atter, Whitehaven, for appellant; Wood & Wooton, agents for Milburn, Workington, for respondents.

[IN THE HOUSE OF LORDS.]

1881. } MULLINS v. THE TREASURER
 Nov. 8, 11, 24. } OF THE COUNTY OF SURREY.

Justice of Peace—Expenses of conveying Prisoners to Gaol—27 Geo. 2. c. 3. s. 1; 11 & 12 Vict. c. 42. s. 26; 28 & 29 Vict. c. 126. ss. 5 and 8—The Prison Act, 1877 (40 & 41 Vict. c. 21), ss. 4, 28, 57—Period of Committal—Prison Authority.

The expenses of conveying to prison a person summarily convicted or committed for trial in all counties except Middlesex are "expenses incurred in respect of the maintenance of prisons, to which" the Prison Act, 1877, applies, "and of the prisoners therein," within the meaning of section 4, as interpreted by section 57 of that Act, and are therefore payable out of moneys provided by Parliament.

This was an appeal from a decision of the Court of Appeal reversing one of the Queen's Bench Division. The case is reported in the Courts below, 49 Law J. Rep. Q.B. 257; 50 *ibid.* 181; Law Rep. 5 Q.B. D. 170; *Ibid.* 6 Q.B. D. 156.

On the 12th of August, 1879, the police magistrate for Lambeth, in the county of Surrey, convicted one Lydia Barnard of being drunk and disorderly, and adjudged her to be imprisoned in the prison at Westminster, in the county of Middlesex, for fourteen days; he also committed one John Allcroft for trial for felony. The plaintiff, acting under warrants of commitment, conveyed the said Lydia Barnard and John Allcroft respectively to the prisons at Westminster and Clerkenwell, in the county of Middlesex.

The prisoners being unable to pay the expenses of their conveyance, the magistrate on the 14th of August, acting in the case of Lydia Barnard under 27 Geo. 2. c. 3, and in the case of John Allcroft under 11 & 12 Vict. c. 42. s. 26, ascertained the sum which ought to be paid to the plaintiff for so conveying them, and made an order on the defendant to pay such sums to the plaintiff.

The defendant in each case refused to pay, on the ground that the liability to pay such sums had been transferred from the defendant to the Secretary of State by the Prison Act, 1877.

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The question was brought before the Queen's Bench Division, the facts being stated in a Special Case. That Court decided that the expenses in question were not "expenses incurred in respect of the maintenance of prisons . . . and of the prisoners therein," which by the Prisons Act, 1877, s. 4, were made payable out of moneys provided by Parliament. Judgment was accordingly given for the plaintiff.

The Court of Appeal reversed this decision.

The plaintiff appealed.

Sir H. Giffard, Q.C., and Poland (A. L. Smith with them), for the appellant.—The object of section 4 of the Prison Act, 1877, is to transfer to Government the expenses previously payable by the prison authority under the Prison Act, 1865 (28 & 29 Vict. c. 126), s. 8, out of the county rate—see the definition of "maintenance of a prisoner," in section 57. These expenses did not include the cost of conveying accused or convicted persons to prison. There was considerable variety as to the mode in which such cost of conveyance was to be paid. Where a man was taken up by a policeman and carried to a lock-up there was no statutory provision, but the practice has been to pay the expenses out of the police rate, which is distinct from the county rate; *e.g.* in London the Metropolitan Police Rate, which is distributed over several counties. The same practice has prevailed as to conveyance of prisoners from lock-up before the Justices. Expenses of conveying a prisoner arrested under a warrant are payable as provided by 3 Jac. 1. c. 10 and 27 Geo. 2. c. 3. s. 1—that is, if the prisoner cannot himself pay them, by the treasurer of the county, who is to be allowed the amount in his accounts by the Justices in quarter sessions. The like provision is made in 11 & 12 Vict. c. 42. s. 26 in regard to prisoners committed for trial. It is contended that although the Justices in quarter sessions are the prison authority, yet the allowance by them in the treasurer's accounts of the amounts so paid is not a payment by them as prison authority.

The terms of the Prison Act, 1877,

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s. 4, apply to "prisoners therein." No person answers that description until he has been brought to the prison.

[LORD BLACKBURN referred to section 57.]

That is the definition of "prisoner," and declares that it means "any person committed to prison." We say that "committal" means the actual lodgment of his body in custody in prison, not the mere order for such lodgment, though often popularly spoken of as commitment. The words, "removal from one place of confinement to another," refer to removal under section 25 of convicted prisoners from one prison to another.

The Solicitor-General (Sir F. Herschell, Q.C.) (E. Baggallay with him), for the respondent.—The expenses in question are subject to alteration and control by the Secretary of State (see section 24), and are therefore within the principle upon which the Act proceeds, that the county is not to bear expenses it cannot control. It is contended that they are expenses of "removal from one place of confinement to another or otherwise."

"Committed," in section 57, is used in the ordinary sense with reference to the commitment or order which makes a man a "prisoner" within the meaning of the Act. In section 27 "committal" and "imprisonment" are mentioned as two distinct things. In section 28 "commit" is used in the same sense.

Then as to these not being expenses payable by the prison authority, as such, the interpretation clause (section 61) merely defines, by reference to the Act of 1865, who the prison authority under the Act is—that is, the Justices in quarter sessions assembled. Having that definition we may substitute "Justices in quarter sessions assembled" all through for "prison authority." These are expenses of maintenance of prisoners, and they are payable by the prison authority out of the same fund as other prison expenses.

Again, if the Act had said generally that all expenses payable by the prison authority should be transferred it might be necessary to examine strictly what expenses were payable by the prison authority as such. But in fact the expenses transferred are all strictly defined,

Further, the expenses to be paid under the Act include expenses not previously paid by the prison authority—those, namely, incurred in the transference from one prison to another—for there was no such transference before the Act.

[LORD PENZANCE.—No provision is made as to ascertaining the amount. Is the old provision of an order upon the treasurer preserved; and if so, where is the control of the Government?]

The expenses might be paid by the treasurer in the first instance and repaid afterwards by the Treasury, as in the case of prosecutions.

Poland, in reply.

Cur. adv. vult.

LORD BLACKBURN.—It appears by this case that a woman was summarily convicted before a magistrate sitting at Lambeth, in the county of Surrey, of an offence committed in the county of Surrey, and sentenced to imprisonment. Before the passing of the Prison Act, 1877, she would have been committed to a Surrey prison, but owing to directions given by the Secretary of State, under the authority of the Prison Act, 1877, she was committed by the magistrate's warrant to the prison at Westminster, in Middlesex. A man was also committed by the magistrate sitting at Lambeth, in the county of Surrey, to take his trial for a felony committed in the county of Surrey. In this case also, the prisoner, before the Prison Act, 1877, would have been committed to a Surrey prison; but, owing to directions given by the Secretary of State, under the authority of the Prison Act, 1877, the warrant was made out committing him to the prison at Clerkenwell, in the county of Middlesex. The constable who, in obedience to the respective warrants, conveyed the two persons to prison incurred expenses (ascertained in each case to be 1s. 6d.). Those expenses are probably in this case not greater, perhaps less, than would have been incurred in conveying the persons committed to a Surrey gaol, but they are not the same. The questions in this case are whether the ultimate liability to repay to the constable these sums remains as it was before the Prison Act, 1877—that is, whether it is to be borne by the treasurer

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of the county of Surrey out of the county rates, or whether it is, by that Act, to be defrayed out of moneys to be provided by Parliament. Though the individual sums are very small, the aggregate of all such expenses amounts to a very large sum, so that the question is one of importance in a pecuniary point of view.

The answer to it depends on the true construction of the Prison Act, 1877; but to understand that Act it is necessary, to some extent, to consider what was the state of the law before it was passed, and how far it altered it. First, as to the costs of conveying the malefactor to prison under the existing law. The case stated one instance of a person summarily convicted and committed to prison under a warrant, in order to undergo her sentence, and another of a person committed for trial, in case there should be any difference as regards the effect of the Prison Act of 1877 in the two cases, but there is none.

The responsibility of the gaoler does not commence till he receives the prisoner into his custody; the obligation to convey him to prison and keep him whilst so conveying him at common law lay upon the vill or place which furnished the constable or other officers who were to obey the Justice. Lord Hale says (1), "The charge of sending malefactors to gaol by the common law is to be borne by the vill where they are apprehended"—3 Edw. Coron. 328; 4 Edw. 3. c. 10. He does not state, nor does either the passage in Fitzherbert's *Grand Abridgment* or the statute cited by him shew, nor have I been able to discover, by what machinery (if any) the constable who, in the first instance, was at the charges was to be reimbursed by the vill. "But now," he proceeds, "by the statute of 3 Jac. 1. c. 10, the charge is to be borne by the prisoner, if he hath wherewith, the same to be levied by warrant of the Justices of the peace; and if he hath not wherewith, then the charge to be borne by the parish, township or tithing where the offender is apprehended, by a tax or rate to be made as by the said Act is prescribed." Since Lord Hale's time, by the 27 Geo. 2. c. 3, the part of the statute 3 Jac. 1. c. 10 which

prescribed the making of a rate for the repayment is repealed, and in lieu of it it is enacted that when any person not having wherewithal is committed by warrant from any Justice of the peace, then, "on application by the constable or other officer who conveyed him to any Justice of the peace of the same county or place," the Justice shall ascertain the reasonable expenses of such constable or other officer, and, "by warrant under his hand and seal, order the treasurer of the county or place to pay the same, which the said treasurer is hereby required to do as soon as he receives such warrant; and any sum so paid shall be allowed in his accounts." By section 4 there is a proviso preventing the making any such order on the treasurer of the county of Middlesex; in that county the order is to be made on the overseers of the parish where the prisoner was apprehended. Why this distinction was made does not appear, but it still subsists. There has not been any further legislation as to the expenses of conveying malefactors to gaol where the prisoner was convicted. The 11 & 12 Vict. c. 42. s. 26 provides for the payment for conveying to gaol prisoners committed for trial. By that section the order is to be made upon the treasurer of the county, riding, division, liberty or place of exclusive jurisdiction wherein the offence is alleged in the said warrant to have been committed. This throws light on what is meant by the word "place" in the 27 Geo. 2. c. 3. The county or place, the Justice for which commits to prison, was, before 11 & 12 Vict. c. 42, the county or place where the offence was alleged to have been committed, and the prisoner was brought in custody before the Justice within that county or place. But under the provisions of 11 & 12 Vict. c. 42. s. 20, prisoners may be in some cases committed to the gaol of the county in which the offence was committed by a Justice of a different county sitting in a different county, and it was probably to meet that case that section 26 was framed as it is. In the case now at the bar the person sent to prison was arrested in the county at large, and would, before the Prison Act of 1877, have been committed to the gaol of the county, and, under such

(1) 2 Hale P.C. 96.

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circumstances, the effect of 27 Geo. 2. c. 3 and 11 & 12 Vict. c. 42 is identical. 11 & 12 Vict. c. 42. s. 26 retains the exception as to Middlesex to be found in 27 Geo. 2. c. 3.

As to the law of prisons, it is not necessary to consider any legislation prior to the Prison Act, 1865. That Act applied to all prisons in England to which Justices of the peace commit malefactors, and was confined to those prisons. For the first time the words "prison authority" are used as designating the managing body that acted for the locality to which the prison belonged; the thing was old though the name was new. By the 5th section, as regards any prison belonging to any county or place in the nature of a county, which is the case with which we have now to deal, the prison authority was the Justices in quarter sessions assembled. The patronage and management of the prison was given to the prison authority. The prison itself was to be provided, by section 8, "at the expense of" the county or place for which it was the prison. And all expenses "incurred by a prison authority in carrying into effect" the Act are to be defrayed out of the rates of the district applicable to the maintenance of a prison or out of any property applicable to that purpose. It is necessary to notice these provisions, and to observe that no expenses were literally payable by the prison authority. They were all to be at the expense of the locality for which the prison authority acted, and to be defrayed out of the rates of that locality, which formed a fund not belonging to the prison authority, though under its management and control.

I do not think that there is any other provision of the law existing before the Prison Act, 1877, which it is necessary to notice. That Act, by section 5, transferred to the Secretary of State all the prisons and the furniture and effects in them, which had heretofore belonged to the localities for which a prison authority acted. Those prisons are not, I think, quite accurately spoken of in section 3 as belonging to the prison authority. It also transferred to the Secretary of State all the power and patronage in respect of those prisons which had before been exer-

cised by the prison authorities. And by sections 24 and 25 the Secretary of State has power to alter the prison to which the prisoner, whether committed for trial or under sentence, might be sent, thereby altering the amount of the expenses of sending him thither; and, in fact, as already pointed out, that power has already been exercised in this case.

Such alteration being made, it was reasonable to make an alteration in the incidence of the expenses; and the Legislature did frame a scheme for that purpose. The county members would have a natural bias to wish to relieve the county rates as much as possible, and therefore they would probably wish the scheme to be to begin the relief from the time when the magistrate made the order of committal; and they might urge in support of this that under this new Act the power of the Secretary of State then began. The Treasury authorities would have a natural bias to wish to throw as little as possible upon the funds to be provided by Parliament, and therefore would probably wish the scheme to be to begin the burthen on the public from the time when the prisoner was received in the gaol, the expenses between the committal and the receipt being borne by the county rate, or the police rate, or otherwise as before, and there are plausible grounds which might be put forward by each. But what a Court of law has to do is to ascertain the intention of the Legislature, and that I think can only be done by taking the words of the Act as it received the Royal assent, and asking, What intention do those words express when used with reference to the existing law and making such a change in it? Section 4 must be read as if for "prisoner" and "maintenance of prisoner" were inserted the definition of those words in section 57; and so read it enacts that all expenses shall be defrayed out of funds to be provided by Parliament, if they are incurred in respect of the maintenance of those prisons to which the Act applies; and "all such necessary expenses incurred in respect of any persons committed to those prisons on remand, or for trial, safe custody, punishment or otherwise, including all such necessary expenses incurred in respect of such a person for food, clothing,

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custody, safe conduct and removal from one place of confinement to another, or otherwise, from the period of his committal to prison until his death or discharge from prison, as would, if this Act had not passed, have been payable by a prison authority, with this proviso, that nothing in this Act shall exempt a prisoner from payment of any costs or expenses in respect of his conveyance to prison or otherwise, which he would have been liable to pay if this Act had not passed."

Prisoners were under a liability to pay under 3 Jac. 1. c. 10. I am not aware of any other liability which existed. The inference to be drawn from that is, that it was supposed that but for the proviso the case would, or at least might, have been within the enactment. And, so far, that affords an argument for construing the enacting part, if ambiguous, in a sense which would prevent the proviso from being idle and unnecessary. And I may here notice an argument used, that if the enacting part put an end to the liability of the county, some provision ought to have been made for securing the constables their expenses, and I think that does afford an argument for construing the existing part, if ambiguous, in a sense that would prevent the imputation on the Legislature of having taken away one remedy for the constables without giving them another. I think it need not be considered which of these arguments is the stronger, for I do not think the words of the enacting part are ambiguous. The first question is, What do the words "committed to prison" and "committal to prison" here mean? Mr. Justice Lush thought that they meant "received into prison," and on that based his judgment. But I cannot agree with him. I think that the words, both in common parlance and in legal phraseology, mean "when the order is made under which the person is to be kept in prison;" and I can see nothing in the scheme of this Act to justify us in putting an unusual sense on the words, especially as the Act gives to the Secretary of State a new controlling power from the time of the making of that order. Then, if the words "period of committal" are to be understood as meaning "from the time of the making out of the order of committal," it seems to

me clear that the expenses incurred in carrying the committed prisoner from the magistrate's office, where he was then in confinement, to the prison, fall within the words "removal from one place of confinement to another or otherwise." And the remaining question is, whether they are within the qualification of being "such as would, if this Act had not passed, have been payable by a prison authority." This is the part of the enactment which has given me most difficulty. But, as I have already observed, no expenses were, before the passing of the Prison Act, 1877, in the literal sense of the words, "payable by a prison authority." They were to be borne by the county or place to which the prisoner belonged, and for which the prison authority acted, and paid out of a fund which was raised by the rates, which in the case of a county, and I should think in all cases, was under the management of the same body which was by the Act of 1865 made the prison authority in respect of prisons in that county or place. And I think that, unless the words "payable by a prison authority" mean payable out of the fund under the management of a prison authority from which prison expenses are defrayed, there were no expenses so payable by a prison authority, and the whole enactment would be inoperative. Construing them so, I think that the expenses payable out of the county rates which are under the control of the Justices in quarter sessions, who are the prison authority, must be considered as paid by a prison authority.

I attach no weight either one way or the other to the fact that the amount of those expenses was to be ascertained by a Justice of the peace. When ascertained they were to be paid by the treasurer, who was the servant of the Justices belonging to the county, out of the fund which was under the control of those Justices, and those Justices were, after the Act of 1865, a prison authority. And I do not see that they were the less payable by the county which the Justices represented because they were not at liberty to disallow the payment made by the treasurer.

The parochial authorities of Middlesex might have laid a case before Parliament for relieving themselves from the payment

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of those expenses. If they did, their claim was disregarded. But I cannot agree with Mr. Justice Manisty that the fact that in Middlesex those expenses are paid out of the parochial fund belonging to a body that had nothing to do with the prison, and which can in no sense be said to be paid by a prison authority, shews that in other counties the payment out of a fund belonging to the body which maintained the prison, and which was under the control of the body which was made the prison authority, was not made by the prison authority.

I therefore agree with the construction of the Act come to by the Court of Appeal, and, consequently, in my opinion, the appeal should be dismissed with costs.

LORD WATSON.—I am also of opinion that the judgment of the Court of Appeal ought to be affirmed. In construing the 57th section of the Prison Act, 1877, for the purposes of this case, the first question arising for consideration is this—whether the expression “committed to prison” refers to the granting of a warrant for the incarceration of the prisoner, or to the delivery of his person into the custody of the gaoler within the prison walls. Upon this point I cannot say that the able argument of the appellant’s counsel raised any serious doubt in my mind. “Commitment” or “committal”—for I take these words to be synonymous—express the act of the magistrate, who alone has power to commit to prison, whether pending further enquiry, for trial or for punishment. His exercise of that power is complete when the warrant of commitment has been duly signed and delivered. With the safe conduct of the prisoner from the dock to the gaol, and his transfer there to the custody of the prison officials, the magistrate has nothing to do. I am, accordingly, of opinion that the leading words of the enactment in section 57 are broad enough to cover all expenses lawfully incurred in respect of the safe conduct and conveyance of a prisoner from the time when the warrant of committal was issued until his death or discharge.

The decision of the case, in my opinion, comes to depend upon the just construction of these words in section 57: “As would,

if this Act had not passed, have been payable by a prison authority.” If it were established that the cost of conveying a prisoner from the dock to the gaol, upon remand or summary conviction, were not payable by a prison authority within the meaning of section 57, it appears to me that the appellant would be entitled to have judgment given in his favour.

It is not in dispute that the term “prison authority” first became a *nomen juris* on the passing of the Prison Act, 1865. By sections 1 and 2, Justices of the peace were constituted the prison authority, for the purposes of the Act, in all counties; and by section 8 it was enacted that all expenses incurred by the prison authorities in carrying into effect the provisions of the Act should be defrayed out of any rate of the nature of a county rate, leviable in the county, and applicable to the maintenance of a prison, or out of any other property applicable to that purpose. Neither is it disputed that the costs to which this action relates formed no part of the expenses of executing the Act of 1865, and were in no sense incurred or payable by a prison authority constituted under that Act. Before the passing of the Prison Act, 1865, it had been enacted that these costs should be paid by the treasurer of the county upon the order of the Justice or Justices by whom the accused party had been committed.

Accordingly, at and before the time when the Prison Act of 1877 became law, matters stood in this position: the cost of conveying to prison a person committed on remand or for trial was a charge upon the county funds or rate administered by the county Justices. As I read the Act of 1865, the expenses incurred in its execution by the Justices acting as the prison authority were made a charge upon the same fund. The Act of 1865 expressly provides that they “shall be defrayed” out of the county rate; and although in section 57 of the Prison Act, 1877, these expenses are described as “payable by a prison authority,” they were not in any strict sense payable by a prison authority under the Act of 1865, but were payable out of the county rates or funds levied or administered by the Justices of the peace. The county prison authorities under the

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Act of 1865 had, *qua* prison authorities, no statutory right to interfere with the county rates or funds; they had merely a right to demand that the expenses incurred by them in carrying out the Act should be defrayed by the Justices, as the legal administrators of the county fund.

I have come to the conclusion that the expression "a prison authority," in section 57, refers to and means the Justices of the peace of the county, and not the Justices acting in their capacity as prison authority for the county. In that clause the expenses with which it deals are first described as "expenses incurred in respect of a prisoner"—that is, incurred by the new prison department of the State. But when reference is made to the state of things existing before the passing of the Act, they are described as expenses payable by a prison authority. If it had been intended by these last words to limit "expenses," for the purposes of the clause, to such as were necessary for carrying out the Act of 1865, the change of phraseology from "incurred" to "payable" is very singular. The whole costs from commitment until death or discharge of the prisoner were "payable," in the strictest sense of the word, by the Justices of the county, whereas the prison expenses, after his actual incarceration, which were "incurred" by the Justices as the prison authority under the Act of 1865, were certainly not "payable" by them in that capacity. The considerations to which I have referred would not of themselves lead me to reject the appellant's arguments upon this part of the case. But they do not stand alone. The 61st section of the statute of 1877 enacts that the expressions "prison authorities," "Justices in sessions assembled" and "visiting Justices" shall have the same meaning in relation to any prison as they have in the Prison Act, 1865, and "expressions defined in that Act shall have the same meaning also in this Act." That enactment appears to me to have the practical effect of transferring, so far as necessary, all its definitions or interpretation clauses from the Act of 1865 to that of 1877. And the provision that "prison authorities" shall have the same meaning as in the Act of 1865 has, in my opinion, no other or further result than to

import the definitions of a prison authority contained in section 5 of that Act into the Prison Act, 1877. I do not think it was intended to import not only that definition, but along with, and as a necessary part of it, all the rights and liabilities belonging or attaching to a prison authority under the Act of 1865. And if I am right in holding that such is the true import and effect of section 61, it is beyond controversy that the costs sued for, which were formerly payable out of the county funds administered by the Justices, must now be met by the Treasury.

I have not been able to derive any aid from the leading enactments of the statute apart from the terms of sections 57 and 61 as indicating the intention of the Legislature in regard to this matter. They do not *per se* create any presumption that the Legislature intended to make these costs a charge upon the national purse; at least that inference does not appear to me to be more probable than the appellant's theory, that nothing is transferred by the Act to the Home Secretary except the prisons of the county, and the maintenance of prisoners after they have been placed in the custody of the prison officials. Nor do I think that there is much weight in the argument derived from the terms of the proviso with which section 57 concludes. It belongs to a species of proviso which is introduced without necessity, and simply *ob majorem cautelam*, and in no way conflicts with either of the two constructions of the enacting words of the clause, for which the appellant and the respondent respectively contend, although the fact of its introduction is more easily explained on the assumption that the contention of the respondent is right.

LORD PENZANCE.—I am glad to find that your Lordships have arrived at the conclusion with respect to this case to which my own mind has been brought upon a full consideration of it, not without some doubt and hesitation. The question is really a very short one, and depends, not only substantially, but in form, upon the proper construction to be given to a single section of a single Act of Parliament. I shall, therefore, not trouble your Lordships at any length on the sub-

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ject. I think a very short time will enable me to put before the House the reasons which have brought my mind to the conclusion that the judgment appealed from ought to be affirmed.

The Prison Act of 1877 was an Act for the purpose of transferring to the Secretary of State the government and management of the prisons of this country, which had before, in the case of counties, been under the management of the magistrates; and the 4th section says that, "after the commencement of this Act all expenses incurred in respect of the maintenance of prisons," "and of the prisoners therein, shall be defrayed out of moneys provided by Parliament." Then comes the question, What is the meaning of the word "maintenance"? That is a technical word which has been used in the Act subject to a definition to be found in section 57, on which the whole question turns.

Section 57 declares that "the maintenance of a prisoner" includes certain things. First, there comes what I call a descriptive category of the matters which are included in the words "maintenance of a prisoner." "All such necessary expenses incurred in respect of a prisoner for food, clothing, custody, safe conduct and removal from one place of confinement to another or otherwise, from the period of his committal to prison until his death or discharge from prison." That is the descriptive category which the section, in the first place, gives us as to the meaning of those words "maintenance of a prisoner." Then follows what I will call a restrictive condition, in these words: "As would, if this Act had not passed, have been payable by a prison authority." And thirdly, there follows a proviso that "nothing in this Act shall exempt a prisoner from payment of any costs or expenses in respect of his conveyance to prison or otherwise which he would have been liable to pay if this Act had not passed."

Now, after the argument that has taken place at your Lordships' bar, I think it cannot be denied that this section is not a plain one. It cannot be denied that it is a section which presents some difficulty, because, whichever construction you give to it, you to a certain extent—I will not say

do violence to other portions of the section—but you do not give the natural meaning to every expression contained in it which would, in the first instance, arise in the mind on reading it. The argument of the appellant proceeds on the supposition that "commitment to prison" does not mean the commitment by a magistrate, but means the actual transfer into the prison, and reception in the prison, of the prisoner. It is necessary for the appellant to place that construction upon the category with which the section starts, because undoubtedly otherwise the sum in question would fall within that category. The sum in question is an expense incurred after the committal by the magistrate and before the reception into prison, and the appellant's argument makes it necessary to give the construction I have just mentioned to that portion of the section. Now, at the outset, I think it is plain that that is doing some violence to the word "commitment." Whether it is "commitment" or "committal" appears to me to be indifferent, for I think they mean the same thing. But I think everyone would say that the natural and ordinary meaning of commitment to prison is the act of the magistrate in committing to prison, and therefore some violence is done, as I think, by the argument of the appellant to that portion of the section. But he justifies that violence by the construction which he says is the necessary and proper construction of the following words—those words which contain what I have called a restrictive condition. They are to be "such expenses as would, if this Act had not passed, have been payable by a prison authority." Now, I confess that, reading those words by themselves, I should have been disposed to think that the Act meant payable by a prison authority, as such. I think that would be the natural meaning of those words, and it is upon that view of the meaning of those words that the appellant's argument is founded. He does some violence, therefore, to the first portion of the section, but he founds his reasons for doing that violence to the first portion of the section on the proper construction of the second portion of the section. Now, referring to the argument on the other side, the respondent says that

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commitment to prison means commitment in the ordinary sense, and certainly he does no violence to that portion of the section. And when he comes to deal with the next portion—namely, the restrictive condition that they must be such expenses as would, if the Act had not passed, have been payable by a prison authority—I understand his argument to be this: he says, “A prison authority—what is that?” Turning to the definition clause of the statute in question, we find that that expression is to have the same meaning as the words “prison authority” had in the Act of 1865. The expression “prison authority,” and other expressions, shall “have the same meaning in relation to any prison as they have in the Prison Act, 1865.”

When we turn to the Prison Act of 1865, we find in section 5 that the persons hereinafter named shall be prison authorities for the purposes of this Act, and then follows a list of the different people who are to constitute a prison authority according to the place in respect of which the Act is speaking. With regard to counties it says, “As respects any prison belonging to any county except as hereinafter mentioned, or to any riding, division, hundred or liberty of a county having a separate Court of quarter sessions, the Justices in quarter sessions assembled” are to be the prison authority. Well, then, if that definition of prison authority is read into the Act of 1877, the restrictive condition to which I have referred would run in these words: “Such expenses as would, if this Act had not passed, have been payable in a county by the Justices in quarter sessions assembled.” The respondent says, “You have no right to go beyond that: that satisfies the whole of these words. You have got a definition of prison authority given you in this statute, and it says that that expression is to mean the same thing as it does in the Act of 1865. The Act of 1865 says, as regards a county, that it means the Justices in quarter sessions assembled, and therefore the whole scope and effect of this portion of the section is merely to say that an expense incurred in respect of a prisoner which is to be within this section, must be such as would, if the Act had not passed, have

been payable by the Justices in quarter sessions assembled.” Now I confess, in my opinion, that construction does much less violence to the *prima facie* aspect of the words contained in the section than that which the appellant has been forced to adopt; and therefore, had the matter stood there alone, my mind would have been driven to the conclusion that the respondent was right. But then there remains the proviso; and I confess I am inclined to give more weight to that proviso than some of your Lordships have done. The proviso is, that “nothing in this Act shall exempt a prisoner from payment of any costs or expenses in respect of his conveyance to prison or otherwise which he would have been liable to pay if this Act had not passed.”

Now, I quite agree that provisos are constantly inserted in Acts of Parliament to protect particular interests *ex majori cautela*, and that you must not always expect to find that if the proviso had not been there an effect would have been produced contrary to or different from the effect that is produced by the proviso being there; in other words, you must not always expect to find that the proviso was necessary. But in this case I cannot help thinking that the proviso has shed a light upon the meaning of the Legislature, because the person who drew this Act must have had before his mind in drawing that proviso the species of expense which is here in question and controversy; he must have had before him the expense of conveying a prisoner to prison—an expense which by previous statutes had been cast upon the prisoner himself in the first instance. It would be impossible, it seems to me, assuming this Act to have been drafted by a single individual, and not to be the work of several hands, to suppose that the draftsman would have put in that proviso unless he had thought that the previous part of the section had been dealing with an expense of this character. There would have been no need for it; and not only would there have been no need, but there would have been almost an absurdity in putting in a proviso that nothing should in future prevent a prisoner paying the expense of his own conveyance to prison as he had

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done before, unless the previous part of the section had dealt with a matter of that character. Therefore I think the proviso does shed a light upon the previous part of the section, and fortifies the arguments which have been urged in other respects in support of the respondent's case.

There is only one other matter to which I desire to call your Lordships' attention, and that is a consideration which was urged upon your Lordships by the learned Solicitor-General. I think it is a consideration well worthy of your Lordships' acceptance; it turns, not upon any special and particular language used in the statute, but upon the general scope and effect of the Act as passed by the Legislature. The object of the Act was to transfer county prisons from the jurisdiction of the magistrates to that of the Secretary of State; and at the same time that it relieved the magistrates from all dealing with prisons, and all control over them, it proposed in general terms undoubtedly to relieve the county from the expense of them.

Now, in this Act there is a provision enabling the Secretary of State to order a prisoner who has committed an offence in county A, to be confined in a prison, not necessarily in county A, but in county B, and in this particular appeal one of the cases brought before the House for its determination is a case where an offence was committed in Surrey, and the prisoner was sent to a prison in Middlesex.

It is obvious enough that in such a state of things, if this expense falls upon the county, the county might be put to much greater charges than it would otherwise have been put to before the Act passed. Before the Act passed the county was responsible for its own prisoners being conveyed to gaol. But it would seem unlikely that at the time when the Legislature was taking away the authority from the county magistrates, and at the time when it was by the same Act relieving them from the expense of prisons, the Legislature intended to cast a new burden upon the county rates in the manner which has been suggested.

I think that this is a consideration which has some weight, and which adds something perhaps to the arguments which have been already urged, and which

have received your Lordships' sanction in favour of the respondent.

I am, therefore, of opinion that this judgment ought to be affirmed.

Judgment of the Court below affirmed, and appeal dismissed with costs.

Solicitors—Solicitor to the Treasury, for appellant; F. F. Smallpeice, for respondent.

[IN THE COURT OF APPEAL.]

1881. { WEBBER v. THE LONDON,
Dec. 19. { BRIGHTON AND SOUTH COAST
RAILWAY COMPANY.*

Practice—Staying Execution pending Appeal to House of Lords—Appeal as to Amount of Damages only.

An application to stay execution will not be granted by the Court of Appeal in order to give a party who is dissatisfied with the amount of damages assessed by a jury an opportunity to decide whether he will appeal or not to the House of Lords.

This was an application to stay execution pending an appeal to the House of Lords. The circumstances under which it was made fully appear from the judgment of the Master of the Rolls.

Murphy, Q.C. (with him *Macrae*), moved on behalf of the defendants.

JESSEL, M.R.—In this case the defendants have neither presented nor decided to present an appeal to the House of Lords, and we are asked to grant a stay of execution, in order to give them an opportunity to decide whether they will do so or not. I have never heard of such an application except where an appeal has been presented, or where the House of Lords is not sitting, and then the applicant always undertakes to present it. This is an entirely new application, and I say emphatically that it is one which ought not to be granted. The effect of the second

* *Coram* Jessel, M.R.; Brett, L.J.; Cotton, L.J.

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appeal would be to allow a wealthy party, although he is in the wrong, to ruin his opponent; and this was one of the principal arguments used by the Lord Chancellor in favour of the proposed abolition, under the Judicature Acts, of such appeals to the House of Lords. The Legislature, however, thought it expedient to allow them, but upon totally different grounds, so that the same argument remains untouched. Is it right, therefore, in a case of this kind to encourage such an appeal? The facts are these: The plaintiff, who was an architect, alleged that he was injured, six years before action brought, through the negligence of the defendants' servants, and that the injury produced consequences which, although not then serious, gradually developed into a disease called *locomotor ataxy*. The defendants denied the negligence, and asserted that the disease was not the result of the accident. The jury, however, found a verdict for the plaintiff for 500*l.*; but the learned Judge before whom the action was tried did not think that the negligence had been sufficiently proved. The defendants moved for a new trial, and the Divisional Court thought that there was sufficient evidence of negligence, but that the verdict was unsatisfactory, on the ground that the sum of 500*l.* was insufficient if the disease—*locomotor ataxy*—had been produced by the accident alone, but too much if that were not so. A new trial was therefore granted.

The plaintiff appealed, on the ground that the damages were not excessive, having regard to the amount of suffering which he had undergone, having been ill in bed for a period of six or seven months.

After hearing the evidence, and considering the summing-up of the learned Judge, we unanimously came to the conclusion that the damages were not excessive, and that we could not say that the jury were wrong in giving 500*l.* damages, and the appeal was therefore allowed. The result therefore is that three Courts have successively found that the plaintiff is entitled to damages, the only difference of opinion being as to the amount, so that the only question is whether this case shall go down for a new trial on that point, as to the amount of these damages. The defendants

admit that the plaintiff is entitled to substantial and not mere nominal damages.

The effect of granting this application would simply be to ruin the plaintiff, who, being a poor man, and unable even to instruct counsel to argue the case before us, would not be able to do so before the House of Lords. Moreover, he might not be able, although entirely in the right, to pay the expenses of his witnesses, and it is possible that, if he had the means of so doing, he might satisfy the jury that the injury was continuous. The plaintiff is entitled to substantial damages, and we should do a positive injustice if we were to grant this application.

BRETT, L.J.—I also agree. Even if the defendants had determined to appeal to the House of Lords, no question of law is involved. The question of the intermediate case, which was not brought before the Divisional Court, was clearly left to the jury by the Judge at the trial. There was ample evidence to support that case, and also the verdict of the jury, who were quite qualified to deal with it.

COTTON, L.J.—I also concur. As there has not been any determination on the part of the defendants to appeal, we ought not to grant a stay of execution.

Application refused.

Solicitors—Norton, Rose, Norton & Brewer, for defendants.

1881. } RICHARDS (*appellant*) v. MACBRIDE
Dec. 7. } (*respondent*).

Licensing Acts—Intoxicating Liquors, sale of—Sunday Closing (Wales) Act, 1881 (44 & 45 Vict. c. 61), s. 3—Time of Commencement of Act—Construction.

[For the report of the above case, see 51 Law J. Rep. M.C. 15.]

1881. } BROWN v. THE GREAT WESTERN
Nov. 5, 30. } RAILWAY COMPANY.

Railway Company—Passengers' Fares—“Rates, tolls and charges”—Absence of Mile-posts on Railway—Construction of Inconsistent Railway Acts—Equalisation of Fares over the Whole System of Amalgamated Railways—Great Western Railway Company's Acts—Railway Clauses Consolidation Act, 1845 (8 Vict. c. 20), ss. 94 and 95.

By the original Act authorising the construction of a railway the company were empowered to demand certain tolls for the carriage of passengers and goods, and upon payment of the tolls demandable all persons should be entitled to use the railway. The company was required to set up mile-posts along the whole line at the distances of one quarter of a mile from each other, and it was enacted that “No tolls should be demanded or taken by the company during any time at which the mile-posts should not be set up and maintained.” Plaintiff having travelled in one of the company's trains along their line at a time when two of the mile-posts had been removed, sued to recover the fare which he had been compelled to pay for his journeys, on the ground that it was not by reason of the above enactment demandable:—Held, that he could not recover, because the provisions as to mile-posts applied only to cases where persons or goods are being conveyed by persons other than the company upon the line, and not where the company conveys in its own carriages, and the plaintiff was not therefore “a person using the railway” within the meaning of the Act.

By their original Act a railway company had a scale of authorised charges for passengers according to distance. By a subsequent Act the company were empowered to make a short extension line, and charge a lump sum for passengers over that extension. A still later Act allowed the company to amalgamate with another existing company on condition of their reducing their charges to the same scale as that of the other company. That scale was 1d. a mile for each third-class passenger. The amalgamating Act, however, said that a fraction of a mile might be charged for as a mile. Plaintiff travelled over the company's

line, including the short extension, and was charged a sum which was at the rate of more than a 1d. per mile calculated over the whole distance travelled, but of not more than 1d. per mile over the distance exclusive of the extension, assuming that the company could also charge the lump sum for the latter piece. On action brought to recover the excess above 1d. per mile over the whole distance,—Held, that the later Act must be taken to have repealed the earlier one authorising the charge of the lump sum; and that the company were only entitled to charge 1d. per mile calculated over the whole journey (but that they might reckon a fraction of a mile as one mile), and that the plaintiff ought to have judgment for the difference.

This was a Special Case stated in an action brought by the plaintiff to recover either the whole or a portion of two sums which he had paid under protest, as fares for being carried as passenger in a train of the defendants' from London to Bristol and back.

The action was brought in the County Court, and removed by the defendants into the High Court by writ of *certiorari*.

The facts shortly were that the distance from Paddington to Bristol is nearly 118½ miles, and on the date of the plaintiff's journeys there were not set up nor maintained mile-posts at the 118th mile, nor at the 118½ miles from Paddington. The plaintiff was charged 10s. 6d. fare each way. To the fare, whatever it might properly be, the company were entitled to add five per cent. for the Government duty, and such five per cent. as charged by the Government is calculated not merely on the fare but on the additional five per cent. itself. In the present case, if the company were entitled to charge 1d. per mile for 119 miles, which, as will be seen by the judgment of the Court, was the decision, the fare would be 9s. 11d. plus 6¼d.—which would make the total 10s. 5½d. nearly.

The *Plaintiff*, in person.—I first contend that the company could not demand any fare at all so long as the mile-posts were not up. By the company's Act of 1835 (5 & 6 Will. 4. c. 107), s. 177, they were

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required to have a list of tolls and fares painted upon boards at certain places, and to ascertain with greater facility the amounts chargeable they shall put mile-posts at every quarter of a mile. Then section 178 says that no tolls shall be demanded during any time at which the mile-posts shall not be set up and maintained. Then sections 93, 94 and 95 of the Railway Clauses Consolidation Act, 1845, enact the same thing generally. The second point is, if I am not entitled to a return of the whole fare, that I have been overcharged and ought to recover the difference between 1*d.* per mile and the sum paid. In 1835 there was a scale of fares up to Acton, and in 1837 (by 1 Vict. c. 92. s. 43) a charge of 2*s.* was granted over the short distance from Acton to Paddington; but both those became obsolete when the Great Western Railway was amalgamated with other lines and became one large complete undertaking. By 10 & 11 Vict. c. 226. s. 47, they were repealed, because by it the company were required to reduce their tolls to the same scale as the Birmingham and Oxford Junction, and that was 1*d.* per mile. Then as to the fraction of a mile, that company could not charge 1*d.* for a fraction, and no charge could be made for a quarter of a mile unless the full quarter was travelled. This distance must therefore be calculated at 118½ miles only.

R. E. Webster, Q.C., and R. S. Wright, for the defendants.—On the first point, the Act does not mean that the absence of one post destroys the right to make any charge. But it is submitted that neither the special nor the general Act applies to a passenger where he is conveyed by the company as carriers; the sections refer to the use of the railway by a person with his own carriage. The rate or toll does not include any charge for conveyance as carriers. In *Garton v. The Bristol and Exeter Railway Company* (1), which was decided upon an Act the language of which is identical with this, the distinction between “charges” and “tolls” was pointed out. So the company may recover charges for work done, and the sections do not prevent their charging fares to a man who has

actually been conveyed in their carriages, and it is submitted that the sections referred to—sections 163, 167, 173, 177, 178—are limited to rates and tolls. As to the general Act, *Wallis v. The London and South Western Railway Company* (2) was in point; the subject-matter of each section must be looked at; also *The North Eastern Railway Company v. Anderson* (3). On the second point: it is admitted that if the special grant of the lump sum of 2*s.* from Acton to London has been repealed the plaintiff would be entitled to recover 1*d.* But there has certainly been no express repeal, and there was no reason for doing away with the power given which would induce the Court to hold that it was repealed by implication. There has been no Act amalgamating the railways together under the title of Great Western Railway, but the existing Great Western Railway was empowered to buy the other railway; and what was intended was to keep a scale where there was one, but reduce the rate to that of the Birmingham and Oxford, and not to interfere where lump-sum charges were authorised expressly. All the payments under the Act of 1837 (1 Vict. c. 92) were lump payments. Then by 10 & 11 Vict. c. 138. s. 51 there is express power to charge for a fraction of a mile as a mile.

Plaintiff, in reply.

Curr. adv. vult.

FIELD, J. (on Nov. 30).—This is an action brought by Mr. Brown to recover back from the Great Western Railway Company either the whole or a portion of two sums which he has paid in respect of his being carried from London to Bristol and back again. He travelled on a certain day from Paddington to Bristol third class, and was charged 10*s.* 6*d.* for his fare. This he paid under protest, and exactly the same was done with respect to his return journey. His contention being that the company had on these and other occasions charged more than they were entitled by law to charge, he applied in the first instance to the Railway Commissioners for an injunction against the company to

(2) 39 Law J. Rep. Exch. 57; Law Rep. 5 Exch. 62.

(3) 1 Sc. Sess. Cas. (3rd ser.) 1056.

(1) 1 B. & S. 112; 30 Law J. Rep. Q.B. 273.

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compel them to discontinue charging more than the maximum fare authorised by their Acts. This Court held that such a matter was beyond the jurisdiction of the commissioners, and granted a prohibition, pointing out that Mr. Brown's proper remedy was by action. Hence this action was brought, and the Special Case stated for our judgment upon the questions raised in it.

Now the distance from Paddington to Bristol is nearly 118½ miles, and it turns out that at the time when the fares were taken there was no mile-post at the 118th mile, and none at the quarter mile beyond the 118th mile.

The first question, then, is whether in consequence of the absence of these posts the company was justified in making any charges to anybody. It would be a very serious consequence if this were answered in the negative, but our duty would be plain so to hold did we think Mr. Brown's construction of the Acts to be the true one. We, however, do not think so, and for the following reasons. The Legislature in the early railway Acts did not foresee the future of railways, thinking that railway companies would make their profits by charging for other persons' engines and trains to run upon their lines, and accordingly the most minute provisions as to fares and tolls were inserted in the original Acts. In practice the railway companies became carriers themselves to the exclusion of other persons, and the clauses which had been inserted imposing upon the railway companies who did themselves carry the liability of common carriers and the consequent duty to carry at reasonable charges, became more important than the other provisions.

This was the state of affairs with regard to this company when the Acts of 1835 and 1837 were passed. There were two series of provisions in the Act, one affecting the use of the railway by other persons and the other affecting the carrying by the company of persons and goods over their lines as carriers; and the distinction between the two must be kept in mind.

The plaintiff claims the return of the whole fare, because by sections 177 and 178 of the Act of 1835 the company are required to paint a list of tolls and fares

upon boards, and to put mile-posts at every quarter of a mile, and are prohibited from taking any rates or tolls for any article or passenger so carried or conveyed along the railway except during the time the boards and posts shall be painted and affixed. That was private legislation. But there was also passed the well-known general Act—the Railway Clauses Consolidation Act, 1845 (8 Vict. c. 20)—and the plaintiff relies further upon it.

As to the private Act, I think it seems reasonably clear that the prohibition of receiving rates and tolls was by the very language of the Act limited to tolls and rates such as were fixed before, and did not refer to the reasonable charges which the company as carriers were entitled to make.

As to the general Act, section 95 says that "no tolls shall be demanded or taken by the company for the use of the railway during any time at which the boards hereinbefore directed to be exhibited shall not be exhibited, or at which the mile-stones hereinbefore directed to be set up and maintained shall not be so set up and maintained."

Section 94 had required the setting up and maintenance of milestones or posts at each quarter of a mile, and section 92 had said, "It shall not be lawful for the company at any time to demand or take a greater amount of toll or make any greater charge for the carriage of passengers or goods than they are by this and the special Act authorised to demand, and upon payment of the tolls from time to time demandable all companies and persons shall be entitled to use the railway."

Now in the present case the plaintiff was not a person using the railway in the sense in which the words are used in that Act. He was being carried by the company in their capacity of carriers. The consequence is that he does not come within sections 163 to 166 of the private Act, and not, we also think, within those of the general Act just referred to.

It was contended indeed that "toll" has in those sections a larger meaning than the "toll" or "rate" referred to in the private Act, because it is defined in section 3 as including "any rate or charge or other payment payable under the

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special Act for any passenger, animal, carriage, goods, merchandise, articles, matter or things conveyed on the railway." But that meaning is given subject to the preamble, so to speak, of the section—"unless there be something in the subject or context repugnant to such construction." We think the words in section 95 are repugnant. If the word "toll" stood by itself it might not be so, but the toll is to be "for the use of the railway." On principle, therefore, we should so decide; but the case is covered by authority as well. The case of *Garton v. The Bristol and Exeter Railway Company* (1) is an authority to the extent of the construction which was put upon sections 163 and 166 of the private Act. The next case which happened—*Wallis v. The London and South Western Railway Company* (2)—decided that carriers' charges were not tolls within the meaning of section 97 of the general Act; and the Court arrived at that conclusion by holding that the 97th section must be read together with the 95th and 96th and the series of sections applicable to it. Consequently the 97th must be read as if the words "for the use of the railway" were inserted in it. A similar question arose afterwards in the Scotch Courts, and the corresponding sections in the Scotch Railway Clauses Act to the 95th, 96th and 97th of the Railway Clauses Consolidation Act, 1845, were discussed, and also the decision in *Wallis v. The London and South Western Railway Company* (2); and it will be found that in *The Caledonian Railway Company v. Guild* (4) the Scotch Court, while differing as to the construction of section 97, distinctly held that the words "for the use of the railway" in section 95 had the meaning placed upon them by the English Courts. Both on principle and on authority we think therefore that the meaning of the Legislature is clear that this prohibition to receive tolls only applies to cases where the person who claims to travel free is using the railway himself, and not where he is carried by the company as a passenger.

We decide that the absence of the mile-posts did not prevent the company charging the plaintiff a fare or toll; and that

he cannot therefore recover it in this action.

The second point is also one of considerable importance. The Great Western Railway Company by their scheme of 1835 stopped short at Acton, making a junction there with the London and North Western Railway Company and taking powers to run over the five and a-half miles into London. In 1837, however, they obtained parliamentary authority to make the remaining five and a-half miles for themselves into a station of their own at Paddington. By the original Act there was a scale of charges which the company were entitled to make, but the new Act, instead of a scale, gave them power to charge a lump sum of 2*s.* for the five and a-half miles. Now unless that power has been taken away, the company here were justified in charging Mr. Brown even more than they have done. The contention, however, is, that as a later Act of Parliament contains clauses inconsistent with the exercise of this power, the earlier Act giving the power must be taken to be *pro tanto* repealed. Some time after 1837, as the Great Western Railway extended itself, it obtained legislative sanction to amalgamation with various other railways upon certain terms. Among others, an Act provided that they were not to be allowed to exercise their powers, or carry out their amalgamation with the Birmingham and Oxford Junction, except on condition of reducing their tolls to the same scale of charges as the Birmingham and Oxford Junction. That scale is 1*d.* a mile, and the plaintiff argues that the 2*s.* maximum is thereby repealed. We think that he is right. This Act of 10 & 11 Vict. c. 226 says that the great undertaking which had by that time become the Great Western Railway is to have a uniform charge all over; and I think that the meaning of the Act was to establish this on the scale mentioned and to do away with the previous right to charge 2*s.* for one particular distance of five and a-half miles. That disposes of the second point.

The third point is, How much are they entitled to charge? The distance from Paddington to Bristol is 118½ miles. The earliest legislation said that for every fraction of a quarter of a mile the company might

(4) 1 New Sess. Cas. (4th ser.) vol. i. p. 198.

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charge a quarter of a mile. But in section 51 of 10 & 11 Vict. c. 226, which was the Act which reduced the tolls, it was enacted that a fraction of a mile might be charged for as a mile. We therefore think that the total distance to be calculated is 119 miles. Mr. Brown has therefore been overcharged to the extent of something more than $\frac{3}{4}$ d. each way. His verdict is therefore for 2d.

NORTH, J.—I take the same view, and wish to state very shortly the way in which it strikes me.

As regards the question about the mile-stones under 5 & 6 Will. 4. c. 107, there are certain clauses referring to the taking of what are called rates and tolls. Other clauses refer to the taking of charges. The 17th section deals with both. [The learned Judge read the section.] That is exclusive of certain items. In that section therefore you have the three—the rates, tolls and charges—lumped together, but distributed by reference to the words “rates, tolls and charges for conveyance” as the case may be. That being the case, clearly there is a distinction recognised by the Act itself between the rates and tolls which are charges for conveyance in carriages not belonging to the company on whose lines the articles or things are being conveyed on the one hand, and the charges for conveyance by that company where they are acting as carriers on the other hand. Now as regards the question of the mile-stones, by the 173rd section, in any case where there is a fraction of a ton conveyed, or the distance for which an article or a person conveyed is less than a mile, the fractions are provided for, and a provision is made for the purpose of ascertaining the distance for which rates or tolls are to be demanded; and the company are to put up and maintain mile-stones at every quarter of a mile. Now that has not been done in this case. Then the 178th section provides that it is not lawful for the company to demand or take any tolls or rates unless the mile-stones, with the proper description thereon, which are directed to be set up every quarter of a mile, are kept in their place. Now that applies specifically to the booking of rates and tolls only, and does not apply to the case in which charges are being received; that

is to say, it does not apply to a case like the present, of a person being conveyed by the company themselves along their own line. Therefore it seems to me clear from the construction of those clauses, and it is also directly in accordance with the decision of the Court of Queen's Bench in the case of *Garton v. The Bristol and Exeter Railway Company* (1). But then it was said also upon this point that the Railway Clauses Consolidation Act deals with a similar matter in somewhat different terms and must be looked at. Of course it might be that under that Act certain duties are imposed upon the company which had not been before; and although we decide in the defendants' favour as regards the private Act, the plaintiff might be in the right under the public Act. But that public Act has also received judicial decision in *Wallis v. The London and South Western Railway Company* (2); and the same conclusion was arrived at there on that Act, namely, that the 95th section, which corresponds to the 178th section here, and which is the same section, applies merely to cases where persons or goods are being conveyed by other persons than the company upon the line, and not to where the persons or goods are being conveyed by the company itself. That disposes of the milestone question.

Now the second question is with respect to the two-shilling charge by the defendants. That stands very shortly in this way. By the 47th section of the Act of 10 & 11 Vict. c. 226, a reduction of tolls and charges is contemplated as required of the Great Western Railway Company to equalise their rates, tolls and charges with those of another railway. Then the 49th section says what is to be charged by the Great Western Railway Company, and in the case we are dealing with now it is this. The maximum rate of charge to be made by the company for the conveyance of passengers along their railway is for every passenger conveyed in a third-class carriage by any such train as the plaintiff was being conveyed by, the sum of 1d. per mile; the maximum charge is to be a 1d. a mile. Now the argument on behalf of the company when reduced to its simple elements was this—that by reason

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of some other Act they had power to charge not only a penny a mile but any other sum they pleased not exceeding two shillings. That seems to me to be directly inconsistent with the terms of this Act, where it says the maximum charge shall be a 1d. a mile for the conveyance of passengers in third-class carriages in a train which is not an express train. It seems to me if that does not directly repeal the previous Act which says that a charge of 2s. may be made, it would have the effect of making the sum charged by the company more than the maximum charge.

Then the third and the only remaining point is with respect to the fraction of a mile. Now as to that, as I understand Mr. Brown, his argument is that inasmuch as certain other companies to whose level the Great Western Railway Company's charges are to be reduced do not charge as much as 1d. for a fraction of a mile, by reason of the 9 & 10 Vict. c. 337, therefore the Great Western Railway Company are bound to reduce their charges to the same level. But assuming that he was right, and that under 9 & 10 Vict. the company could charge only for a full mile; by the Act of 10 & 11 Vict. c. 226, the Act of the following session, they are clearly empowered to charge for any fraction of a mile beyond six miles or more as for one mile. Therefore if the two Acts are inconsistent, the earlier one is to be rejected, and the later Act seems to me to be clear upon the point and to entitle the company to take the toll for a whole mile instead of a fraction.

Judgment for plaintiff.

Solicitors—R. R. Nelson, for defendants.

1881. } THE BANBURY URBAN SANITARY
Dec. 19. } AUTHORITY v. PAGE.

*Public Health Act, 1875, s. 47—Nuisance
—Not Injurious to Health.*

[For the report of the above case, see
51 Law J. Rep. M.C. 21.]

1881. } BOBBETT v. THE SOUTH EASTERN
Dec. 19. } RAILWAY COMPANY.

*Statute of Limitations—Lands actually
required for the purposes of the Railway—
Lands Clauses Act, 1845, s. 127—3 & 4
Will. 4. c. 27. s. 7—37 & 38 Vict. c. 57.
s. 1—Order XL. rule 10.*

*Action for the recovery of land taken
by a railway company in 1881 as being
actually required for the purposes of their
undertaking. The land had for some
years before 1863 been in the possession of
one Beale, who used it as a coal wharf, and
was from that time up till 1881 used by
the plaintiff, who had purchased Beale's
business. The company's servants occa-
sionally, at the plaintiff's request, repaired
a fence which was between the coal wharf
and a siding whereon the company's trucks
which took the plaintiff's coals were shunted.
No rent was ever agreed on or paid or
contemplated for the plaintiff's use of the
land :—Held, that the mere fact that the
land taken was not superfluous land,
but land required for the purposes of the
undertaking, would not prevent the plaintiff
acquiring a title as against the company
under the Statute of Limitations; even
although the plaintiff acquired title by the
laches of the company's servants.*

This was an action for the recovery of land, of which the plaintiff had been in possession for more than twelve years before it was taken by the defendant company.

The jury at the trial were unable to agree as to whether or not the plaintiff had had possession of the land to the exclusion of the company since 1864, and were discharged. Both parties moved for judgment. The facts and arguments appear sufficiently from the judgment.

*Willis, Q.C. (with him E. B. Stone), for
the plaintiff.*

E. Clarke, Q.C., for the defendants.

DENMAN, J.—This action was brought to recover possession of a piece of land near the Frant Station on the defendant's line. The land in question was about one hundred yards from the station door, inside a line of fence which divided the

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company's land from the high road. It was on a level with the line, and within a few feet of a siding of the company. In the year 1863 the land in dispute had been for some years used as a coal wharf by one Beale, who carried on his business there as a coal merchant, receiving coal from the company's trucks and delivering off to customers from the wharf into carts standing on the highway. In 1863 Beale retired, and the plaintiff purchased his business. The plaintiff then applied to Noden, the defendants' manager, for "permission to occupy" the coal wharf in the place of Beale; and Noden wrote that he would give instructions to the station-master "to allow the plaintiff to take possession of the wharf;" and he wrote a letter to the station-master to that effect. Thereupon the plaintiff, after communicating with the station-master, but without any lease or agreement, proceeded to use the coal wharf and a small wooden shed adjoining, used by Beale as an office, for the purposes of his business. In 1865 the plaintiff erected a brick office in the place of the wooden shed above mentioned. Down to 1881 the plaintiff carried on the business there. The company's servants occasionally repaired a fence, which was between the coal wharf and the siding. No permission was ever given by the plaintiff to the company's servants to repair the fence; but it was occasionally repaired by them at his request, and sometimes he gave a gratuity to the company's servants who had repaired it. No rent was ever agreed upon or paid or contemplated for the plaintiff's use of the land. The usual access to the coal wharf was through the gate which led from the high road to the station, and across the station yard, and which was kept closed at night by the company, but not locked. There was also a mode of entering the coal wharf from the high road through some openings at the back of the coal wharf abutting upon the high road, through which coal was unloaded into carts standing in the high road, and the plaintiff occasionally entered by those openings. A siding of the company came up close to the fence which separated the coal wharf from the rest of the company's land. This fence was put up by the company to prevent the coals

from falling upon the metals of the siding. The engineer of the company proved that the land in dispute was not superfluous land, and in fact it was required in 1881 for an additional siding. On the 14th of April, 1881, the defendants gave the plaintiff a notice in these words: "In order to carry out some necessary alterations we shall require to take a portion of the wharf which you now occupy. Of course we have no wish to ask you to give up entire possession; on the other hand, we ask, of course, that you will willingly meet our views in every way." The plaintiff, on the 18th, answered, saying that he had a large stock of coal on hand, and that he did not know where they were to be put; and added, "Could you arrange for some one to meet me at the station and decide where I am to have my wharf?" A certain part of the company's premises was pointed out, but, the plaintiff being dissatisfied, the company proceeded to make a new siding on the ground in dispute, and the plaintiff brought his action. On the part of the plaintiff it was contended that the plaintiff was tenant-at-will from the year 1863, when he first was let into possession, or that he had been in possession to the exclusion of the defendants without any tenancy at all, and that, in either case, the time required by the Statute of Limitations having run, he was absolutely entitled to the land when ousted by the defendants. The defendants, on the other hand, contended that no tenancy at all had been created, but that the occupation of the plaintiff was that of a mere licensee, and that, upon the facts, he had never, notwithstanding the language used in 1863, had any exclusive possession of the premises, but merely used them for the purposes of his business in common with the defendants, and for the benefit of both parties. It was also contended for the defendants that even if the plaintiff was a tenant-at-will from 1863, and in exclusive possession, the Statute of Limitations did not apply to the case, for that the land in question being inalienable by the company, could not by the mere *laches* of its officers have vested in the plaintiff contrary to the intention of the Legislature, which it was agreed only allowed the company to take

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and possess land for the purpose of the undertaking, and subject to the provisions of its Acts, and not to give it up to others. I left to the jury the question whether the plaintiff had since 1864 had possession of the premises to the exclusion of the company. The jury were unable to agree and were discharged; but both parties claiming judgment, I reserved the case for further consideration, and having heard it argued, have now to give judgment on the several points disputed. The most important and difficult of these was the question whether the defendants were entitled to judgment on the ground that the Statute of Limitations does not apply to the case of land taken by a railway company, not superfluous (for which see *Betts v. The Great Eastern Railway Company*) (1), but actually required for the purposes of the Act. The argument of the defendants was as follows: By the 127th section of the Lands Clauses Act, 1845 (2) if this land had been superfluous land it would have been the duty of the company to have sold it within ten years of the completion of the works, and, if not sold, it would, at the expiration of ten years, have become the property of the adjoining owners. But, not being superfluous land, no officer of the company could have bound the company by any sale of it. The mere *laches* of the company's officers could not effect that indirectly which the company had no power to do directly. Therefore the merely allowing the plaintiff to occupy the land without rent or acknowledgment for twelve years could not give the plaintiff a title.

The argument on the other side was

(1) 47 Law J. Rep. Exch. 461; Law Rep. 3 Ex. D. 182.

(2) 8 Vict. c. 18. s. 127: "Within the prescribed period, or, if no period be prescribed, within ten years after the expiration of the time limited by a special Act for the completion of the works, the promoters of the undertaking shall absolutely sell and dispose of all superfluous lands, and apply the purchase-money arising from such sales to the purposes of the special Act; and in default thereof all such superfluous lands remaining unsold at the expiration of such period shall thereupon vest in and become the property of the owners of the land adjoining thereto, in proportion to the extent of their lands respectively adjoining the same."

that the case fell within the express words of section 7 of 3 & 4 Will. 4. c. 27 (3), and that the plaintiff, having been in possession of the land to the exclusion of the defendants for twelve years, from 1863, as tenant-at-will, the defendants' right of entry accrued either in 1863 or at the latest in 1864, which was the expiration of one year from the commencement of the tenancy; and therefore that the defendants were barred by the lapse of twelve years, since 1864 at the latest, by the joint effect of 3 & 4 Will. 4. c. 27. ss. 7 and 37, and 37 & 38 Vict. c. 57. s. 1 (4)—*Day v. Day* (5). Several cases were cited bearing upon the question, and it may be useful to refer to one or two which were not cited.

In *Mill v. The Commissioners of the New Forest* (6) it was held that under section 1 of the Prescription Act (2 & 3 Will. 4. c. 71) (7), though as against an

(3) 3 & 4 Will. 4. c. 27. s. 7: "When any person shall be in possession or in receipt of the profits of any land, or in receipt of any rent, as tenant-at-will, the right of the person entitled subject thereto, or of the person through whom he claims, to make an entry or distress, or bring an action to recover such land or rent, shall be deemed to have first accrued either at the determination of such tenancy or at the expiration of one year next after the commencement of such tenancy, at which time such tenancy shall be deemed to have determined; provided always that no mortgagor or *cestui que trust* shall be deemed to be a tenant-at-will, within the meaning of this clause, to his mortgagee or trustee."

(4) 37 & 38 Vict. c. 57. s. 1: "After the commencement of this Act no person shall make an entry or distress, or bring an action to recover any land or rent, but within twelve years after the time at which the right to make such entry or distress, or to bring such action or suit, shall have first accrued to some person through whom he claims, or if such right shall not have accrued to any person through whom he claims, then within twelve years next after the time at which the right to make such entry or distress, or to bring such action or suit, shall have first accrued to the person making or bringing the same."

(5) 40 Law J. Rep. P.C. 35; Law Rep. 3 P.O. 751.

(6) 18 Com. B. Rep. 60; 25 Law J. Rep. C.P. 212.

(7) 2 & 3 Will. 4. c. 71. s. 1: "No claim which may be lawfully made at the common law, by custom, prescription or grant, to any right of common or other profit or benefit, to

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enjoyment of thirty years it would be unavailing merely to shew the commencement of the enjoyment within legal memory, it would still be important to shew that the right claimed could not have had a legal origin in a grant from the Crown. Chief Justice Jervis there says, "The effect of the argument for the claimant is that you are to get indirectly from the *laches* of its officers that which the Crown could not confer directly." So here it might be argued that the officers of the company who had no power legally to dispose of the land acquired, and required by the company for the purposes of its undertaking, could not by their mere *laches* transfer such land to the plaintiff. In the case of *St. Mary Magdalene, Oxford, v. The Attorney-General* (8) an attempt was made to prevent the operation of the statute in favour of the Attorney-General suing on behalf of a charity on similar grounds. The case turned upon a different enactment, but the argument was based on similar considerations. It was, however, there held that the object of the statute "being obviously to establish a general rule for the great object of quieting titles and giving security to long and quiet possession," and the charity having by the *laches* of the trustees lost its claim by length of time and non-possession, the

be taken and enjoyed from or upon any land of our sovereign lord the King, his heirs or successors, or any land being parcel of the Duchy of Lancaster or Cornwall, or of any ecclesiastical or lay person or body corporate, except such matters and things as are herein specially provided for, and except tithes, rent and services, shall, where such right, profit or benefit shall have been actually taken and enjoyed by any person claiming right thereto without interruption for the full period of thirty years, be defeated or destroyed by shewing only that such right, profit or benefit was first taken or enjoyed at any time prior to such period of thirty years, but nevertheless such claim may be defeated in any other way by which the same is now liable to be defeated, and when such right, profit or benefit shall have been so taken and enjoyed as aforesaid for the full period of sixty years, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was taken and enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing."

(8) 6 H.L. Cas. 189; 26 Law J. Rep. Chanc. 620.

Attorney-General's right to sue for the charity was also gone.

This case again was decided upon a different part of the statute; but it would seem to be inconsistent with the contention that the *laches* of persons who have no right to alienate may not operate so as to cause the loss of land even to persons whose rights they are bound to regard and preserve.

The case of *The Earl of Abergavenny v. Brace* (9) was a very peculiar case. There the majority of the Court—Baron Channell and Baron Cleasby (*dissentiente* Baron Bramwell)—held that certain estates tail rendered inalienable by a private statute would not be lost by the operation of 3 & 4 Will. 4. c. 27, though if they had been ordinary estates tail they would have been barred. The *ratio decidendi* of that case appears to be contained in the words of Baron Channell, at p. 171 (p. 134 Law J. Rep.) of the report. He says that "the sections of 3 & 4 Will. 4. c. 27 relating to estates tail seem to shew it was meant that wherever a person with the present right to the possession of property could dispose of the estate by his own express act, neglect on his part such as would bar his own right should amount to a disposition of the estate, and bar also those who came after him;" and he adds: "I do not, however, find any case where this Act enables a man to do indirectly by his neglect anything which he could not do directly by his act. Therefore, although I think that an ordinary tenant-in-tail would by virtue of the 1st and 2nd sections lose his right after twenty years want of possession, in the time of his ancestor, yet I do not think the present plaintiff, whose estate tail is so exceptional, is in the same position." In *The Mayor, &c., of Brighton v. The Guardians of the Poor of Brighton* (10) certain commissioners had been appointed by an Act of 1850, amongst other things, to manage the Pavilion Estate. The Act expressly prohibited them from selling without consent of the vestry. In 1853 the guardians of the poor removed into certain buildings form-

(9) 41 Law J. Rep. Exch. 120; Law Rep. 7 Exch. 145.

(10) 49 Law J. Rep. C.P. 648; Law Rep. 5 C.P. D. 368.

Bobbett v. South Eastern Rail. Co.

ing part of the Pavilion Estate, and continued in exclusive occupation of them without payment of rent, until 1879, when an action was brought by the corporation (who in 1855 had been substituted by statute for the commissioners) to recover possession. My brother Lopes, in delivering a judgment in which I agreed, distinguished the case of *The Earl of Aberghenny v. Brace* (9) as follows: "There the estates were made in the first instance inalienable absolutely; here an express power is given to sell with the consent of the vestry;" and headed, "There are no words in the clause which can control the effect of the Statute of Limitations or can have any reference to the loss of the estate by a want of possession for a length of time."

This case appears to me to be an authority in favour of the plaintiff that the statute applies, supposing he had been in exclusive possession for twelve years from 1864.

The other case on this point which it is necessary to mention is *Norton v. The London and North Western Railway Company* (11), where, although it is true that the Lords Justices held that the defendants had lost the land in question as superfluous land which had vested by the statute in the adjoining owner, yet I think it clear that they also held distinctly (though perhaps it was not necessary to the decision of the case) that, even assuming it not to have so vested, their title was lost by reason of non-possession for twenty years. Upon consideration of these cases, and others which I have looked into, I have arrived at the conclusion that the mere fact that the property in question was land taken for the purposes of the undertaking, and not superfluous land, would not prevent the plaintiff, if he had exclusive possession since 1863, either as a wrongdoer or as tenant-at-will in the first instance, from being entitled to the land by virtue of the Statute of Limitations.

This brings me to the question whether upon the undisputed facts proved at the trial, and set forth above, I ought to give judgment for either party under Order XL. rule 10 (12).

(11) Law Rep. 13 Ch. D. 268.

(12) Order XL. rule 10: "Upon a motion for judgment, or for a new trial, the Court may, if

When this question arises I understand the proper test to apply is to consider whether there is evidence such as, if left to the jury, would warrant them in finding a verdict for the plaintiff, which the Court would not be clearly bound to set aside as wholly unreasonable. If there be such evidence there ought to be a new trial; if not, in the absence of any ground for thinking that further light could be thrown upon the matter by a new trial, judgment ought to be entered for the defendants. Applying this test to the present case I am of opinion that I ought to enter judgment for the defendants. [His Lordship then reviewed the facts proved and the correspondence, and proceeded:] I am therefore of opinion that if the jury had found a verdict for the plaintiff on the question I left to them, or if it had been left to them to say whether the plaintiff occupied in 1864 and since as tenant or as mere licensee, and they had answered that he occupied as tenant, such verdict could not have been allowed to stand, as being wholly unreasonable and unsupported by the evidence; and therefore that there ought to be judgment for the defendants under Order XL. rule 10. I give judgment for defendants accordingly with costs.

Judgment for defendants with costs.

Solicitors—Collyer-Bristow, Withers & Russell, agents for Stone & Simpson, Tunbridge Wells, for plaintiff; W. R. Stevens, for defendants.

satisfied that it has before it all the materials necessary for formally determining the questions in dispute, or any of them, or for awarding any relief sought, give judgment accordingly, or may, if it be of opinion that it has not sufficient materials before it to enable it to give judgment, direct the motion to stand over for further consideration, and direct such issues or questions to be tried or determined, and such accounts and enquiries to be taken and made, as it may think fit."

1881. }
Nov. 28. } MILLEN v. BRASH AND COMPANY.

Carrier — Negligence — Temporary loss of Goods—Carriers Act (11 Geo. 4 and 1 Will 4. c. 68), s. 1—Consequential Damages.

*The plaintiff delivered to the defendants, carriers for hire from London to Rome, a trunk to be sent by rail from London to Liverpool, and thence by ship to Italy. The trunk contained wearing apparel consisting of silk dresses and other articles within the Carriers Act exceeding 10*l.*, but no declaration of their value was made. Owing to the defendants' negligence the trunk was sent to the Victoria Docks in London, and thence shipped to New York. It was eventually recovered, and, after considerable delay, delivered to the plaintiff in Rome. Some of the contents were injured owing to the Custom House officer in New York unpacking and negligently repacking the trunk. The plaintiff having claimed for the loss of the trunk and injury to its contents, and also for the cost of repurchase of other articles in Rome at enhanced prices, it was,—Held (by LOPES, J.), on further consideration—first, that the defendants were protected by the provisions of the Carriers Act from liability for the loss of the trunk and injury to its contents, notwithstanding that the loss was temporary; secondly, that the trunk was lost on the land journey within the meaning of the Act the moment it was despatched on its wrong road to the Victoria Docks; thirdly, that the plaintiff was entitled to recover as damages for non-delivery within due time the cost of the repurchase of other articles at Rome at enhanced prices.*

Further consideration.

The case came on for trial before Lopes, J., at Westminster, when on proof of the following facts the jury were discharged by consent, and all questions of law and fact were left to the learned Judge:—

The defendants were carriers for hire from London to Rome. On the 13th of November the plaintiff's agent delivered to the defendants a trunk to be sent by rail from London to Liverpool, and then shipped in one of Bibby's steamers for Italy. The defendants had in their possession a case of

paper goods (Christmas cards) consigned to Mr. Hamburger, of New York. By the carelessness of the defendants' servants the trunk belonging to the plaintiff was taken to the Victoria Docks, and shipped as and for Hamburger's case to New York. The defendants were not aware of the mistake until about the 15th of December, 1879. On the 15th of December the defendants wrote to Hamburger, and on the 19th of December the trunk arrived in New York. On the 27th of February, 1881, the plaintiff claimed 210*l.* for loss of the trunk and injury to its contents. On the 11th of March the trunk arrived at the defendants' offices, and at the plaintiff's request was retained there till June, and then delivered to the plaintiff. The miscarriage of the trunk and its loss for the time were admitted. It was also admitted that some of the contents of the trunk were injured in New York, owing to the Custom House officer unpacking the trunk and negligently repacking it. It was also admitted that silk dresses and a sealskin jacket packed therein were articles within the Carriers Act, that their value exceeded 10*l.* and that no declaration was made. It was agreed that if the plaintiff was entitled to a verdict the damages were to be—for silk dresses 36*l.*, for sealskin jacket 4*l.*, and for repurchase of other articles in Rome at enhanced prices 10*l.*, and that these several sums should be, beyond the 5*l.*, paid into Court.

The case was afterwards argued on further consideration by

Edward Pollock, for the plaintiff.
Bigham, for the defendant.

LOPES, J. (on Nov. 28), after stating the fact as above set out, delivered the following written judgment:—

This case raises an important question under the Carriers Act. The plaintiff complains of unreasonable delay in the delivery of the trunk and injury to its contents while in the defendants' custody. The defence rests upon the Carriers Act, and unless the defendants bring themselves within the provisions of that Act the plaintiff is entitled to recover. The plaintiff contended that the Carriers Act did not apply in this case, because the loss was temporary and

Millen v. Brash.

not permanent. There is nothing in the Carriers Act and no authority which would justify so narrow a construction to be put on the word "loss." I think it is immaterial whether the loss is temporary or absolute. The trunk and its contents not being delivered within a reasonable time were lost to the owner within the meaning of the Act. The plaintiff also contended that the Carriers Act did not apply, because the defendants were not carriers of the trunk by land. The trunk was accepted to be carried partly by land and partly by sea. *Le Couteur v. The London and South Western Railway Company* (1) is an authority to shew that where there is one entire contract to carry partly by land and partly by sea the contract is divisible, and that as to the land journey the carrier is within the protection of the Act if the loss arose during the transit by land. I think this trunk was lost in its transit from the defendants' receiving house. It ought to have gone to the railway to be conveyed to Liverpool. It went to the Victoria Docks. Directly it was on its wrong road it was lost to the owner within the meaning of the Act. Again it was contended by the plaintiff that the defendants were not entitled to the protection of the Carriers Act, because they were wrong-doers in that they sent the trunk on the wrong road and not on the journey contracted for. *Morrill v. The North Eastern Railway Company* (2) is an answer to this objection. Mr. Justice Blackburn there says, "Unless it is proved that the misdelivery was unintentional the case is within the Act." I can see no distinction in principle between that case and the present. It was lastly contended by the plaintiff that he was entitled to recover 10*l.* for repurchase of other articles in Rome at enhanced prices, irrespective of the Carriers Act, and that the Carriers Act did not apply to that portion of his claim. I think the plaintiff is right, for this is not a loss by the carrier of the trunk nor an injury to its contents, but damages sustained by the owner in consequence of non-delivery within due time; it is something consequential to the

loss. I do not think this 10*l.* is within the protection of the Carriers Act. The defendants say if it is not within the protection of the Act, this portion of the claim is too remote. Much depends upon whether it was a reasonable and necessary act for the plaintiff to buy these articles in Rome. This is a question of fact which I have to decide. I think it was both the reasonable and necessary consequence of the defendants' failure to deliver that the plaintiff should purchase what he did in Rome—a necessity arising from the non-delivery of a trunk which the defendants might fairly assume contained wearing apparel. The observations of Lord Justice Mellish in the case of *Leblanch v. The London and North Western Railway Company* (3) are not inapplicable here. That was a case where a passenger, delayed in his journey by the want of punctuality in the arrival of the defendants' train, sought to recover the costs of a special train which he had engaged. Lord Justice Mellish said, "Now one mode of determining what, under the circumstances, was reasonable is to consider whether the expenditure was one which any person in the position of the plaintiff would have been likely to incur if he had missed the train through his own fault, and not through the fault of the railway company." I think the plaintiff would have gone to the same expense and bought the same articles for the use of his wife if there had been no railway company to look to, and if the trunk had been lost by his own fault. There was nothing extravagant or unreasonable in his so doing. I do not think these damages are too remote. I give judgment for the plaintiff for 5*l.* beyond the 5*l.* paid into Court, with costs.

Judgment for the plaintiff.

Solicitors—Wilson, Bristows & Carpmael, for plaintiff; Goldberg & Langdon, for defendants.

(1) 35 Law J. Rep. Q.B. 40; Law. Rep. 1 Q.B. 54.

(2) 45 Law J. Rep. Q.B. 289; Law Rep. 1 Q.B. D. 302.

(3) 45 Law J. Rep. C.P. 521; Law Rep. 1 C.P. D. 286.

1881. } SIMCOX v. HANDSWORTH LOCAL
Nov. 8. } BOARD.

Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 150 and 257—Notice of Apportionment—Time Limited for Appeal—Defaulting Owners—Separate Notice to Owner in Default.

The respondents gave notice to the appellant to pave, sewer, &c., a certain road, which his premises adjoined. The appellant failed to pave, sewer, &c., whereupon the respondents, the local urban authority, executed the work; and on the certificate of their surveyor that 213l. 13s. 6d. was the amount due for such paving, &c., gave notice to the appellant, in pursuance of section 150 of the Public Health Act, 1875, that the amount he was required to pay was 213l. 13s. 6d. The appellant did not dispute the apportionment within three months, and the respondents on the 15th of October, 1879, served a notice on the appellant, requesting him to pay that sum. The appellant not having paid the said sum, the respondents on the 13th of March, 1880, commenced summary proceedings to recover the same; and on the 23rd of April, 1880, an order to pay the amount was made by the Justices:—Held, on appeal, first, that the respondents were not out of time, as the words in the notice of apportionment did not constitute a demand from the making of which the time limited for instituting summary proceedings would run; second, that where an owner fails to do the work in obedience to the collective notice, he is not entitled to a separate notice, before proceedings are commenced against him.

This was a Case stated by two Justices of the peace for the county of Stafford, under the provisions of 20 & 21 Vict. c. 43. The appellant is the owner of property abutting on a private street, within the district (not being a highway) called Albert Road, and which street was not paved, levelled, sewered, flagged and channelled to the satisfaction of the respondents.

On the 25th of October, 1878, the respondents, in pursuance of section 150 (1) of the Public Health Act, 1875, gave

(1) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 150: "Where any street within any

notice to the owners of the land fronting such street, requiring them to pave, &c., within a specified time.

All the said owners with the exception of the applicant executed the works required by the respondents to be executed by them respectively; but as regards that part required to be executed by the appellant, the notice to execute not having been complied with, the respondents executed the works, and thereupon served a notice upon the appellant, that the amount that he was required to pay "according to the frontage of his premises" was 213l. 13s. 6d. No notice to dispute the apportionment being given, it became binding and conclusive. On the 15th of October, 1879, the respondents gave notice to the appellant to pay that amount within fourteen days, and the amount not having been paid, the respondents, on the 13th of March, 1880, preferred the present complaint by way of summary proceeding for its recovery. The summons on such complaint, issued on the 1st of April, 1881, was heard on the 23rd of April, 1881, when an order to pay the said amount was made against the appellant.

The questions submitted to and decided by the Court were—

urban district (not being a highway repairable by the inhabitants at large), or the carriage-way, foot-way or any other part of such street, is not sewered, levelled, paved, metalled, flagged, channelled and made good, or is not lighted to the satisfaction of the urban authority, such authority may, by notice addressed to the respective owners or occupiers of the premises fronting, adjoining or abutting, on such parts thereof as may require to be sewered, levelled, paved, metalled, flagged or channelled, or to be lighted, require them to sewer, level, pave, metal, flag, channel or make good, or to provide proper means for lighting the same within a time to be specified in such notice. . . . If such notice is not complied with, the urban authority may, if they think fit, execute the works mentioned or referred to therein: and may recover in a summary manner the expenses incurred by them in so doing from the owners in default, according to the frontage of their respective premises, and in such proportion as is settled by the surveyor of the urban authority, or (in case of dispute) by arbitration in manner provided by this Act; or the urban authority may, by order, declare the expenses so incurred to be private improvement expenses. . . ."

Simcox v. Handsworth Local Board.

1. Whether the summons was improperly issued on the 1st day of April, 1881.

2. Whether the demand in the notice of apportionment was a legal demand.

3. Whether the order made by the Justices was properly made.

Anstie, for the appellant, contended that sections 150 (1) and 257 (2) of the Public Health Act, 1875, shew that the Act intended that the work ordered to be done should be carried out by the owners collectively or by the board, and not partly by those owners and partly by the board. Nor is there any power to apportion otherwise than according to the several frontages. When, therefore, the appellant failed to do the work in accordance with the first—that is, the collective—notice, he was entitled, before proceedings such as those taken were commenced, to have a separate notice sent to him. The notice of apportionment in this case contained the words “which you are required to pay;” and the respondents cannot make a subsequent demand, so as to extend the time limited for the board to take these proceedings.

It is true that the owner has three months in which to decide whether the amount claimed shall be made the subject of arbitration, but the board may demand payment at the time of giving notice of apportionment, if they choose; and they have, it is contended, demanded in this case; and having once made such demand, the board has only six months from that date in which to commence proceedings to recover the amount.

Jelf, Q.C. (with him *Bosanquet*), for the

(2) 38 & 39 Vict. c. 55. s. 257: “Where any local authority have incurred expenses for the repayment whereof the owner of the premises for or in respect of which the same are incurred is made liable under this Act, or by any agreement with the local authority, such expenses may be recovered, together with interest, at a rate not exceeding five pounds per centum per annum from the date of service of a demand for the same till payment thereof from any person who is the owner of such premises when the works are completed for which such expenses have been incurred, and until recovery of such expenses and interest the same shall be a charge on the premises in respect of which they were incurred. . . .”

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respondents.—The demand in the notice of apportionment (if any) was not a legal formal demand for money due, and therefore the six months' limitation did not begin to run from the date of the notice of apportionment—*Grece v. Hunt* (3). The word “respective” in section 150 would be surplusage if the work is to be done *en bloc* either by the owners or the board; and it would be in direct opposition to the spirit of the Act to call on people to do certain work, and after they have done it, make them pay because some others do not perform their share.

The form of notice to execute the works given in schedule 4 of the Act of 1875 bids each person to do the part opposite his land. In it the words “the same” must refer to “premises opposite his land.” The words “in default” would be superfluous if the contention on the other side that the works are to be done *en bloc* is to be upheld.

The clear intention of the Act is that the board are to do the works in case of default of the person required to do them, and to make the person in default pay for them. If there were any intention that in default the proceedings were to be commenced *de novo* the Act would be more explicit.

GROVE, J.—With regard to the point made as to the respondents being out of time, I think that though in the case of *Grece v. Hunt* (3) the words in the apportionment notice, which were there the subject of decision, are not identical with those contained in the notice of apportionment in this case, the reasoning in that case applies to this, and that a mere contingent demand is not sufficient, but that there must be a real demand after the three months allowed to the recipient of a notice of apportionment to apply for arbitration have elapsed. But irrespective of that case I should decide that there has been no sufficient demand; and the decision in that case, therefore, only confirms my own opinion. I think that the only way to make the Act workable is to construe the words “owners in default” as

(3) 46 Law J. Rep. M.C. 202; Law Rep. 2 Q.B. D. 389.

Simcox v. Handsworth Local Board.

really meaning such owners respectively as fail to perform the work required by the local board to be done. It may be that the Act contemplated that each owner should contribute in the ratio of his own frontage; but if not, the meaning would seem to be that each should contribute according to the proportionate amount of benefit derived from the works. In either case the Act provides a remedy as against an owner refusing to execute his share of the work required to be done. There is no doubt a difficulty as to going back to those who have done the work in front of their premises for any surplus found to be due from them in respect of more expensive work done by the local board in front of a defaulting owner's premises; but if the section be construed in any other than the way I construe it, there would be no means of working the Act. To take the portions one by one, and say that as long as one is not done completely all those to whom notices have been sent are defaulting owners, and the whole process must be begun *de novo*, or that a separate notice must be given every time one owner refuses to do what is required of him, would be impracticable. I do not think my construction is at all inconsistent with the scope of the Act, but that the construction sought to be put on this section by the counsel for the appellant would be inconsistent and end in impracticability. I am, therefore, of opinion that the appeal must be dismissed.

BOWEN, J., concurred.

Leave to appeal was applied for and refused.

Appeal dismissed.

Solicitors—F. Needham, agent for E. & A. Cad-dick, West Bromwich, for appellant; Robinson, Preston & Stow, agents for Rowlands, Bagnall & Co., Birmingham, for respondents.

[IN THE COURT OF APPEAL.]

1881. }
Dec. 19. } ROSENBERG v. COOK.*

Vendor and Purchaser—Conditions of Sale—Possessory Title of Vendor—Void Conveyance of Land by Railway Company to Vendor—Objection to Title—Time.

The defendant sold to the plaintiff certain land described in the particulars of sale as freehold building land. The land, part of which was over a railway tunnel, had been purchased by the defendant from a railway company who had no parliamentary powers to make the sale, so that the conveyance, being ultra vires, was void. The conditions of sale provided that the title was to commence with the conveyance from the railway company to the defendant; that the purchaser should not make any objection to the conveyance or the title prior to the date thereof; and that he should object to the title within seven days from the date of the delivery of the abstract. The plaintiff, after the expiration of the seven days, objected that the defendant could not make a title to the land, and refused to complete. In an action to recover the deposit,—Held, that the plaintiff could not recover, because, although the defendant was not able to make a title, being merely in possession of the land, the objection thereto was taken too late.

Appeal by the defendant from a judgment of Lindley, J., in an action for the recovery of a deposit of 65*l.*, paid under the following circumstances:—

On the 23rd of January, 1880, the defendant sold to the plaintiff by private contract certain land which was described in the particulars and conditions of sale as "two valuable plots of freehold building land, situate on the east side of Victoria Street, Cable Street, St. George's-in-the-East," which "are quite ready for building operations."

Among the conditions of sale were the following:—

"4. The title shall commence with the conveyance from the East London Railway Company to the vendor, and the purchaser shall not require the production of,

* *Coram* Jessel, M.R.; Brett, L.J.; and Cotton, L.J.

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or investigate or make any objection or requisition in respect of such conveyance or the title prior to the date thereof, whether such title shall appear by reference, recital, statement, covenant for production or otherwise, or do not appear at all.

"5. The purchaser shall examine the said conveyance, and send in his objections and requisitions (if any) in respect of the title or the abstract or particulars, or anything appearing therein respectively, which shall be stated in writing, to the office of the vendor's solicitor, within seven days from the date of the delivery of the abstract, and in this respect time shall be of the essence of the contract; and in default of such objections or requisitions (if none), and subject to such (if any), shall be deemed to have accepted the title. . . .

"7. The property is sold subject to certain covenants, stipulations and provisions as to the mode and use of the premises, and certain rights of the East London Railway Company contained in the said conveyance; and the purchaser at this present sale shall in his conveyance enter into a covenant with the present vendor to observe the same, and to indemnify the present vendor against any breach thereof. A copy of such covenants, stipulations and provisions will be produced at the time of sale, and may, in the meantime, be inspected at the office of the vendor's solicitor; and the purchaser shall be deemed to purchase with a full knowledge and acceptance thereof, and no objection or requisition shall be made in respect thereof.

"Lastly, if the purchaser shall fail to comply with the above conditions, his deposit shall be forfeited, and the vendor shall be at liberty to resell the property, at such time and in such manner and subject to such conditions as he shall think fit; and any deficiency in price which may happen thereon, and all expenses attending the resale, shall immediately afterwards be paid by the purchaser to the vendor, and in case of non-payment be recoverable by the vendor as liquidated damages."

The land in question had been sold to the defendant by the East London Rail-

way Company, who by the conveyance reserved to themselves power to enter upon it for the purpose of making and executing all necessary repairs to a line of railway and tunnel which ran under part of the land; and the conveyance also provided that the company would make reasonable compensation to the owner for all injury, loss or inconvenience caused by the exercise of such power.

On the 27th of January an abstract of title was delivered to the plaintiff, but no requisitions or objections were sent in to the vendor.

On the 20th of February, and after the expiration of the seven days given by condition 5, the plaintiff objected that the defendant could give no title to the land, as the conveyance from the railway company was void, and finally refused to complete. The defendant thereupon declared the deposit to be forfeited, and the present action was brought to recover it.

The action was tried by Lindley, J., without a jury, and judgment was given for the plaintiff on the ground that he was in exactly the same position as the purchaser in the case of *In re The Metropolitan District Railway Company and Cook* (1); and that the defendant purported to sell a freehold, whereas he had only a revocable licence, if even that.

The defendant appealed.

W. G. Harrison, Q.C., and *Swinfen Eady*, for the defendant.—Even assuming that the defendant had a bad title to the land, the conditions of sale put the plaintiff on the enquiry, and he must be taken to have known what kind of property he was buying. The defendant was in actual possession of the land, and sold that possession to the plaintiff. Next, the objection to the title was too late, not having been taken within seven days from the date of the delivery of the abstract.

Philbrick, Q.C., and *Tindal Atkinson*, for the plaintiff.—The whole question is, whether the vendor had that which he purported to sell. The defendant, although in actual, was not in legal, possession of the land. No doubt a vendor may, by apt words, sell a bad title or such interest as

(1) 49 Law J. Rep. Chanc. 277; Law Rep. 13 Ch. D. 607.

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he may profess to have; but here the defendant purported to sell freehold building land, whereas he only had a licence from the railway company to go upon the surface. The case of *In re The Metropolitan District Railway Company and Cosh* (1) does not in terms decide that the railway company would lose possession under section 127 of the Lands Clauses Consolidation Act, 1845 (8 Vict. c. 18).

[JESSEL, M.R.—That case only decides that slips of land above and below a tunnel are not superfluous lands.]

A similar point arose in *Hamund v. Best* (2), but there the conditions of sale were stricter than in the present case. The plaintiff had a right to assume that the railway company had power to sell the land. The objection to the title was not taken too late under condition 5, which does not apply to cases where there is a total want of title.

JESSEL, M.R.—In this case the vendor, believing that he had a title to this piece of ground which he had purchased from the railway company, and which had a tunnel running under a great part of it, put it up for sale subject to certain conditions, one of which precluded any objection being made to the title unless taken within seven days from the date of the delivery of the abstract, and as to that, time was to be of the essence of the contract. The purchaser was aware of the contents of the conveyance under which the vendor claimed to hold the land, and knew exactly what he was buying, namely, a piece of land with a tunnel underneath capable of supporting buildings, and certain easements granted to the railway company to enable them to repair the tunnel. The company had, two years ago, professedly conveyed the land to the vendor, who was in actual possession of it, but it turned out that they had no sufficient parliamentary powers to make the sale, consequently the conveyance did not pass the property at law, and the vendor therefore had only a bare possession. Under these circumstances, the title was submitted to the purchaser's advisers, who did not take objection to it until after

the time for making such objection had expired. The answer to that is, that, under condition 5, it was made too late. It was, however, argued that, although the physical possession of the ground was in the vendor, yet he had no legal possession sufficient, under the Statute of Limitations, to make it a freehold estate—that is, no possession in the sense that time would perfect it. That argument appears to me to be unsound. The title of a disseisor in this country is a freehold title, and although it is a very bad title and one liable to be defeated, still it is a title which is good as against all the world except as against a better one. If, therefore, the vendor had possession of the land, he had a title which by law was subject to be defeated only by a person with a better title—in this case, the company. It was suggested that because the company could not convey, therefore no title could be acquired under the Statute of Limitations; but there is no such limitation made by statute. It is quite immaterial for this purpose whether the person can alienate or not, and the plaintiff cannot recover his deposit, because he has not come early enough. There is not any Act of Parliament which says that land cannot by any possible means be devoted to any other purpose than that of a railway, or that the Statute of Limitations shall not apply. The fact is, that the vendor here had actual and quiet possession of the land, and as he sold fairly, not knowing that he had a bad title, he is not to be deprived of the benefit of the special condition which required the purchaser to make objection to the title within a certain time. I think that this appeal ought to be allowed.

BRETT, L.J.—It seems to me that, if the only objection here was that the defendant had no title to convey to the plaintiff, or that he had a bad title, then the objections made by the plaintiff were taken too late. The judgment of my brother Lindley seems to me to be that the objection was not taken to the title, because the defendant had not possession of anything which, if his possession was lawful, would correspond with what he was professing to sell to the plaintiff. If the defendant had never had possession of anything at all, then the

(2) 48 Law J. Rep. Chanc. 503; Law Rep. 12 Ch. D. 1.

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question was not one of title at all, and the judgment is one with which I should have agreed. So, if all that the defendant ever had possession of was a licence to go upon the land, or if he never had assumed to exercise anything but an easement, I should have thought that what he assumed to have possession of, if it was a lawful possession, would be all that he could give, and notwithstanding the notice to the plaintiff did not correspond with the subject-matter of the contract. In either of these cases I should have agreed with my brother Lindley's judgment. It seems to me, however, that the judgment was founded upon the assumption that the defendant was not in possession of anything but a revocable licence. I cannot therefore agree with that judgment. I think that the defendant was in possession, and assumed to be in possession, of more than a mere easement or revocable licence; for he was in actual possession of the land above the tunnel. It was said that his actual possession must be held to be no possession at all, because the railway company had no right to give to him, and also because his possession would not, even if he held the land for a number of years, give him a title against the railway company. It seems to me that the Statute of Limitations would have applied against the railway company as against private owners, and he would have had a title. It is sufficient to say that the defendant had actual possession of this part of the land which he assumed to sell. No doubt he had a bad title, but being in possession he assumed to sell that possession, and if there was nothing to prevent him from doing so, he assumed to sell the freehold.

The only objection was that he had no title to that which he assumed to convey, but he merely assumed to sell as a trespasser or disseisor, and in the same way as a squatter who might assume to sell, by such a contract as this, before he had gained a title under the Statute of Limitations against the true owner. There, a purchaser who had the notice which this plaintiff had could not recover a deposit on the purchase-money from the squatter on the ground that he had no title. Therefore the judgment of my brother Lindley, which is only wrong, to my mind, on the assumption that the defendant had not

possession of anything which he could sell, cannot be supported.

COTTON, L.J.—The first question is, whether the vendor proposed to convey to the purchaser what the particulars describe or something else. It is said that this land is not building or freehold land; but that is only part of the particulars, for they also referred to a conveyance from the railway company to the vendor, whereby they purported to sell something to the vendor—not land in its ordinary sense, but a little strip of land with a tunnel underneath. If the particulars stood alone, that would not be accurately described as freehold land, but the plaintiff saw the conveyance from the railway company before he entered into the contract. No doubt the defendant only had possession of the land, but that would give a freehold when perfected by lapse of time.

Then comes the other question, that the conveyance from the railway company was *ultra vires*, and void. It has already been settled in the case of *In re The Metropolitan District Railway Company and Cook* (1) that a strip of land over a railway arch is not superfluous land, so that the railway company could not convey it. That, however, is a question of title which ought to have been enquired into by the purchaser. The conditions here must be taken to mean that the purchaser must enquire whether or not the railway company has special powers to make such a conveyance. The argument assumes that the defendant was not in possession, but that is a fallacy, because he was actually occupying the land. It is said that Parliament had appropriated this land for a particular purpose, but that is not true. The Act merely means that the railway company cannot apply it to any other purpose except that of a railway. I am of opinion, if it is necessary to decide that question, that the vendor here had such a possession as in time would ripen into a good title under the Statute of Limitations.

Appeal allowed.

Solicitors—Stones, Morris & Stone, for plaintiff;
J. W. Cook, for defendant.

1881. }
Dec. 10. }

WEBBER v. LEE.

Statute of Frauds (29 Car. 2. c. 3), s. 4
—*Sporting Rights—Participation in Profits—Interest in Land.*

An agreement to enter upon specified terms the lands of another for the purpose of exercising sporting rights and carrying away a definite proportion of game killed thereon, is an agreement relating to an interest in land within the meaning of the 4th section of the Statute of Frauds, and must be in writing.

Further consideration, before Bowen, J.

This was an action brought to recover damages for breach of contract on the part of the defendant under the following circumstances: The plaintiff was the owner of certain shootings at Fleet, in Hampshire, under a seven years' lease, and desiring to let a portion of them advertised for a companion to join him upon equal terms, paying 200*l.* for his half share of shooting, and receiving half of the total of game killed. The defendant agreed, but not in writing, to take one-fourth of the shooting at a stipulated price, but afterwards refused to carry out such agreement. Thereupon the above action was brought, to which the defendant pleaded a denial of the agreement, and also the Statute of Frauds.

At the trial a verdict was found for the plaintiff; but the learned Judge reserved for further consideration the question whether the agreement was one which, under the Statute of Frauds, could only be enforced if reduced into writing.

McClymont, for the plaintiff, contended on behalf of the plaintiff that the agreement conferred no interest in land, but it was a mere licence to go and exercise sporting rights upon the plaintiff's land.

He cited *Wright v. Stavert* (1), *Powell v. Jessop* (2), *Watson v. Spratley* (3), *Wells v. The Mayor, &c., of Kingston-upon-Hull* (4), *Taylor v. Waters* (5) and *Wood v. Manley* (6).

(1) 2 E. & E. 721; 29 Law J. Rep. Q.B. 161.

(2) 18 Com. B. Rep. 336; 25 Law J. Rep. C.P. 199.

(3) 10 Exch. Rep. 222; 24 Law J. Rep. Exch. 53.

(4) 44 Law J. Rep. C.P. 257; Law Rep. 10 C.P. 402.

(5) 7 Taunt. 374.

(6) 11 Ad. & E. 34; 3 Jur. 1028.

Austie, for the defendant, was not called upon.

BOWEN, J.—I think that in this case judgment must be entered for the defendant. The contract relied upon by the plaintiff is not in writing, and is for the lease of shootings over certain grounds, and under it the defendant was to have the right to go over the plaintiff's land for the purpose of exercising the right of sporting, and of carrying away a definite proportion of the game that was killed. The question I am called upon to decide is, whether a grant of this description is a mere revocable licence to go upon the land, or whether it is coupled with an interest in the land, in which latter case it must be in writing. Now here there is something more than a mere right to go upon the land—there is an actual participation in the profits, of however limited a character; and, as was pointed out in *Watson v. Spratley* (3), a contract granting an interest in land must be in writing. The authorities which have been urged before me as supporting the plaintiff's view are all distinguishable. *Wright v. Stavert* (1) was a contract for board and lodging, including only the permission to reside in a house, and was properly decided to pass no interest in land. In *Wells v. The Mayor, &c., of Kingston-upon-Hull* (4) it was decided that a contract for the use of a graving-dock under certain specified regulations need not be in writing, the *ratio decidendi* being that there was no exclusive right to the possession of the dock, and that nothing in the nature of an interest in land was created. *Watson v. Spratley* (3) and *Powell v. Jessop* (2) were decided upon similar grounds, namely, that shares in a mine worked upon the cost-book principle do not constitute an interest in land. Similarly, in *Taylor v. Waters* (5) it was held that the right to use an opera-box at certain performances at a theatre was a licence to enjoy a beneficial privilege on land only, and was not such an interest in land as was required to be in writing. In that case there was no participation in the profits of the land; but here the defendant has a right not only to go on the land, but to take away a portion of the profits derived from it. However much I may regret the application of the Statute of

Webber v. Lee.

Frauds to a case like the present, I can come to no other conclusion than that this agreement does confer an interest in land, and, not being in writing, cannot be enforced. Judgment must therefore be entered for the defendant, notwithstanding the finding of the jury.

Judgment for the defendant.

Solicitors—J. O. Jacobs, for plaintiff; J. P. Murrough, for defendant.

[APPEAL FROM REVISING BARRISTERS' COURT.]

1881. } ADAMS (*appellant*) v. BOSTOCK
Nov. 23. } (*respondent*).

Parliament — Borough Vote — Amendment—Notice of Objection—Place of Abode omitted—41 & 42 Vict. c. 26. s. 28.

A Revising Barrister may amend a notice of objection by adding the place of abode.

In a notice of objection to a borough voter, the objector omitted to state his place of abode. The objector was a solicitor practising in the borough. He was clerk to the magistrates, and coroner. He had resided in the borough all his life, and was well known to the inhabitants. No one was misled by the omission:—

Held, that the omission was a mistake which the Revising Barrister could amend under 41 & 42 Vict. c. 26. s. 28. sub-s. 2.

Appeal from the decision of the Revising Barrister for the borough of Horsham, amending a notice of objection.

The respondent objected to the name of the appellant being retained in the list of voters for the said borough.

The notice of objection was as follows:—

“To Mr. Frend Adams.—I hereby give you notice that I object to your name being retained on the list of persons entitled to vote at the election of a member to serve in Parliament for the parliamentary borough of Horsham, on the following grounds, viz.:—

“That you have not occupied twelve months to July 15.

“Dated this 25th day of January, 1881.

“(Signed) Arthur Reid Bostock,

“on the list of parliamentary voters for the parish of Horsham.

“Mr. Frend Adams, Horsham.”

The appellant objected that such notice was invalid and void in law, inasmuch as it did not state the place of abode of the respondent and could not be amended (1).

The borough of Horsham comprises the greater part of, and is contained within, the parish of Horsham, and in every instance in which the residence of the voter is within the parish of Horsham the place of abode is described as “Horsham” only in the list of voters.

The place of abode of the respondent was described in the list of voters as “Horsham.” No other person of the same name was on the list of voters, and it was admitted that if the respondent had inserted in his notice of objection the words “of Horsham,” the notice of objection would have been valid.

The respondent is a solicitor practising at Horsham, and is clerk to the magistrates and coroner. He has resided in the parish of Horsham all his life and is well known to the inhabitants thereof.

The names of thirteen other persons were objected to under similar circumstances. The notices of objection were duly served on the persons objected to. The notices of objection served on the overseers were duly published by them.

(1) 41 & 42 Vict. c. 26.

Form L.—Form of Notice of Objection.

No. 2 (*Parliamentary*).

Notice of objection to be given to person objected to.

To Mr.

I hereby give you notice that I object to your name being retained on the list of persons entitled to vote at the election of members [or a member] to serve in Parliament for the parliamentary borough of _____, on the following grounds, viz.:—

1. *E.g.* That you have not occupied for twelve months to July 15th.

2. That

3.

Dated the _____ day of _____, 18 ____.

(Signed) A.B. of [place of abode],

on the list of parliamentary voters for the parish of _____

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No evidence was produced before the Revising Barrister to shew that any one of the persons so objected to was misled or deceived, and he held as a fact that no one of such persons was misled or deceived by the omission of the words "of Horsham."

He further held that the omission of the words "of Horsham" was a mistake within sub-section 2 of section 28 of the Act 41 & 42 Vict. c. 26, and in the exercise of his discretion he corrected such mistake by inserting the words "of Horsham" in the notices of objection.

It was admitted that if the alleged defect in the notices of objection was capable of amendment, the names of the appellant and the said thirteen other persons must be expunged from the said list of voters, and he accordingly expunged the same.

Bompas, Q.C., for the appellant.—The words of section 28 of 41 & 42 Vict. c. 26, "the Revising Barrister may correct any mistake which is proved to him to have been made in any claim or notice of objection," must receive a reasonable limitation. The mistake alluded to in section 28 is an accidental mistake, and not a mistake where the person making it has done what he intended to do. The omission was fatal to the notice of objection. In *Woollett v. Davis* (2) the place of abode of the objector, described as the "Oaks," without the addition of any parish, was held insufficient; and though there was added "on the register of voters for the parish of St. W." it was held the list of voters could not be looked at to shew the "Oaks" was in that parish. The object of the notice is to make the objector give grounds of his objection; it is therefore essential that the person objected to should know his address, because he may be able to satisfy the objector his objection is groundless, and then the objector may withdraw. *Luckett v. Knowles* (3), *Bendle v. Watson* (4), *Pickard v. Baylis* (5), *Ballard v. Robins* (6), *Mel-*

(2) 4 Com. B. Rep. 115; 16 Law J. Rep. C.P. 185.

(3) 2 Com. B. Rep. 187; 15 Law J. Rep. C.P. 87.

(4) 1 Hopw. & C. 591; 41 Law J. Rep. C.P. 15; Law Rep. 7 C.P. 163.

(5) 49 Law J. Rep. C.P. 182; Law Rep. 5 C.P. D. 235.

(6) 2 Hopw. & C. 384; 47 Law J. Rep. C.P. 50; Law Rep. 3 C.P. D. 92.

bourne v. Greenfield (7), were also referred to.

A. L. Smith, for the respondent.—The Revising Barrister has power to amend such an omission, though fatal without amendment, as in *James v. Howarth* (8), where it was held the omission of the word "parliamentary," though fatal to a notice of objection, might be added by the Revising Barrister.

He was then stopped by the Court.

DENMAN, J.—I think there is no doubt but that the amending power conferred by section 28 of 41 & 42 Vict. c. 26 was intended to include a matter so trivial and unimportant as the present. The notice of objection was in all respects regular, except that the place of abode of the objector was omitted. He was a person well known to the inhabitants of the district, and no one was deceived or likely to be deceived by the omission. The decision of *James v. Howarth* (8) has supplied us with an authority to shew that an omission as unimportant as the present was considered by the Court to be capable of amendment, and we may safely follow that decision. If there is any conflict between *James v. Howarth* (8) and the older cases, as *Woollett v. Davis* (2), they must be considered to be overruled by the later decision. I therefore am of opinion the decision of the Revising Barrister was right.

BOWEN, J.—I am of the same opinion. It is not necessary to decide whether the omission of the address in a notice of objection is fatal. All that we hold is that under the circumstances of the present case the Revising Barrister was not wrong in considering the omission to be a mistake which he might amend.

Appeal dismissed. Decision of Revising Barrister affirmed with costs.

Solicitors—J. C. Charlton, for appellant; Robinson, Preston & Stow, agents for Bostock & Rawlison, Horsham, for respondent.

(7) 7 Com. B. Rep. 1; 29 Law J. Rep. C.P. 81.

(8) 49 Law J. Rep. C.P. 169; Law Rep. 5 C.P. D. 225.

[IN THE QUEEN'S BENCH DIVISION AND
IN THE COURT OF APPEAL.]

1881. }
Nov. 24. } NUTH (*appellant*) v. TAMPLIN
Dec. 16. } (*respondent*).*

Parliament—Borough Vote—Registration—New Lodger Claim—Sufficiency of Declaration annexed to Notice of Claim—Prima facie Evidence of Qualification—Representation of the People Act, 1867 (30 & 31 Vict. c. 102), s. 4—Parliamentary and Municipal Registration Act, 1878 (41 & 42 Vict. c. 26), ss. 22, 23, 25, and sched. II, form 2.

By section 23 of 41 & 42 Vict. c. 26, "in the case of a person claiming to vote as a lodger, the declaration annexed to his notice of claim shall, for the purposes of revision, be *prima facie* evidence of his qualification":—Held (reversing the decision of the Revising Barrister), that the section applied to all lodger claimants, both new and old—as well to those who claim in respect of lodgings for the first time under 30 & 31 Vict. c. 102, s. 4, as to those who, being already on the list of voters, claim to be placed on the list under 41 & 42 Vict. c. 26, s. 22—so that a person claiming to be put on the list as a lodger for the first time is not bound to appear before the Revising Barrister, either personally or by an agent, in support of his claim; but the notice of claim and declaration annexed thereto are to be taken as *prima facie* evidence of his qualification, and the Revising Barrister, in the absence of any objection thereto, is bound to allow such claim.

This was a Case stated by the Revising Barrister for the borough of Marylebone, from which it appeared that the appellant, Edward Nuth, of No. 20, Lady Somerset Road, in the parish of St. Pancras, claimed under section 4 of the Representation of the People Act, 1867, in due form to have his name inserted as a lodger on the list of voters for the borough. The claim, which was in form H, No. 2, of the schedule to the Parliamentary and Municipal Registration Act, 1878 (41 & 42 Vict. c. 26) (1),

* *Coram* Denman, J., and Bowen, J., in the Queen's Bench Division; Jessel, M.R., Baggalay, L.J., Brett, L.J., Cotton, L.J., and Lindley, L.J., in the Court of Appeal.

(1) The notice of claim which set out the claimant's qualification contained the following

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was duly published by the overseers in the list of lodger claimants.

The claimant did not appear personally, and no evidence of any kind was tendered in support of his claim; to which, however, no formal objection in writing was made, as required by section 39 of 6 & 7 Vict. c. 18, by or on behalf of any person whose name was on the list of voters for the borough.

It was contended for the claimant that section 23 of 41 & 42 Vict. c. 26 applied to all lodger claimants, as well to those who claim in respect of lodgings for the first time under section 4 of the Representation of the People Act, 1867 (30 & 31 Vict. c. 102), as to those who, being already on the list of parliamentary voters in respect of lodgings, claim to be placed on the list of voters under section 22 of 41 & 42 Vict. c. 26 (2) in respect of the same lodg-

declaration, which was in the form H, No. 2, prescribed by schedule:—

"I hereby declare that I have during the twelve calendar months preceding the 15th day of July in this year occupied as sole tenant and resided in the above-mentioned lodgings, and that those lodgings are of a clear yearly value, if let unfurnished, of 10*l.* or upwards."

The notice of claim, together with the declaration, was duly signed by the claimant, and his signature was duly witnessed.

(2) 41 & 42 Vict. c. 26, s. 22: "Where a person is entered in respect of lodgings on the register of voters for the time being in force, and desires to be entered on the next register in respect of the same lodgings, he may claim to be so entered by sending notice of his claim to the overseers of the parish in which his lodgings are situate on or before the 25th day of July.

"The overseers shall, on or before the last day of July, make out a list of all persons so claiming, and if they have reasonable cause to believe that any person whose name is entered on the list is not entitled to be registered or is dead, shall add in the margin of the list opposite his name the words 'objected to' or 'dead,' as the case may be.

"The lists so made out shall be signed, published and otherwise dealt with in the same manner as the alphabetical lists mentioned in section 13 of the Parliamentary Registration Act, 1843 (6 & 7 Vict. c. 18), and shall for the purposes of the Parliamentary Registration Acts be deemed to be lists of voters, and the provisions of the Parliamentary Registration Acts as to objections shall apply to such lists, and the persons against whose names the overseers have so written the words 'objected to' or 'dead,' shall be deemed to be duly objected to."

Section 23: "In the case of a person claiming

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ings as those claimed for, and that the claimant was entitled to have his name inserted in the list of voters for the borough of Marylebone as a lodger, without further evidence being adduced in support of his claim other than that furnished by the declaration.

The Revising Barrister disallowed the claim on the ground that section 23 of 41 & 42 Vict. c. 26 did not apply to the case of persons claiming only under section 4 of 30 & 31 Vict. c. 102, and not under section 22 of 41 & 42 Vict. c. 26, to be placed on the list as lodgers; and that it was necessary for a person so claiming, whether objected to or not, to appear either himself or by his agent, and to produce evidence in support of his claim other than that (if any) afforded by the declaration.

The claimant appealed.

Bompas, Q.C., for the appellant.—Section 23 of 41 & 42 Vict. c. 26 must apply to those claiming to vote as lodgers for the first time, as well as to those already on the list of voters by virtue of the Act of 1867. It is true that Coleridge, C.J., and Denman, J., in *Picard v. Baylis* (3) thought that section 23 did not so apply; but that point was not the one actually decided, and was not fully argued. All other voters are admitted without any support in person of their claims unless those claims are objected to, and in no other case is a man bound to give evidence of his claim in the absence of objection thereto. Those claiming to vote as lodgers have to put in a formal declaration. 30 & 31 Vict. c. 102, s. 4, sub-s. 30 gives a vote to a lodger, and prescribes the form of his claim; and 41 & 42 Vict. c. 26 substitutes another form for the one given in schedule G, which prescribes formalities purporting to shew a *prima facie* title in the claimant to vote. The declaration and attestation thereof but for this would be useless.

to vote as a lodger, the declaration annexed to his notice of claim shall, for the purposes of revision, be *prima facie* evidence of his qualification."

Section 25 declares that any person, whether a claimant or a witness in respect of a claim to vote as a lodger, who signs a false declaration shall be guilty of a misdemeanour, and punishable by fine or imprisonment for a term not exceeding one year.

(3) Coltm. Reg. Cas. 98; 49 Law J. Rep. C.P. 182; Law Rep. 5 C.P.D. 235.

It is admitted that lodgers on the list of lodger voters after 1867 but before 1878 were not and are not required to attend and support their claims since they are within section 23, except where an objection has been proved in accordance with section 28, sub-section 10, of the Act of 1878, and that section 24 is extended to new lodgers. Then section 23, which uses the same words as section 24 in describing those persons it is intended to affect, namely, those "claiming to vote as lodgers," must also extend to new claimants, who therefore should not be required to attend.

By section 23 the declaration in the requisite form is declared to be sufficient *prima facie* evidence of the claimant's qualification for the purposes of revision. This is obviously to meet the difficulty as to new claimants, and means that, in the absence of objections, no personal attendance is necessary. What is intended is that everyone should be able to get put on the register unless there is an objection made. *Picard v. Baylis* (3) does not really apply, and if it does, is not correctly decided.

E. Clarke, Q.C., for respondent.—This was decided as a material point in *Picard v. Baylis* (3), and the decision was right. If the mere making a declaration were *prima facie* evidence of a right to the vote, this would be the only class of voters to whom no objection could be made. Their claim must be sent in not later than the 25th of August, and all objections must be taken on or before the 25th of August. By the Act of 1867 all lodger claims are to be sent in by the 25th of August. The Act of 1878 made a special provision as to old lodgers that their claims should be sent in by the 25th of July, and the list published by the 1st of August, thus giving till the 25th of August for objections; but these provisions do not apply to new lodgers, and there is thus no time for objections, and thus new lodgers have an unfair advantage.

[BOWEN, J.—But new lodgers can be objected to in Court without any notice of objection in writing, as is necessary in the case of old lodgers.]

As to a ratepayer, the overseer's list is *prima facie* evidence of qualification, but in a case of a lodger that cannot be.

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[BOWEN, J., referred to 40 & 41 Vict. c. 26. s. 10.]

That does not apply to objections in Court. Section 23 was passed with the object of removing the hardship from the old lodgers, who have before proved their claims, of having to attend again.

The natural construction is that sections 22 and 23 are complete in themselves as a provision for old lodgers. If there should happen to be an error or omission they may under section 24 make a declaration—which is to be received as “evidence of the facts declared to”—but this does not apply to new lodgers.

[BOWEN, J.—But section 24 applies to “every borough and burgess list,” not merely to old lodgers.]

But section 23, it may be said, comes between one applying to old lodgers and one to all voters—that is, lists of voters as distinguished from lists of claims.

[BOWEN, J.—But the words are nowhere “claimant to a vote,” but “person claiming to be entered,” and in sections 23 and 24, “claiming to vote as a lodger.”]

Both claim to have their names inserted in the list. The sentence is clearly elliptical, and means really “claiming to have his name put on the list.”

[BOWEN, J.—Then if you are right, “claiming to vote as a lodger” in section 23 differs in meaning from those words in section 25.]

Section 25 applies to both. But the position of section 23 restricts the meaning of the words. In *Picard v. Baylis* (3) this was not a side point, but was fully argued.

Bompas, in reply.—*Picard v. Baylis* (3) cannot be deemed a decision. There is only a *semble* in support of the contention on the other side, and no headnote of any case in any law report touches the point. It is clear that old lodger claimants being on the list, and therefore in the position of householders as regards the franchise, do not require a provision as to a *prima facie* title. Therefore it cannot be the object of section 23 to make such provision as to them, but as to new lodger claimants.

DENMAN, J.—The sole question now before us is whether the words of section 23 are applicable to this case or not. That section is as follows—[His Lordship read

section 23]. It was contended that that section does not apply to persons only claiming under section 4 of the Act of 1867, and not under section 22 of this Act. The Revising Barrister must we think have been influenced by the idea that certain *dicta* of Lord Coleridge, C.J., and myself in the case of *Picard v. Baylis* (3) constituted an authority for the position that section 23 did not apply to the claims of new lodgers. I must confess that at the time of deciding that case I was somewhat strongly inclined to the opinion that section 23 by its juxtaposition to, and coming between, sections 22 and 24, which deal, one exclusively and the other inclusively, with persons already at the time of the passing of the Act on the list, was only applicable to old lodger claimants. My attention has been called to the language I used, but I am strongly of opinion and recollection that I desired cautiously to abstain from saying anything that should be interpreted as a decision on that point. I did not feel that we had had it sufficiently discussed to hold that it was only so applicable. It is also clear that my brother Lindley, a member of the deciding Court, was strongly of opinion the other way. At any rate there was no such judgment on the point as to absolve the Court from approaching this case as involving a new point.

However, having heard it more fully argued, I must confess that the opinion of my brother Lindley was sounder, and my *dictum* to the contrary was wrong. The words of section 23 are very strong, comprehensive and general, and there is no *prima facie* qualification of them. It would be contrary to the well-known canon of construction to import words into the Act that are not there. The language of the section is as large as possible, but it has been here argued that it was not intended to apply to new lodger claims. The most forcible argument put forward was, it seemed to me, that it would be giving advantage to new lodgers over the old, but that argument was met by the observations of my brother Bowen in the course of the argument, which was by no means a strong one. I do not think it by any means clear that the new lodger is put in a better position. He has to make his claim in a particular form, give minute particulars of

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his claim, and have a witness stating under the sanction of a heavy penalty that the claimant is the person he asserts himself to be. That argument therefore seems to fail, but there is a strong argument on the other side that if we hold that section 23 applies only to old lodgers we should be holding that language which is identical in the two sections between which this section in question intervenes must be interpreted in different senses. To so hold would, I think, be most dangerous in the absence of most cogent reasons. In section 25, the words "claimant to vote as a lodger" admittedly apply to all claimants, and section 22 *prima facie* so applies. I think, therefore, it would be wrong to hold that those words exclude the new lodger and admit the old in section 23. There is no right to so construe it according to the generally received principles of construction. Several speculative grounds for such a construction have been put forward, such as that the Legislature intended to be more generous to one class than to the other, but we cannot go into them. I come to the conclusion that the natural construction is that which we are now giving to the section. I therefore think that the appeal should be allowed with costs.

BOWEN, J.—I am of the same opinion, and for the reasons given by my brother Denman. The words of the section are, in my opinion, clear, and but for certain *dicta* of Lord Coleridge and my brother Denman in the case of *Picard v. Baylis* (3) I should not have felt even the hesitation I have in coming to this decision. What doubt I may have had owing to the fact of Lord Coleridge's opinion on the point having been somewhat positively expressed is, I may almost say, entirely dissipated by the fact that my brother Denman, who in that case spoke with some hesitation on the point, has come in this case, after a full argument of the point, which did not occur in that, to a contrary conclusion. I must say I am not convinced by the language of Lord Coleridge in *Picard v. Baylis* (3). In thus holding I am supported by the judgment of Mr. Justice Lindley, who dissented from Lord Coleridge and my brother Denman. For these reasons I think the appeal should be allowed with costs.

The respondent Tamplin appealed.

Dec. 16.—*Charles, Q.C.*, for the respondent Tamplin.

Bompas, Q.C., for the claimant, was not called on.

JESSEL, M.R.—The question we have to decide is the meaning of section 23 of 41 & 42 Vict. c. 26. It was contended on the part of the present appellant that the section was not to be read literally, and that the literal meaning was not the true one, but that the section applied to the case of a person claiming to vote as a lodger, and that it must be limited by inserting some such words as "in the case of the person mentioned in the preceding section, or of the person who has been already entered as a lodger."

Where it is contended that a section of an Act of Parliament is not to be construed literally one of two things must be shewn, either that some other section of the Act cuts down that section, or else that the section itself leads to some absurdity, and is repugnant to the purview of the Act. The argument of the appellant was addressed to the second proposition. It was said that if the section was read literally, the result would be that a person who makes the declaration required by section 23 would be entitled to go upon the list of voters without the possibility of any objection being raised. Before we consider that argument it may be well to look at the position of the voter previous to the passing of the Act of 1878. A new voter, before that Act, had to send in his claim with a declaration, but no penalty was attached if he made a false declaration; and he was then compelled to attend and support it, according to our law, by oral evidence. But anybody on the list, either by himself or by proxy, could object to the admission of the claim, as I read the sections of the former Acts of Parliament. It seems to me to be plain that any person on the list could object to a claim, and that any person was liable to have his claim opposed. That being so, before the passing of the Act of 1878 the lodger was subject to the inconvenience of having to attend either by himself or by his agent, and to produce oral evidence. If he could be opposed then, I cannot find anything to prevent his being opposed now. But section 23 says that the declaration shall be *prima facie*

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evidence of his qualification, and by section 25 a penalty is imposed on any person who makes a false declaration; so that now a person who makes a declaration is in very much the same position as one who makes an affidavit. Formerly, the voter had to prove his claim orally, but now the only result is that anyone who wishes to oppose the claim must put in rebutting evidence. It was suggested that the voter would be put in a worse position than before; but if the case is a clear one he would not anticipate that false rebutting evidence would be put forward to oppose the claim. If evidence is brought forward it seems to me that the voter may be in this position—either he or his agent may ask for an adjournment; or if any objection is anticipated, he may still come with his witnesses. It seems to me that this would cause no inconvenience.

It was also objected that the voter must go himself, but I think the overseers would bring the claim in before the Revising Barrister, who would then allow it if it was not opposed. Here we have to deal with a case where an agent appeared for the claimant, and where the claim was not opposed. I rest my decision on the broad ground that the section must be construed literally. I am of opinion, therefore, that the decision of the Court below must be affirmed.

BAGGALLAY, L.J.—In my opinion, the reasons assigned by Mr. Justice Denman, which I entirely adopt, are sufficient to reverse the decision of the Revising Barrister. In this case the claim was both made and published in due form and order, and although no one appeared in support of it, it was the duty of the Revising Barrister before whom it came to give effect to it, and also to the declaration, in the absence of any rebutting evidence.

BRETT, L.J.—The question here rests entirely on the construction of section 23, and in order to give my opinion on it I shall endeavour to shew exactly how I think it takes effect. With regard to the duties of a Revising Barrister, it is necessary in the first place to observe that the only things to be revised by him are the lists. No register is before him, not even that of the former year; and all that he has to do,

if the overseers have done their duty, is to revise the list. There is one case only where he has to revise claims which are not in the list, namely, where a person has made a claim, but the overseers have accidentally omitted to put that claim in the list.

With regard to boroughs, a general list of voters is made out by the overseers; but as persons who make claims may be omitted, the overseers make out another list, which contains the claims omitted from the general list. As regards lodgers, there are some who assert that they were on the list of the previous year as lodgers. The names of these persons are by section 22 of the Act of 1878 to be put into a list which is to be revised by the Revising Barrister, but subject to the stipulation in that section that no objection can be taken to the claim unless notice of such objection has been given before the list goes into the presence of the Revising Barrister, who has then to revise it, and who, if there are no objections, must put the names on the list of voters. The case of persons who are alleged to have been on the old list is therefore now determined by section 22 of the new Act; but with regard to the claims of lodgers who were not on the list of former years, the mode is not determined by the Act of 1878, but by section 30 of the Act of 1867. They are to send in their claims to be registered as voters, and the overseers are to make out a list of such claims, which is to be brought before the Revising Barrister. By section 30 all persons are bound to support and make out their claims, even though no notice of objection has been given to the claims. Then any voter has a right, according to sections 38 and 39 of 6 Vict. c. 18, which are introduced into section 30 of the Act of 1867, then and there to test the proof of the claim and see whether it is proved, and, if a *prima facie* claim is made out, may offer evidence to rebut it. It is true that it is said that the person who objects must give notice in writing, but that form is not, as a matter of practice, insisted upon; so that any voter in the room may object that the claimant has not made out his claim. By that statute, therefore, a person who claims to be put on the list of lodgers, but who was not on the list before, is bound to make out his claim before the

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Revising Barrister. There is nothing in the Act of 1878 to get rid of any part of that statute; a new claimant is therefore bound to make out his claim, although no objection has been made to it.

Then comes the question whether section 23 of the Act of 1878 applies to such a case. It certainly does apply to persons who have been on the list before, and they have only to put in their claim, together with the declaration, which is to be *prima facie* evidence of their qualification. Now does the section (the words of which are as large as they can be) apply to the case of a new claimant? His name is on the list for the purposes of revision, and the terms of the section apply as much to him as to another. The declaration is to be taken as *prima facie* evidence, and if he is there before the Revising Barrister, or if anyone is there for him, the section presents no difficulty at all; but anyone there may object to the claim. The difficulty, as it struck me, was that either the claimant, or somebody for him, must be present. I think, however, that this only applies as to the question of evidence, and that he is bound to make out his claim. But if he is not there it is the duty of the overseers to point out the declaration; if the overseers are not there, then it is the duty of the Revising Barrister to take notice of the declaration and to allow the claim, unless somebody is there to shew that it is wrong—in which case the objection must be entertained. It therefore comes to this, that no previous notice of objection need be given to the claimant, but if he is not present it is his misfortune if his claim is not inserted on the list. The words of the section apply equally to the case of a person who claims for the first time as to that of a person who was on the old register. It is therefore the duty of the Revising Barrister to accept the declaration as *prima facie* evidence of this claimant's qualification.

CORRON, L.J.—I am of opinion that the judgment of the Court below is right. The question is one as to the construction of section 23 of the Act of 1878. It was conceded that the construction put upon it by the Court below was in accordance with the section itself; but we have to consider

whether there is any other section which might restrict its operation. No such section has been pointed out, and in my opinion there is none. Then comes the question whether any inconvenience arises from extending this section to lodgers who claim for the first time. I do not think there would be any manifest inconvenience. The section for the first time makes the declaration *prima facie* evidence, when the claimant would otherwise have been obliged to give other evidence. In my opinion the section applies to a declaration made by a lodger who claims for the first time as well as to a lodger who has already been put on the register.

LINDLEY, L.J.—I am of the same opinion. In order to understand section 23 it is only necessary to look at it with section 25 and form H given in the schedule. These sections, if taken together, are all perfectly consistent. It is said we ought to restrict the ordinary language, because of the inconvenience which might arise from the lodger acting upon section 23 and being met with some objection without any notice having been given to him. Whether that is so or not I do not know. Even if it is not necessary to give notice, we have come to the conclusion that practically it is more convenient for the lodger to be able to act upon the declaration being taken as *prima facie* evidence of qualification and to run the risk of any objection being taken to the claim. Whichever way we look at the matter, there seems to be no reason for cutting down the general language of the section. I think the appeal should be dismissed with costs.

Appeal dismissed.

Solicitors—H. T. Ives, for appellant; G. S. Joseph, for respondent.

[IN THE QUEEN'S BENCH DIVISION AND
IN THE COURT OF APPEAL.]

1881. { BRADLEY (appellant) v. BAYLIS
Nov. 23. { (respondent). MORFEE (ap-
Dec. 15, { pellant) v. NOVIS (respon-
16, 21. { dent). KIRBY (appellant) v.
 { BIFFEN (respondent).*

Parliament—Borough Vote—Occupation Franchise—Lodger or Inhabitant Occupier—Part of a House—Separately occupied—Joint use of other Parts of the House—General Control by Landlord—30 & 31 Vict. c. 102. ss. 3 and 4—41 & 42 Vict. c. 26. s. 5.

Where the owner of a house does not let out the whole of it, but retains part of it for his own use and resides therein, and also does not let out the passages and staircases, but only gives a right of ingress and egress to the tenants, retaining a control over the passages and staircases so as to interfere and turn out trespassers, there the inmate of part of that house (whether he has the exclusive use of the room or not) is a "lodger" within the meaning of 30 & 31 Vict. c. 102. s. 4, as explained by 40 & 41 Vict. c. 26. s. 5.

Where the owner of a house lets out the whole of it in separate apartments so as to demise the passages, but reserving to the inmates of the several floors a right of ingress and egress, and retaining no control over the house either by himself or his servants, there each inmate is an "inhabitant occupier" within the meaning of 30 & 31 Vict. c. 102. s. 3, as explained by 40 & 41 Vict. c. 26. s. 5.

Per JESSEL, M.R.—The question whether a person is an "inhabitant occupier" or a "lodger" within the meaning of these statutes depends upon the circumstances of each particular case, and no exhaustive definition can be given.

A claimant furnished and occupied with his wife and family, during the qualifying year, a room in a dwelling-house. The landlord, who resided on the premises, exercised a general control over them, but rendered no services to the claimant either by himself or his servants. In all other

respects the claimant was entitled to be put on the occupiers' list :—Held (reversing the judgment of the Queen's Bench Division), that the claimant was not an inhabitant occupier as tenant of a dwelling-house within the meaning of 30 & 31 Vict. c. 102. s. 3, but was a "lodger" within section 4 of the same Act, as explained by 41 & 42 Vict. c. 26. s. 5.

A claimant furnished and occupied two rooms on the first floor of a dwelling-house. One room was used as a bedroom, and the other as a sitting or living room. The claimant's landlord was the tenant of and resided in the rest of the house. Both the claimant and his landlord had keys of the outer door, and used a certain wash-house attached to the house in common, but the landlord alone was rated and paid the rates. In all other respects the claimant was entitled to be put on the occupiers' list :—Held (reversing the judgment of the Queen's Bench Division), that the occupation of the claimant was that of a "lodger" within the meaning of 30 & 31 Vict. c. 102. s. 4, as explained by 41 & 42 Vict. c. 26. s. 5.

A claimant occupied, during the qualifying year, two rooms on the first floor of a dwelling-house which contained eight rooms. Such rooms were not structurally severed from the rest of the house nor separately rated. The remaining rooms also were let out to tenants. The landlord did not reside in the house, nor did he either by himself or his servants render any services to the tenants or retain any control over the house or any part of it. The passages and staircases were not demised to the claimant or the other tenants, but, together with the outer door and other conveniences, were used by them in common. The landlord paid all the rates and taxes, and repaired the house both inside and out :—Held (affirming the judgment of the Queen's Bench Division), that the claimant was an "inhabitant occupier" of a dwelling-house within the meaning of 30 & 31 Vict. c. 102. s. 3, as explained by 41 & 42 Vict. c. 26. s. 5.

These were three appeals from the decision of Revising Barristers, in which the same point was raised, namely, whether the claimant in each case was entitled to

* *Coram* Denman, J., and Bowen, J., in the Queen's Bench Division; Jessel, M.R., Baggallay, L.J., Brett, L.J., Cotton, L.J., and Lindley, L.J., in the Court of Appeal.

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the franchise as an inhabitant occupier of a dwelling-house within the meaning of 41 & 42 Vict. c. 26. s. 5.

BRADLEY v. BAYLIS.

Consolidated appeal from the decision of the Revising Barrister for the borough of Chelsea, disallowing the claim of the appellant to have his name inserted as an inhabitant householder in the occupier's list for the parish of Hammersmith in the said borough.

The claimant, the present appellant, had occupied as his residence for upwards of twelve calendar months previously to the 15th day of July, 1881, one unfurnished room (furnishing and residing in it with his wife and family) (1) in a dwelling-house situate within the parish of Hammersmith, at a weekly rental of 3s. 6d.; the clear value of the room if let unfurnished was under 10l. The room was rented by him from the tenant of the entire house, who held of the owner of the house at a yearly rent—(the claimant had a key of the outer door) (1). The house comprised more rooms than that occupied by the claimant.

Subject to the claimant's occupation aforesaid, and his right of access to and from the outer door of the house, the renter of the entire house resided on the premises, and exercised, from the 15th of July, 1880 to the 15th of July, 1881, a general control over the whole house (2), but rendered no service, either by himself or any servant of his, to the claimant. In all other respects the claimant was qualified to be inserted in the occupier's list for the said borough, and he claimed to be inserted as an inhabitant occupier in this list of occupiers for the parish of Hammersmith.

The Revising Barrister disallowed the claim on the ground that as the renter of the entire house resided in the house, and exercised a general control over the same (2), although without rendering any ser-

vice to the claimant, the occupation of the claimant was that of a lodger and not that of an inhabitant occupier as tenant of a dwelling-house.

Bompas, Q.C. (Torr with him), for the claimant.—The Reform Act (2 Will. 4. c. 45) by section 27 conferred a borough vote on the rated occupier of a house of the annual value of 10l., but it was held that that section could not confer the franchise on the occupier of part of a house unless there was a complete severance in fact between the part and the remainder of the house—*Cook v. Humber* (3). Thereupon the Representation of the People Act (30 & 31 Vict. c. 102) by section 61 defined the term "dwelling-house" to include any part of a house occupied as a separate dwelling, thus reversing *Cook v. Humber* (3). This definition came before the Court in *Thompson v. Ward* (4), *Ellis v. Burch* (5) and *Boon v. Howard* (6), when the Court was divided, some of the Judges holding that a part of a house could not be said to be occupied as a separate dwelling where the occupier had a joint use with the other tenants of the passage, staircase, front door and conveniences. It was to meet the doubts thus raised that a new definition of a "dwelling-house" in 41 & 42 Vict. c. 26. s. 5 (7) was framed in substitution for the

(3) 11 Com. B. Rep. N.S. 33; 31 Law J. Rep. C.P. 73.

(4) 1 Hop. & C. 530; 40 Law J. Rep. C.P. 169; Law Rep. 6 C.P. 327.

(5) 1 Hop. & C. 537; 40 Law J. Rep. C.P. 169; Law Rep. 6 C.P. 327, 329.

(6) 2 Hop. & C. 208; 43 Law J. Rep. C.P. 115; Law Rep. 9 C.P. 277.

(7) 41 & 42 Vict. c. 26. s. 5, enacts that "In and for the purposes of the Representation of the People Act, 1867, the term 'dwelling-house' shall include any part of a house where that part is separately occupied as a dwelling; and the term 'lodgings' shall include any apartments or place of residence, whether furnished or unfurnished, in a dwelling-house."

"For the purposes of any of the Acts referred to in this section, where an occupier is entitled to the sole and exclusive use of any part of a house, that part shall not be deemed to be occupied otherwise than separately, by reason only that the occupier is entitled to the joint use of some other part."

"The interpretation contained in this section of 'dwelling-house' shall be in substitution for the interpretation thereof contained in section 61 of the Representation of the People Act,

(1) These words were added with the consent of both sides on the argument in the Queen's Bench Division.

(2) It was admitted on the argument in the Queen's Bench Division that no facts other than what appeared in the cases could be stated in support of this finding.

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definition in 30 & 31 Vict. c. 102. s. 61; and so long now as there is separate occupation of part of a dwelling-house, there is sufficient occupation to confer the franchise notwithstanding the joint occupation of other parts of the house.

G. M. Freeman, for the respondent.—The alteration of the definition of “dwelling-house” in section 5 of 41 & 42 Vict. c. 26 was for the purpose of removing the then existing doubts as to structural severance. The words of the section closely follow the state of facts in *Toms v. Luckett* (8), where an exclusive occupation of apartments in a house, with a key of the outer door, and free and uncontrolled access therein—the landlord occupying a portion of the premises but not residing therein—was held to constitute a tenancy of a building within 2 Will. 4. c. 45. s. 27. In giving judgment Maule, J., said, “The question depends upon whether or not the owner of the house resides on the premises retaining his quality of master, and reserving to himself the general control and dominion over the whole. If he does, the inmate is a mere lodger.” In the present case the landlord resided on the premises reserving to himself the general control and dominion of the whole. In *Thompson v. Ward* (4), Bovill, C.J., went elaborately through different qualifications, and in defining that of a lodger states almost identically the facts which have been found in the present case, and sums up his remarks thus: “It is always important in determining whether a man is a lodger, to see whether the owner of the house retains his character of master of the house, and whether he occupies a part of it by himself, or his servants, and at the same time retains the general control and dominion

1867, but not so as to affect any of the other provisions of the said Act relating to rating.”

Section 14 enacts that, whereas doubts have been entertained as to the application of section 19 of the Poor-Rate Assessment and Collection Act, 1867, and it is expedient to remove them: “Be it therefore enacted that the recited enactment shall not be deemed to apply exclusively to cases where an agreement has been made under section 3 of the same Act, or where an order has been made under section 4 of the same Act, but shall be of general application.”

(8) 2 Hop. & C. 208; 5 Com. B. Rep. 23; 17 Law J. Rep. C.P. 27.

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over the whole house; and this he may do, though he do not personally reside on the premises.” In *Phillips v. Henson* (9), where the definition of “lodger,” under the Lodger Goods Protection Act, 1871 (34 & 35 Vict. c. 79), was in question, it was held that the person who hired rooms in a dwelling-house at so much a quarter, paying rates and taxes, and keeping the premises in repair—the landlord retaining possession of rooms in the house—was a lodger and not an under-tenant. It lies on the appellants to show what difference exists between such facts as constitute a lodger and the facts of this case.

Bompas, Q.C., in reply.—The definition of “lodger” in *Phillips v. Henson* (9) was under another Act, and is no authority in an enquiry on the Registration Acts. A man may be a lodger as well as an occupier, and be entitled to both franchises. *Toms v. Luckett* (8) was discussed in *Cook v. Humber* (3), and it was there considered that the true question—namely, the sufficiency of the tenement—was not referred to the Court by the Revising Barrister; all that was required was structural severance, and this was no longer required.

MORFEE v. NOVIS.

Consolidated appeal from the decision of the Revising Barrister for the borough of Hastings, disallowing the claim of the appellant to have his name entered in the occupiers' list for the said borough.

The claimant—the present appellant—occupied two rooms in a dwelling-house in the said borough: one was used as a bedroom and the other as a living or sitting-room, in which his wife cooked, and he and his wife took their meals.

The rooms were let to him unfurnished at the weekly rent of 3s., by one Cousin, his landlord, who was the tenant of the house, which consisted altogether of six rooms, and who occupied all the rest of the house.

The claimant and his landlord had each a key to the street or outer door of the house, with which each let himself in and out when he pleased.

There was a wash-house attached to the house which was used in common by the claimant and his landlord.

(9) 47 Law J. Rep. C.P. 273; Law Rep. 3 C.P. D. 27.

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It was no part of the agreement of letting that the landlord should supply attendance, or render any service to the claimant, nor did he do so. The wife of the claimant cleaned the rooms, and did there all that she and her husband required for the occupation of the same.

The landlord was alone rated to the rates for the relief of the poor in respect of the occupation of the entire house, and he duly paid such rates.

The claimant had the exclusive use of the two rooms, and in all other respects was qualified to be inserted in the occupiers' list.

The Revising Barrister was of opinion that, though the claimant had the exclusive use of the two rooms, yet the landlord retained to himself such an occupation of the entire house as would constitute him, and not the claimant, the occupier, and as would entitle him and not the claimant to maintain trespass. He was further of opinion that the claimant occupied the rooms as lodger only, and he therefore disallowed the claim.

Biron (Gill with him), for the claimant.

Hollings, for the respondent.—In this case there is a joint occupation of the dwelling-house, with such a joint occupation of the premises as would be inconsistent with the exclusive use by the claimant of his rooms, and in this respect this case differs from the preceding. The occupation of the claimant is similar to that of a lodger, as shewn by *Blackburn, J.*, in defining the term "exclusive occupier" in *Allan v. The Overseers of Liverpool* (10).

KIRBY v. BIFFEN.

Appeal from the decision of the Revising Barrister for the city of Westminster, allowing the claim of the respondent to have his name inserted in the occupiers' list for the borough of Westminster.

The claimant—the present respondent—had occupied for the qualifying year, as tenant at a weekly rent of 7s., two rooms on the first floor of No. 23 Ponsonby Terrace. Such rooms were not structurally severed from the rest of the house, nor separately rated, nor was the claimant's

(10) 43 Law J. Rep. M.C. 69; Law Rep. 9 Q.B. 191.

name entered in the occupiers' column of the rate-book, but the entire house was rated in the name of the landlord, and he had paid all the rates. The furniture in the two rooms was the claimant's own. The house in question was an ordinary dwelling-house containing eight rooms, and was wholly let out on similar tenancies to tenants—of whom the claimant was one—the landlord paying all rates and taxes, including water-rate, in respect of the entirety of the premises, and also doing all painting and repairs inside and out. The tenants, including the claimant, had the common use of the passage, the staircase and conveniences of the house, and of the street door. The landlord did not reside within the house, nor, save as aforesaid, did he, by himself or his servant, retain the control and dominion over the house or any part of it, or render any services of any kind to the tenants or any of them. He simply received his rents from them.

The Revising Barrister considered that the claim ought to be allowed, but reserved final judgment, and, at the request of the claimant, and with the view of enabling him to establish a claim as a lodger, in case he was not entitled to the dwelling-house franchise, he, notwithstanding objection on behalf of the objector, received further evidence as to the name and address of the claimant's landlord, and was thus satisfied that, if not the occupier of a dwelling-house within the meaning of the Acts, then the claimant would have been entitled as a lodger if he had made a proper lodger claim.

The Revising Barrister finally decided that the claimant ought to be transferred to the lodger list if the premises for which he claimed were not sufficient in law to qualify him for the dwelling-house franchise, but that, in his opinion, he was entitled to the dwelling-house franchise; and he placed him upon the household list.

The Revising Barrister submitted to the Court that, if the Court was of opinion that the claimant was not entitled to the dwelling-house franchise, then his name was to be erased from the household list; but in such case, and if the Court was of opinion that such further order could properly be made, the name of the claimant was to be transferred to the lodger list.

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Charles, Q.C. (Douglas Kingsford with him), for the appellant (11)—The 41 & 42 Vict. c. 26. s. 5 is, as the preamble states, an Act to amend the law relating to registration, and no alteration or extension of the franchise was intended. The definition in section 5 alters the definition in 30 & 31 Vict. c. 102. s. 61 by altering the position of the word "separate," and in immediate juxtaposition is the definition of the word "lodgings"—which is to include "any apartments or place of residence, whether furnished or unfurnished, in a dwelling-house." If the claim is allowed the lodger franchise disappears. The lodger franchise is conferred by 30 & 31 Vict. c. 102. s. 4, and the form of notice of claim given in the schedule to that Act seems to contemplate that the landlord resides off the premises. An anomaly would exist in the franchise if the occupant of a room, however small its value, was entitled to a vote, while a lodger was not entitled unless his room was of the yearly value of 10*l*. This is pointed out by Montague Smith, J., in *Stamper v. The Overseers of Sunderland* (12). It has been held that a shop and parlour not structurally severed from the house are lodgings—*Lang v. Edwards* (13).

[BOWEN, J.—In order to support your contention, are you not driven to contend that structural severance is necessary in order to constitute occupation of a dwelling-house?]

That is so; structural severance is a test of separate occupation, and the judgment of Brett, J., in *Thompson v. Ward* (4), which is based, not on structural severance, but on exclusive occupation, is applicable now. If necessary, I should ask for special leave under 44 & 45 Vict. c. 68. s. 14, to appeal on that point (14).

(11) That is, against the claim.

(12) 37 Law J. Rep. M.C. 137; Law Rep. 3 C.P. 388.

(13) 3 Ir. C.L. Rep. 155.

(14) 44 & 45 Vict. c. 68. s. 14: The jurisdiction of the High Court of Justice to decide questions of law upon appeal or otherwise, under the 6 & 7 Vict. c. 18; the County Voters' Registration Act, 1865; the Parliamentary Elections Act, 1868; the Corrupt Practices (Municipal Elections) Act, 1872; the Parliamentary Municipal Registration Act, 1878; or any of the said Acts, or any Act amending the same re-

[BOWEN, J.—The object of that section is to appeal against the particular decision, but not against past decisions.]

In those cases—*Thompson v. Ward* (4) and *Boon v. Howard* (6)—the decision of the Revising Barrister was affirmed. The opinions on structural severance, therefore, were not decisions.

Secondly, the Revising Barrister had no jurisdiction to insert the name of the claimant on the lodger list without first finding that the claim was, in his judgment, "insufficient in law to constitute a qualification of the nature or description stated or claimed;" and this he has not found (15).

R. S. Wright, for the respondent, in support of the claim.—It is the same as if section 5 of 41 & 42 Vict. c. 26 (7) declared in terms that, whereas in *Thompson v. Ward* (4) and *Boon v. Howard* (6) two Judges were of one opinion and two of another, therefore be it enacted that the opinion of those Judges who held the occupation in those cases to be sufficient is to be the true interpretation for the future. It may be that the lodger and occupier franchise may overlap.

Secondly, the Revising Barrister did not exceed his jurisdiction in entertaining the respondent's claim as lodger. The object of 41 & 42 Vict. c. 26. s. 28 (subsection 12) was that the names should not appear in two lists, therefore the Barrister has prospectively placed the names on the other list, and he has merely suspended

spectively, shall henceforth be final and conclusive, unless in any case it shall seem fit to the said High Court to give special leave to appeal therefrom to Her Majesty's Court of Appeal, whose decision in such case shall be final and conclusive.

(15) 41 & 42 Vict. c. 26. s. 28 (sub-s. 12): Where the matter stated in a list or claim, or proved to the Revising Barrister in relation to any alleged right to be on any list, is in the judgment of the Revising Barrister insufficient in law to constitute a qualification of the nature or description stated or claimed, but sufficient in law to constitute a qualification of some other nature or description, the Revising Barrister, if the name is entered in a list for which such true qualification in law is appropriate, shall correct such entry by inserting such qualification accordingly, and in any other case shall insert the name with such qualification in the appropriate list, and shall expunge it from the other list (if any) in which it is entered.

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his judgment. It may be that in cases where the Revising Barrister has actually altered the list he ought to record that "in his judgment the claim is insufficient in law to constitute a qualification of the nature or description claimed," but he has given no judgment, and merely returned his reasons to the Court.

Charles, Q.C., in reply.

DENMAN, J.—Had there been any material difference between these cases we should have thought it right to take further time to consider our judgment; but as, in our opinion, there is not, and as we are also of opinion that sufficient facts are stated to enable us to come to a determination, we proceed to give judgment.

The question which is raised by each of these appeals is, whether the several claimants are entitled to the franchise as inhabitant householders under 41 & 42 Vict. c. 26. s. 5 (7), by reason of an exclusive occupation of rooms in a dwelling-house as their dwelling, subject only to the exercise of such general control on the part of the landlord as can be inferred from the facts stated and admitted, who in some cases resides on, and in some cases resides off, the premises.

I proceed to call attention to some of the facts and statements in the cases to shew that my decision is given with a due regard for any distinctions which have been relied on in the course of the argument. In the first case—*Bradley v. Baylis*—the claimant had occupied as his residence the room which he had furnished and in which he resided with his wife and family. There were other rooms in the house, and, subject to this occupation—namely, residence with his wife and family in a room, using it as his dwelling-house, and subject to his right of access to and from the outer door, that is, his absolute right to come in and go out when he pleased—the renter, his immediate landlord, who resided in the house, exercised a general control over the entire house, but rendered no service, either by himself or any servant of his, to the claimant.

Under this expression, "general control," some ambiguity arises, but I apprehend it only amounts to this, that the landlord could go, subject to the exclusive right of

the claimant in his apartments, over the whole house: he might, for instance, mend the staircase and paint the staircase walls and the outer door; he might repair the roof and do all things not inconsistent with the exclusive right of the claimant. There seem to be no facts found which would prevent the claimant saying that he occupied this room as his residence to the exclusion of his landlord. None were suggested. If they had been we should have sent the case back to have them found. Such is the first case, which, in my opinion, gives sufficient facts to enable us to decide the point raised for our determination.

The second case—*Morfee v. Novis*—appears also to state all facts necessary to enable us to decide it. The two rooms occupied by the claimant were taken unfurnished. He furnished them, using one as a bedroom and the other as a sitting-room, in which his wife cooked, and he and his wife took their meals. He had a key to the outer door; there was a wash-house, probably accessible by internal communication, which was used by him in common with his landlord, who resided in the house. It was no part of the agreement that the landlord should supply attendance or render any service; nor did he, in fact, do so. The claimant had resided sufficiently long to entitle him to a vote; and the case finds that in all other requisites the claimant was entitled to be registered. The question was, Was he an occupier within the meaning of the Act? The Revising Barrister held he was not, because the landlord retained such an occupation of the house as would constitute him and not the claimant the occupier. Taking the whole of the facts, we have to say whether the claimant was an occupier of a dwelling-house within the meaning of 41 & 42 Vict. c. 26. s. 5 (7). There appear to be ample facts stated on which we can decide this question, and there would be nothing gained by sending the case back to the Revising Barrister for further facts, for it does not seem probable there are more facts to be found which would assist the Court in arriving at their decision.

The third case—*Kirby v. Biffen*—is identical in principle with the two former

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cases, except that the landlord did not reside on the premises, whereas in the other two cases he did. One argument in the case with reference to this fact was that form H, No. 2, schedule to 41 & 42 Vict. c. 26, which is the form given for the claim of a lodger, suggests that the Legislature contemplated that the landlord would not reside on the premises. It may be the Legislature did; but one cannot draw a conclusion that the franchise depended on whether the landlord resided on or off the premises from the mere supposition that the form in the schedule may have assumed that the landlord would reside elsewhere. It would be too far-fetched a conclusion, and there is nothing in the Act itself to warrant it. The question, and the sole question, in this case also, is whether the claimant comes within the terms of section 5 of 41 & 42 Vict. c. 26 (7). Another argument was, that this Act is headed with a title shewing it to be directed to other matters, namely, the amendment of the law relating to the registration of voters; but any argument founded on that can be well answered by an argument from the second part of the title, relating to the rights of voting which, according to the usages of Parliament, would include a case involving the alteration of the rights of voters. But the question before us does not seem to raise any such difficulty, because from a consideration of the previous cases and legislation it does not appear that any alteration of rights of voting was intended, but only an intention to put an end to doubts which had existed in the minds of learned Judges in the interpretation of former statutes. The only argument which could be urged with any hope of success was, that structural severance is necessary in order to constitute the separate occupation required by the Act; and it was fairly admitted by Mr. Charles that unless he could induce the Court to review the decisions of former Judges as to structural severance, he could not make good his contention.

Now what is the history of this legislation? Section 61 of 30 & 31 Vict. c. 102 defines "dwelling-house" as including any part of a house occupied as a separate dwelling. These words have received judicial construction in *Thompson v. Ward*

(4), *Ellis v. Burch* (5) and *Boon v. Howard* (6). In the last case Mr. Justice Keating and I considered that even under the former statute (30 & 31 Vict. c. 102. s. 61) the occupation of premises identical with these constituted an occupation of a dwelling-house and conferred the franchise on the occupiers. Mr. Justice Brett and Mr. Justice Honyman considered the franchise not to be conferred because the rooms had not been separately rated. Mr. Justice Brett also, adhering to his former opinion in *Thompson v. Ward* (4) and *Ellis v. Burch* (5), held that the rooms did not constitute "a dwelling-house" within the meaning of the Act, because they were not structurally separated from the rest of the house, and there was a joint occupation of other parts of the house with other persons who occupied the rest of the house. Looking at the new Act (41 & 42 Vict. c. 26. s. 5) (7), I cannot doubt but that the object of the Legislature was not to confer a new franchise or enlarge the definition of a dwelling-house, but to decide that for the future the view taken of the meaning of the word "dwelling-house" under 30 & 31 Vict. c. 102, by Mr. Justice Keating and myself, was the view which the Legislature intended should be adopted. The object of the Legislature was to solve all doubts and to enact that for the future this should be the rule—That the words "separately occupied" should not mean the exclusive occupation of everything occupied, but that it was sufficient if that part of the occupation which was relied on as giving the franchise was separately occupied as a dwelling, whatever joint occupation there might be of the staircase, wash-house, hall and other parts of the house. Even if this were doubtful on the first part of section 5, the succeeding paragraph, which enacts that the part of the house "shall not be deemed to be occupied otherwise than separately, by reason only that the occupier is entitled to the joint use of some other part," renders it plain. This paragraph seems to me to stop any gap and to render it impossible to say that the old law is at all germane to the matter. The case now turns on this particular enactment, on which I think there is no doubt. We therefore decide in favour of those claiming the franchise in each case.

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With regard to the difficulty suggested in the way of making an alteration in the claim in *Kirby v. Biffen*, the inclination of my opinion is that the Court might have been able to get over the objection; but I do not wish to express any opinion on the point. It may be, as the point has thus been raised, that Revising Barristers will be careful for the future to avoid the objection which was brought against the course taken in this case.

BOWEN, J.—I am of the same opinion, and, agreeing with my brother Denman in the result at which he has arrived, and for the reasons he has given, I do not propose to say more than that I think our judgment should be given in each case in favour of those claiming the franchise.

With regard to the other point, as to whether the Revising Barrister has rightly altered the claim from one of occupier to one of lodger, I confess I doubt whether he has sufficiently followed the practice in entering on the lodger list a name which he has not struck off the occupiers' list. It is unnecessary to decide the point, and I express no opinion; but I think Revising Barristers would do well to avoid in the future the objection which has been raised.

Bompas asked for costs against the respondent in *Bradley v. Baylis*. The respondent is the returning officer for the borough of Chelsea, who represents the town clerk—6 Vict. c. 18. s. 101—and is made respondent by the Revising Barrister under 41 & 42 Vict. c. 26. s. 38, and he can obtain his expenses under the same section.

Freeman.—The returning officer appears out of respect to the Court, so that the case shall not be presented with one side unrepresented. In *Pickard v. Baylis* (16) the Court did not give costs.

DENMAN, J.—In that case the returning officer appeared at the request of the Court, and we thought that the other side ought not therefore to bear the costs of the returning officer. In the present case we see no reason for not following the general rule.

On a subsequent day (Dec. 19) leave to appeal was given in all the above cases (14).

(16) 49 Law J. Rep. C.P. 182; Law Rep. 5 C.P. D. 235.

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MORFEE v. NOVIS (17).

Dec. 15, 16.—*The Solicitor-General* (Sir F. Herschell, Q.C.), (with him G. M. Freeman), for Baylis, the respondent in the Court below.—The question is, whether the claimant is entitled, under the circumstances mentioned in the case, to be put on the list of voters as a householder. It is contended that he is only a lodger, and that the decision of the Revising Barrister refusing to register him as a householder is correct. The Representation of the People Act, 1867 (18), was passed with reference to the

(17) These two cases were argued together, as the Court of Appeal intimated that two counsel only on each side would be heard where the cases were identical.

(18) 30 & 31 Vict. c. 102. s. 3 enacts that "Every man shall . . . be entitled to be registered as a voter, and, when registered, to vote for a member or members to serve in Parliament for a borough, who is qualified as follows: that is to say, . . . (2) Is on the last day of July in any year, and has during the whole of the preceding twelve calendar months been, an inhabitant occupier, as owner or tenant, of any dwelling-house within the borough; and (3) Has during the time of such occupation been rated as an ordinary occupier in respect of the premises so occupied by him within the borough to all rates (if any) made for the relief of the poor in respect of such premises; and (4) Has on or before the 20th day of July in the same year *bona fide* paid an equal amount in the pound to that payable by other ordinary occupiers in respect of all poor-rates that have become payable by him in respect of the said premises, up to the preceding 5th day of January: provided that no man shall under this section be entitled to be registered as a voter by reason of his being a joint occupier of any dwelling-house."

Section 4 enacts that "Every man shall . . . be entitled to be registered as a voter, and, when registered, to vote for a member or members to serve in Parliament for a borough, who is qualified as follows: that is to say, . . . (2) As a lodger has occupied in the same borough separately and as sole tenant for the twelve months preceding the last day of July in any year the same lodgings, such lodgings being part of one and the same dwelling-house, and of a clear yearly value, if let unfurnished, of 10*l.* or upwards; and (3) Has resided in such lodgings during the twelve months immediately preceding the last day of July, and has claimed to be registered as a voter at the next ensuing registration of voters."

Section 7 enacts that "Where the owner is rated, at the time of the passing of this Act, to the poor-rate in respect of a dwelling-house or

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well-known distinction between lodgers and householders, and regard must be had to that distinction when considering the definition of a dwelling-house. The overseers are obliged to put householders on the list of voters, so that if the decision of the Divisional Court be sustained they will have to decide the *status* of all claimants. Section 61 of the Act of 1867 must be read into section 3, sub-section 2, which gives the franchise. There has been much difference of opinion as to what was a "dwelling-house"—*Thompson v. Ward* (4), *Ellis v. Burch* (5), *Boon v. Howard* (6); but these difficulties were removed by 41 & 42 Vict. c. 26 (8), section 5 of which explains what the term "dwelling-house" is to include. The rating question was also dealt with by 32 & 33 Vict. c. 41 (19), other tenement situate in a parish wholly or partly in a borough, instead of the occupier, his liability to be rated in any future poor-rate shall cease, and the following enactments shall take effect with respect to rating in all boroughs: (1) . . . No owner of any dwelling, house or other tenement situate in a parish, either wholly or partly within a borough, shall be rated to the poor-rate instead of the occupier, except as hereinafter mentioned; (2) The full rateable value of every dwelling-house or other separate tenement, and the full rate in the pound payable by the occupier, and the name of the occupier, shall be entered in the rate-book: where the dwelling, house or tenement shall be wholly let out in apartments or lodgings not separately rated, the owner of such dwelling, house or tenement shall be rated in respect thereof to the poor-rate."

Section 61 enacts that "' Dwelling-house ' shall include any part of a house occupied as a separate dwelling and separately rated to the relief of the poor."

(19) 32 & 33 Vict. c. 41. s. 3 enacts that " In case the rateable value of any hereditament does not exceed 20*l.*, if the hereditament is situate in the metropolis, . . . or 8*l.* if situate elsewhere, and the owner of such hereditament is willing to enter into an agreement in writing with the overseers to become liable to them for the poor-rates assessed in respect of such hereditament, for any term not being less than one year from the date of such agreement, and to pay the poor-rates whether the hereditament is occupied or not, the overseers may, subject nevertheless to the control of the vestry, agree with the owner to receive the rates from him. . . ."

Section 4 enacts that " The vestry of any parish may from time to time order that the owners of all rateable hereditaments to which section 3 of this Act extends, situate within such parish, shall be rated to the poor-rate in

which provided by section 19 that a person who was rateable should not lose the franchise because he was not actually on the rate-book, so that if a man is the occupier of a separate dwelling-house and rateable, he is entitled to be put on the register as a householder. The claimant in this case, however, is a lodger and can only be placed on the register under section 4 of 30 & 31 Vict. c. 102, as explained by section 5 of 41 & 42 Vict. c. 26.

Pitts v. Smedley (20), *Score v. Huggett* (21), *Wansey v. Perkins* (22) were all decisions on what constituted a lodger prior to the Act of 1867, but *Cook v. Humber* (3) decided that actual structural severance was necessary to constitute a part of a house a separate dwelling-house. The effect of the judgment of the Divisional Court is to destroy the lodger franchise, for it brings all lodgers within section 3 of the Act of 1867, whereas the Legislature contemplated two kinds of franchise, and intended in 1878 to preserve the two franchises constituted by the Act of 1867. The only effect of section 5 of the Act of 1878 is to get rid of the difficulties raised in *Ellis v. Burch* (5). The law regards the tenant of the building as the occupier for the purposes of inhabited house duties.

[JESSEL, M.R.—But the occupation for taxation is quite different from the occupation of such rateable hereditaments instead of the occupiers, on all rates made after the date of such order; and thereupon and so long as such order shall be in force the following enactments shall have effect: (1) The overseers shall rate the owners instead of the occupiers. . . ."

Section 19 enacts that " The overseers in making out the poor-rate shall, in every case, whether the rate is collected from the owner or occupier, or the owner is liable to the payment of the rate instead of the occupier, enter in the occupiers' column of the rate-book the name of the occupier of every rateable hereditament, and such occupier shall be deemed to be duly rated for any qualification or franchise as aforesaid: . . . provided that any occupier whose name has been omitted shall, notwithstanding such omission, and that no claim to be rated has been made by him, be entitled to every qualification and franchise depending upon rating, in the same manner as if his name had not been so omitted."

(20) 7 Man. & G. 85; 14 Law J. Rep. C.P. 73.

(21) 7 Man. & G. 95; 14 Law J. Rep. C.P. 74.

(22) 7 Man. & G. 151; 8 Sc. N.R. 978; 14 Law J. Rep. C.P. 75.

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pation for the franchise. BRETT, L.J., referred to *Stamper v. The Overseers of Sunderland* (12).]

In *Allan v. The Overseers of Liverpool* (10), Blackburn, J., held that persons occupying sheds as a coal *depôt* were not liable to be rated, because they had not exclusive possession. The claimant here, who has not exclusive possession, is not rateable, and he cannot have the franchise, as by the Act of 1878 rateability is a condition precedent. In order to have a vote as an occupier of a dwelling-house a man must occupy rateable premises; if he does not, and his rent is not sufficient to enable him to claim as a lodger, he cannot be put on the register of voters at all.

Bompas, Q.C. (with him *Torr*), for the claimant Bradley.—The two franchises overlap, and it is immaterial whether the claimant to the vote is a lodger if he is a householder; but where there is no reason he should not be both. The question of rateability cannot be settled on this appeal, as the case states that all that is necessary to render this claimant rateable has been done.

In *Cook v. Humber* (3) the four conditions laid down were tenement, occupation, value and estate. The Act of 1867 gave the franchise to householders by section 3, and did away with the question of value, while it added that of rateability; whereas section 4 gave the franchise to lodgers and added value, while abolishing rateability. No doubt the majority of lodgers are not rated, and so they cannot claim under section 3, for any lodger whom his landlord can exclude at will is not rateable.

A lodging, by the Act of 1878, includes any place of residence, and even though the landlord resided on the premises the tenant is not thereby made a lodger—*Smith v. The Overseers of St. Michael, Cambridge* (23). The judgment of Cockburn, C.J., in *The Queen v. The Assessment Committee of St. George's Union* (24) shews what control a landlord must retain to render his tenants lodgers and so as to prevent them from being rateable to the poor-rate. Such an occupation is found here as constitutes the part of this house occupied

by the claimant a separate dwelling-house; for the landlord does not exercise any special control over the room which he occupies.

Biron, for the claimant Morfee.—In this case the exclusive occupation is found to be in the claimant. He has part of a house separately occupied as a dwelling-house, and is entitled to be put upon the register as a householder.

No counsel appeared for Novis, the respondent in the Court below.

KIRBY v. BIFFEN (25).

Sir H. Giffard, Q.C. (*Douglas Kingsford* with him), for the appellant Kirby.—The claimant is a mere lodger, and not a householder; he is not rateable, because he is not in occupation of a rateable hereditament. If the occupation of a rateable hereditament is essential to the right of a person to vote, then the claimant does not, according to the statement found in this case, occupy such a hereditament; for no lodger, although he occupies the greater part of a house, is rateable. This is a question of fact.

[JESSEL, M.R.—It may be assumed that a man cannot be both an occupying tenant and a lodger.]

In *Edwards v. Lang* (26) the whole house was let out in tenements; neither the landlord, nor anyone as his representative, resided on the premises; he did not retain any portion of it in his hands, nor had he the key of the outer door; but it was held that the persons to whom the various rooms were let were lodgers, and not occupying tenants. The ground of that decision was that there were certain parts of the house which were not let, and over which some control was retained by the landlord. The principle there established is, that if a number of persons occupy rooms in what is popularly called a lodging-house, and there is some part of the house which is not demised to them, then no part of the house can be said to be "a house." That principle is applicable here.

Next as to the question of rating. Sec-

(25) This case was argued on the assumption that the passages and staircases were not demised to the various tenants by the landlord—see judgment of Jessel, M.R., *post*.

(26) 3 Ir. C.L. Rep. 394.

(23) 3 E. & E. 383; 30 Law J. Rep. M.C. 74.

(24) 41 Law J. Rep. M.C. 30; Law Rep. 7 Q.B. 90.

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tion 19 of the Act of 1869 is relied on by the claimant, but none of the Acts contain any provisions which control section 7 of the Act of 1867 as to rating the owner instead of the occupier in the case of lodgings.

[BRETT, L.J.—Suppose the landlord lets out the passages and other parts of the house, and then goes abroad, can he be rated? If he cannot, there is not anybody who can be rated for the whole house; and would not each tenant have to be rated? JESSEL, M.R.—Ought not the words “not separately rated” to be read as “not separately rateable”?]]

Perhaps so, according to the ordinary practice of rating; but section 7, in express terms, says that where a house is wholly let out in lodgings not separately rated, as in the present case, the owner, and not the occupier, is to be rated. The occupiers, therefore, are not entitled to vote, because one of the conditions of the household franchise is that the tenement must be rated. The interpretation of “dwelling-house” in the Act of 1878 is substituted for that given in section 61 of the Act of 1867, and does not affect this point, because the terms “lodging” and “apartments” are identical.

Bompas, Q.C. (with him *R. S. Wright*), for Biffen, the claimant.—Section 7 of the Act of 1867 is in effect repealed by sections 3 and 4 of the Act of 1869.

Section 19 of the Act of 1869 provides that the owner can be rated, and that, notwithstanding that fact, the occupier is still entitled to the franchise. In *Boon v. Howard* (6), where the facts are practically the same as in the present case, it was held by Keating, J., and Denman, J. (Brett, J., and Honeyman, J., *contra*), that the claimant was entitled to the household franchise. There are authorities to shew that parts of a house—*e.g.* rooms occupied as here—are rateable—*Stamper v. The Overseers of Sunderland* (12), *Toms v. Luckett* (8)—and a person is entitled to the franchise provided he occupies a rateable tenement. In *Edwards v. Lang* (26) it was held by some of the Judges that a claimant may be liable to be rated as an occupier for premises in respect of which he claims as a lodger, yet he will not thereby lose the lodger franchise if he be not actually rated.

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The fact that the claimant occupies a rateable tenement, as in this case, is sufficient to confer on him the franchise, and he is entitled to be put on the register as a householder.

Cur. adv. vult.

The following judgments were (on Dec. 21) delivered:—

JESSEL, M.R.—These are three appeals from the decision of the Divisional Court, affirming the right of the three claimants to be put on the householders' list as voters for their respective boroughs, and they raise very important questions as to the proper construction to be placed on the various Acts of Parliament, and as to the vexed question upon which there has been a great difference of judicial opinion as to what constitutes a lodger as distinguished from an occupying tenant.

The history of the legislation on this matter must be referred to in order to make my judgment intelligible. The franchises in question were first conferred by 30 & 31 Vict. c. 102. Up to that time there was no household franchise, except at a value of 10*l.*, and there was no lodger franchise at all. The effect of sections 3 and 4 of that Act (18) was to confer for the first time a simple household franchise, irrespective of value, and also a lodger franchise. Neither of these sections define either “inhabitant occupier” or “lodger”; but when we look at the conditions which the inhabitant occupier as tenant had to fulfil—to pay rates and to be rated—it is clear that his occupation was a rateable occupation, and that he was not a lodger. If he was an inhabitant occupier he was not a lodger; if he was a lodger then he was not an inhabitant occupier. The words of section 7 seem to point to the case of something which could be rateable, although not separately rated. The only other section necessary to refer to is section 61, which enacts that a “dwelling-house” shall include any part of a house occupied as a separate dwelling, and separately rated to the relief of the poor. No one can say what this definition means, and consequently there has been a great difference of judicial opinion upon the subject. For, whenever something is made to include something else which it

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does not include, a difficulty must arise, and the question soon arose as to the meaning of the words "part of a house occupied as a separate dwelling." In one sense, every room occupied separately as a dwelling is occupied as a separate dwelling, but in another sense it may not be so occupied, for a man may have the use, or even the exclusive use, of a room—like a guest at an inn or at a country house—and yet not be an occupier in the legal sense. Some of the Judges thought that it meant any part of a house, irrespective of the way in which it was built; while others have thought it meant any part of the house that was structurally separated (as, for instance, by a door which shuts it off) from the rest of the house, and was separately rated to the relief of the poor. But no question of that kind arises here. It was then discovered that the result of the ratepaying clauses in the Act of 1867 was to curtail the right which it had been assumed was given to householders, without reference to the value of the tenement, to vote for members of Parliament. The law was amended by 32 & 33 Vict. c. 41. By section 3 of that Act, the owner may agree to pay the rate to the overseers, and receive a commission from them for so doing, and by section 4 the vestry may order the owner to be rated instead of the occupier. Then by section 19, the overseers in making out the poor-rate are in every case, whether the rate is collected from the owner or occupier, or whether the owner is liable to pay the rate instead of the occupier, to enter in the rate-book the names of the occupier of every rateable hereditament, who is then to be deemed to be duly rated, and to be qualified to vote. The meaning of that is, that anybody who occupies a rateable hereditament within the purview of sections 3 and 4, shall be deemed to be duly rated, although the landlord of the house is rated as the owner; and that where the name has been omitted the occupier is, notwithstanding such omission and that no claim to be rated has been made by him, to be entitled to every qualification and franchise depending upon rating, in the same manner as if his name had not been omitted. The result of the amending Act appears to be that every man who occupies

a rateable hereditament is to be deemed to be rated, and is entitled to vote, although he is not actually rated and has not paid the rate; but this is limited to the "franchises aforesaid"—that is, to the cases provided for by sections 3 and 4 of the Act of 1867. It is necessary to pass to the Act of 1878 (41 & 42 Vict. c. 26), section 14 of which provides that section 19 of the Act of 1869 is not to apply exclusively to cases under sections 3 and 4 of that Act, but is to be of general application. The result of all these Acts taken together is that a man is entitled to be treated as a householder who occupies a portion of a house which is rateable, whether he is rated or not, and whether he pays the rates or not, assuming that somebody does pay them. That was the position of the matter as regards the occupier. It has, however, been decided that a lodger is not rateable; and there is therefore this broad line of demarcation between a lodger and an occupier of part of the dwelling-house, that the latter is rateable, whereas the former is not. The section of the last Act which extends the right of persons to vote in respect of part of a dwelling-house, is section 5 of the Act of 1878. [His Lordship read the section.]

Then section 6 deals with the rights of lodgers, and it is sufficient to say that it shews that lodgers were still considered to exist as a separate class. One part of section 5, however, gets rid of the separately rated condition in the Act of 1867, and another part gets rid of a decision or rather a difference of opinion on the point that a man is not to be deemed to be an occupying tenant within the Act of 1867 if he occupies separately one part of a house, and also occupies jointly with others another part of the same house. The section is important, therefore, because it shews that a part of a house not structurally separated from the rest—an ordinary part of a dwelling-house—can confer the franchise; and the question we have to consider is, What are the terms that entitle a man to the franchise as a householder? It follows from what I have said, that there must be a rateable tenement; and therefore we still have the distinction between the household and the lodger franchise: the householder must

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occupy a rateable tenement, but the lodger need not and cannot be rateable. It remains therefore to consider the question, When does a man occupy a rateable tenement as an occupying tenant; and when does he occupy or have the "exclusive use" of it as a lodger only? The question has arisen, first, under the Rating Acts, as to whether or not certain occupations were rateable; secondly, in Ireland under one of the Parliamentary Franchise Acts; and, thirdly, in this country under the Lodgers' Protection Act, which protects a lodger from distress by the superior landlord when he has paid his rent to his immediate landlord. There has been a great variety of judicial opinion upon this question, and having considered the cases I am of opinion it is impossible to reconcile them. I have been quite unable to frame an exhaustive definition; but I think it wiser and safer to say that the question whether a man is a lodger or whether he is an occupying tenant must depend upon the circumstances of each particular case.

This would give very little help to the Revising Barristers who decide these cases, and I think I ought to go further and to state what are cases of occupying tenants and what are cases of lodgers, and to say that the list is not exhaustive, as there may be intermediate cases upon which no opinion can be given until the facts are known. First, to take the case of a lodger (and I deal only with the unfurnished lodgings, because the question is not likely to arise where the lodgings are furnished), it seems to me that where the owner of a house does not let the whole of it, but retains a part for his own use, and resides there, and does not let out the passages and staircases to the outer door but only lets to the tenants the right of ingress and egress; and where the owner retains the control over the staircases and passages to the outer doors—that is, where he retains the right to interfere, and to turn out trespassers and the like—there I consider the landlord is the occupying tenant of the house, and the inmate, whether or not he has the exclusive use of the room, is a lodger. That is one extreme case. Again, where the landlord lets the whole of the house in separate apartments, and lets out each floor separately so as to demise the

passages, reserving simply to each inmate of the upper floors a right of ingress and egress over the lower passages, parting altogether with the whole legal ownership, and retaining no control over the house, there I am of opinion that the inmates are occupying tenants, and are rateable as such. That is another extreme case. There are a great number of intermediate cases which I can deal with but imperfectly, and only as they arise.

I have tried in vain to frame an exhaustive definition. Take the first case which we have to decide. Does it make any difference that the inmates have latch-keys to the outer door, and also keys to the inner door? Does it make any difference that the landlord does not reside himself, but has resident servants who occupy on his behalf part of the house? Does it make any difference whether or not the landlord repairs or pays rates and taxes? In all these cases I think that it does not, but that the inmates still are "lodgers." On the other hand, suppose the landlord does not demise the whole of the house, but demises everything that can be demised with the exception of the passages and staircase, and as to them gives the inmates the right of ingress and egress, but exercises no control, and does not even reside there or interfere in any way; there I think the inmates are occupying tenants. The fact that the staircase and passages are not actually demised is not sufficient to distinguish them from occupying tenants, nor does the fact that the landlord repaired, or paid the rates and taxes, in my opinion, make any difference. If a landlord repairs, he has a right of entry at all reasonable times of the year to make such repairs. I have given these illustrations for the purpose of aiding those who have to consider these matters, and I think that further aid may be obtained by a consideration of the actual cases which we have to decide.

The first is the case of *Bradley v. Baylis*. [His Lordship read the Special Case.] It follows, from what I have already said, that the claimant in this case is a lodger. The landlord resides in the house and has a general control over it; in other words, the claimant lives with him, not as a householder who

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is capable of being rated, but as a mere lodger. I think, therefore, that this appeal ought to be allowed.

The next case is that of *Morfee v. Novis*. [His Lordship read the Special Case.] The landlord here occupied all the rest of the house except the two rooms let to the claimant, who had only a right of access. The mere fact that he had the key of the outer door does not, in my opinion, make him otherwise than a lodger; for he is not the landlord of the house. In this case, also, the appeal ought to be allowed.

The third case was that of *Kirby v. Biffen*. [His Lordship read the Special Case.] It was admitted in argument that the passages were not demised, and that the tenants had a right of ingress and egress only. It therefore follows, from what I have already said, that this claimant is an occupying tenant. The landlord has no control over the house; for he neither lives there himself nor do his servants, and he does not render any service to the tenants. The whole of the house is let out in the usual way—that is, all the rooms are let out, with a right of ingress and egress, and the keys are in the possession of the tenants.

It seems to me that if there can be a case at all in which part of a house can be "separately occupied as a dwelling," this is the one; because the other case which I put, of the landlord demising the passages and staircases, is practically unknown, and here it is admitted that they were not demised. I do not think such a thing has ever occurred; at all events, it is not the usual way of letting, and we cannot suppose that the Legislature contemplated and intended only to include such an extreme and peculiar case as that.

It appears to me that this claimant was entitled to be put on the householders' list, and this appeal ought, therefore, to be dismissed.

BAGGALLAY, L.J. (27).—In each of the three appeals now under our consideration we have to determine whether the respondent is qualified in respect of his occupation of a part of a house, within a borough in

England, to vote for a member to serve in Parliament for that borough.

I deem it unnecessary to refer to the facts detailed in the several cases stated by the Revising Barrister, but will proceed at once to consider the statutory provisions which bear upon the questions involved.

Under the 27th section of the Reform Act, 1832 (2 Will. 4. c. 45), the borough franchise could be acquired by the occupation, as owner or tenant (under certain conditions as to value and rating), of "any house, warehouse, counting-house or other building within the borough."

The question as to what constituted a house within the meaning of this Act became the subject of numerous judicial decisions, more or less conflicting, all of which were considered and reviewed in the case of *Cook v. Humber* (3), the effect of the decision in which was, that, although a room or rooms in a house might constitute a "house," so as to satisfy the statute, it was essential, in order that the qualification should be sufficient, that there should be an actual or structural severance of such room or rooms from the other portions of the house. Chief Justice Erle, in the course of his judgment, said, "We consider that the qualification fails, because the subject of occupation was not a house, but only part of a house, without any actual severance from the residue." But in *Cook v. Humber* (3), as was pointed out by Mr. Justice Willes in the course of his judgment in *Thompson v. Ward* (4), to which I shall have occasion to refer presently, no certain rules were laid down for determining what amount of severance would be sufficient to support the qualification.

In 1867 the statute 30 & 31 Vict. c. 102 was passed. Two borough franchises were conferred by this statute. By the 3rd section the franchise was conferred upon every man who (having qualified in other respects, which need not be more particularly alluded to) should on the last day of July in any year be, and should during the whole of the preceding twelve calendar months have been, "an inhabitant occupier, as owner or tenant, of any dwelling-house within the borough," and should during the time of such occu-

(27) This was a written judgment.

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pation have been rated as "an ordinary occupier," in respect of the premises so occupied by him, to all rates made for the relief of the poor, and should have paid a specified proportion of such rates; and it was further provided that no man should, under that section, be entitled to be registered as a voter by reason of his being a joint occupier of any dwelling-house.

By the 4th section of the same statute the borough franchise was, in like manner, conferred upon every man who, "as a lodger, should have occupied in the borough, separately and as sole tenant, for the twelve months preceding the last day of July in any year, the same lodgings, such lodgings being part of one and the same dwelling-house." By the 61st section it was enacted that the term "dwelling-house," as used in the Act, should include "any part of a house occupied as a separate dwelling, and separately rated to the relief of the poor."

Now it appears to me clear that it was the intention of the Legislature to establish a distinction between two qualifications necessary to confer the "occupation franchise" and the "lodger franchise," as the two franchises are conveniently, though perhaps not very accurately, described, in the margin of the authorised editions of the statute. Nor is there, in my opinion, any sufficient reason for holding, as has been suggested in argument, that the two qualifications might overlap; in other words, that the same occupation might supply both qualifications, leaving it open to the occupier to assert his right to either or both of the franchises.

It appears to me unreasonable to suppose that it should have been intended by the Legislature that an occupation of the same nature should confer the "lodger franchise," if the part of the house occupied were of the clear annual value of 10*l.*, and should confer the "occupation franchise" if it were of less value.

To acquire the occupation franchise by the occupation of a part of the house, it was essential that the part of the house should be occupied as a "separate dwelling;" that it should be separately rated to the relief of the poor; and that the occupier should occupy "as owner or tenant;" but there was no condition as to annual value.

To acquire the lodger franchise by the occupation of part of a house, it was essential that the part of the house should be occupied as a "lodging;" that it should be of a clear yearly value of 10*l.*; that the occupier should occupy as "lodger;" and that he should occupy "separately and as sole tenant;" but there was no condition as to the part of the house so occupied being rated.

With respect to the necessity of the occupier occupying as "owner or tenant," it should be borne in mind that this was required by the Act of 1832, and that in several cases the occupying lodger was not recognised as a tenant within the meaning of the Act, though he was doubtless a tenant in the ordinary acceptation of the word; as, for instance, in *Pitts v. Smedley* (20), where the claimant was held not to occupy as tenant because he had not the key of the outer door, and the landlord resided on the premises; and in *Wansey v. Perkins* (22), where he was held to be a lodger, and not a tenant within the meaning of the Act, because the landlord remained in possession of the rest of the house.

On the other hand, in *Score v. Huggett* (21) the claimant was held qualified as a tenant because he had the key of the outer door. It must also be borne in mind that the Act of 1867, though it for the first time introduced the lodger franchise, did not contain any definition either of the word "lodger" or of the word "lodgings." It, however, recognised the lodger as a tenant, for it required, as I have already mentioned, that he should occupy as the sole tenant of the lodgings.

Having regard to these several considerations, I am of opinion that the Legislature used the words "lodger" and "lodgings" in their ordinarily accepted sense, as illustrated in the several cases to which I have alluded, and in other cases of a similar character, amongst which I would particularly include *Stamper v. The Overseers of Sundarima* (12); and I am further of opinion that section 3 of the Act of 1867 must be treated as having reference to an occupying tenant other than a lodger.

Shortly after the passing of the Act of 1867, questions arose as to the construction to be put upon the words "part of a house

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occupied as a separate dwelling." Several cases, and notably that of *Thompson v. Ward* (4) and *Ellis v. Burch* (5), were brought under the consideration of the Court of Common Pleas, as the Court of Appeal in registration matters. The facts of these cases may be concisely stated as follows, and it is, in my opinion, important to bear them in mind: The claimant in *Thompson v. Ward* (4) occupied one room in a house consisting of nine rooms; the landlord did not reside upon the premises, and the other rooms were occupied by other tenants. The claimant had the exclusive use of the room occupied by him, and the passages, staircase and other conveniences were common to him and all the other tenants. There was one outer or street door to the passage, which was never closed, and which was without lock or bolt. In *Ellis v. Burch* (5) the claimant occupied two rooms on different floors. The outer door was fastened with an ordinary lock and bolt, and was usually closed at night by one or other of the tenants; in other respects, the details were substantially the same as in *Thompson v. Ward* (4). In each case the part of the house in the occupation of the claimant was separately rated to the relief of the poor, and the Revising Barrister in each case was of opinion that the premises occupied by the claimant were not "dwelling-houses" within the meaning of the Act of 1867, and disallowed the claim. Upon appeal to the Court of Common Pleas, the Judges were equally divided in opinion, and the decisions of the Barristers were consequently affirmed; the appeals were argued and disposed of together.

In the course of his judgment Mr. Justice Willes expressed the opinion that it was not intended by the Act of 1867 that a man should have a vote as the occupier of a "dwelling-house" which would not have been a "house" within the meaning of the Act of 1832; and taking *Cook v. Humber* (3) as his guide, he held that, by the use of the words "a part of a house occupied as a separate dwelling," the Legislature meant something which could properly be called a dwelling-house, and which was structurally, or at least practically separated from the rest of the dwelling of which it formed part; and inasmuch as in neither of the cases then under appeal was

there any such structural or practical severance, he was of opinion that the claimants were not entitled to vote. Mr. Justice Brett was of opinion that, notwithstanding the exclusive use by each of the claimants of a part of the house, the joint use by them with the other tenants of the passages, staircases and other conveniences prevented the exclusive use of the part being an occupation of that part as a separate dwelling; and in this opinion Mr. Justice Willes apparently concurred, though he rested his decision upon the grounds already mentioned. The Chief Justice Bovill and Mr. Justice Keating were of opinion that the language of section 61 was enacted for the purpose of getting rid of the difficulties which had arisen out of the decision in *Cook v. Humber* (3) and that in *Henrette v. Booth* (28), which was supposed to conflict, but in my opinion did not conflict, with *Cook v. Humber* (3), and of avoiding for the future the determination of the question in any particular case, whether "a part of a house" should be treated as "a house." It would appear that the words "occupied as a separate dwelling" were regarded by the learned Judges (whose expressed opinion I am now considering) as amounting to no more than requiring that the occupation as a dwelling should be separate as distinguished from joint, or, as intimated by Mr. Justice Keating, as repeating the provision at the end of section 3, that no man should, under that section, be entitled to be registered as a voter by reason of being a joint occupier of any dwelling-house.

Where so many varying opinions were expressed, it may perhaps be permitted to me to say that I regard the occupation in both the two cases to have been an occupation as tenant of a part of a house separately rated to the poor-rate, but not occupied as a separate dwelling, and therefore not sufficient to confer the right of voting upon the occupier. This was apparently the view taken by Mr. Justice Brett.

The case of *Boon v. Howard* (6) came before the Court of Common Pleas shortly after *Thompson v. Ward* (4) and *Ellis v. Burch* (5). In it the Judges were again equally divided in opinion as to the interpretation to be given to the words "occu-

(28) 15 Com. B. Rep. N.S. 500; 33 Law J. Rep. C.P. 61.

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pied as a separate dwelling," Mr. Justice Keating and Mr. Justice Denman adopting the views expressed by Chief Justice Bovill and Mr. Justice Keating in *Thompson v. Ward* (4) and *Ellis v. Burch* (5), while Mr. Baron Huddleston concurred with Mr. Justice Brett in adopting the views expressed by the latter in the same cases. A question also arose in this case as to the rating of the premises which were the subject of occupation; and upon this question also the learned Judges were divided in opinion.

In this state of judicial opinion, the statute 41 & 42 Vict. c. 26 was passed in 1878. By section 5, sub-section 2, of the statute it was enacted that for the purposes of the Act of 1867, the term "dwelling-house" should include any part of a house where that part is separately occupied as a dwelling; and by sub-section 4, that this interpretation of dwelling-house should be "in substitution for the interpretation thereof contained in section 61 of the Representation of the People Act, 1867, but not so as to affect any of the other provisions of the said Act relating to rating;" and it was also enacted (sub-section 3) that for the purposes of any of the Acts referred to in that section (amongst which were included the Act of 1832), where an occupier was entitled to the sole and exclusive use of any part of a house, that part should not be deemed to be occupied otherwise than separately, by reason only that the occupier was entitled to the joint use of some other part. We have to consider the effect which these provisions have upon those previously in force. The same section (sub-section 2) also contains a reference to lodgings, to which it is not necessary for me more particularly to allude than to say that the statute evidently intended to keep up the distinction between the occupation franchise and the lodger franchise.

In delivering judgment in the several cases in respect of which these appeals now before us have been brought, Mr. Justice Denman is reported to have said that he could not doubt that the object of the Legislature in passing the Act of 1878 was not to confer a new franchise or enlarge the definition of a "dwelling-house," but to decide that for the future the view taken

by Mr. Justice Keating and himself of the meaning under the Act of 1867 of the word "dwelling-house" was the view which the Legislature intended should be adopted, or, as he further expressed his meaning, that the expression "separately occupied" was not to imply the occupation of everything exclusively, but that it was sufficient if that part of the occupation which was relied on as giving the franchise was separately occupied as a dwelling, whatever joint occupation there might be of the staircase, wash-house and other conveniences; and in the view so expressed by Mr. Justice Denman, Mr. Justice Bowen expressed his concurrence. Whether such views are in accordance with the true interpretation of the statute is now what we have to determine.

Omitting the reference to rating, the change in the language interpreting the term "dwelling-house" is very slight. Under the Act of 1867 it is to include "any part of a house occupied as a separate dwelling;" under the Act of 1878, "any part of a house separately occupied as a dwelling." Is there any difference in meaning between the expressions "occupied as a separate dwelling" and "separately occupied as a dwelling"? If this change in the definition of what the term "dwelling-house" is to include had been merely intended to remove a doubt which had arisen from judicial decisions as to a previous definition, we should expect to find some direct intimation in the statute that such was the intention of the Legislature; but no such intimation is to be found. Again, had there been any such intention we should hardly have found such an apparent identity of meaning in the two definitions. The inference which I draw from the language of the later statute is, that it was not the intention of the Legislature to explain the definition given in section 61, but to enlarge it, so as to make it include the meaning which the Chief Justice and Mr. Justice Keating had attributed to that definition in *Thompson v. Ward* (4); and I think that such is its true effect, though I regret that the intention was not expressed in more clear language. Under the former definition, the subject of occupation was to be occupied as a separate dwelling—in other words, it was to have all the incidents of a separate dwelling, all the necessary conve-

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niences, including access to the street. Such incidents would be wanting if these conveniences were enjoyed only in common with others; but if, under the new definition, there is a separate occupation of the subject-matter of occupation—that is, of the room or rooms occupied—and if such subject-matter is so occupied as a dwelling, the terms of the definition are, as it appears to me, satisfied, even though some of the incidents of a dwelling may be enjoyed in common with others. And this view of the interpretation of the definition given in sub-section 2 of section 5 of the Act of 1878 is supported by the provision in sub-section 3 of the same section, that where an occupier is entitled to the sole and exclusive use of any part of a house, that part shall not be deemed to be occupied otherwise than separately, by reason only that the occupier is entitled to the joint use of some other part.

To this extent I assent to the conclusion at which Mr. Justice Denman and Mr. Justice Bowen have arrived as to the practical effect of the statute of 1878; and I am of opinion that in each of the three cases now under consideration, there was an occupation of a part of a house, and that such part was separately occupied as a dwelling. But we have further to consider the character of the occupation. Was the occupation of each claimant that of a lodger or of a tenant, within the true meaning of section 3 of the Act of 1867? If his occupation was as a lodger, then, for the reasons I have already assigned, he is not entitled to the franchise as an occupying tenant, in which character the several claims have been made. But how are we to determine whether an occupier is a lodger or not? In my opinion each case must depend upon its particular circumstances; and it is impossible to do more than to lay down certain general rules for guidance, which must be applied by those upon whom the duty devolves. I can suggest no better rules than those which the Master of the Rolls has mentioned. Adopting them, and having regard to the decisions to which I have referred, and in which the distinction has been drawn between a lodger and a tenant who is not a lodger, I am of opinion, though I cannot say that I express a very confident opinion, under circumstances

which afford so much room for doubt, that the claimant in each of the first two cases (Bradley in the one case and Morfee in the other) occupied the room or rooms which were in fact occupied by him in the character of a lodger, and not in that of a tenant other than a lodger, and that consequently in neither case was the occupation franchise acquired.

But as regards the claimant in the third case—*Kirby v. Biffen*—it appears to me that his occupation is that of an occupying tenant under section 3. It remains, however, to be considered whether the part of a house so occupied by him was separately rated to the relief of the poor, so as to satisfy the condition to that effect required by the statutes. During the argument on this case I felt considerable doubt upon the subject. Such doubts were, to some extent, founded upon the provisions of section 7 of the Act of 1867, but upon further consideration of that section, and having regard to section 19 of the Poor Rate Assessment and Collection Act, 1869 (32 & 33 Vict. c. 41), and section 14 of the already-mentioned Act of 1878, I am of opinion that, so far as the qualification of the claimant to vote as an occupying tenant is dependent upon the premises occupied by him being separately rated to the relief of the poor, he is entitled to the franchise. The combined effect of the two last-mentioned sections is, in my opinion, to make the provisions of previous statutes as to rating practically inoperative, so far as they affect the qualification necessary to entitle an occupying tenant to the borough franchise. The claimant need not be actually separately rated; it is sufficient if the landlord is rated; but under the statutes referred to, he is to be considered as if he was separately rated, so far as his right to the franchise is concerned. I have already stated that he is, in my opinion, entitled to the franchise, so far as the nature and character of his occupation are concerned; and I am consequently of opinion that his name has been properly placed upon the list of voters.

BRETT, L.J.—It seems to me that nothing could be more difficult to construe, or more involved, than these statutes; and the difficulty has arisen from the fact of an

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Act of Parliament saying that things are what things are not. The question here, which arises with reference to the borough franchise, is whether certain persons are entitled to be put upon the register as householders or whether they ought to have been put upon it as lodgers. On one side it was said that none of these claimants were householders within the meaning of the statute; and that if any of them were, those persons were not rated, rateable, or to be deemed to be rated; and that, even if they were householders, they ought not to be put upon the register. On the other side it was said that they were all householders, but that, even though they were lodgers, they were nevertheless householders. This point, expressed in other words, was that some of these franchises overlap each other. The majority of Judges in two cases have held that a house under the Reform Act, 1832 (2 Will. 4. c. 45), and a dwelling-house under 30 & 31 Vict. c. 102, did, as it were, overlap each other, so that a man might be the occupier of a house which would give him a vote under the statute of William, and at the same time might be the occupier of a dwelling-house which would give him a vote under the statute of Victoria. No doubt that to a certain extent is true. If the house is of a greater value than 10*l.*, then, if the person is an inhabitant occupier of it, that would give him a vote under the statute of William, but it would not take away his right to a vote under the statute of Victoria, in respect of the same house and for the same occupation.

The question arose in *Townshend v. The Overseers of St. Marylebone* (29) and *Bendle v. Watson* (30), where the majority of the Court held that if a man claim as for a dwelling-house, and it was found that for some reason or other his occupation would not give him a vote under the statute of Victoria, he might shew that he occupied a house that gave him a vote under the statute of William. I dissented from that view because I thought that the descriptions in the two statutes were to be taken to be descriptions of separate rights,

(29) 41 Law J. Rep. C.P. 25; Law Rep. 7 C.P. 143.

(30) 41 Law J. Rep. C.P. 15; Law Rep. 7 C.P. 168.

and that a person who could not support his claim under one of those descriptions ought not to be allowed to qualify himself by shewing that he occupied under the other description. I am of the same opinion still; not that if the case came before the Court of Appeal I should feel bound to overrule it, after it has lasted so long, but, except in that particular case, it is impossible to say that any of these franchises overlap each other. That view seems to me to answer the proposition that people can be lodgers and also householders in respect of the same subject-matter of occupation. The franchises given to lodgers and to householders are two separate and distinct qualifications.

The question still remains whether the claimants here are householders. I will first eliminate the cases which are not within the statute of Victoria. Where there is a structural separation of the premises, as in the case of chambers in the Inns of Court or of flats in Victoria Street, these were held to be separate houses under the statute of William and before 30 & 31 Vict. c. 102. Section 3 of this latter statute gives the franchise to any man who for the stipulated period has been an inhabitant occupier of a dwelling-house. Two matters are there enunciated—the thing to be occupied (that is, a dwelling-house) and the mode in which it is to be occupied (that is, as an inhabitant “occupier”—a term which has a legal signification). Then the section imposes certain other conditions—that the claimant has during the time of occupation been rated as an ordinary occupier, and that he has paid the rate.

The first question with regard to these claimants depends on what is the thing they occupy. Whether they have satisfied that condition or not must be decided—that is, both the thing to be occupied and the mode of occupation must be determined before the question of rating can be entered into; for if a man occupies as a lodger, and his mode of occupation is that of a lodger, he cannot be rated. So that the question whether he is a lodger or a householder must therefore be first decided. Under section 3 of the Act of 1867, the claimant must have occupied a dwelling-house. If the matter had rested there, no

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difficulty could have arisen, because it would have been impossible to say that a man who occupies two rooms in a house occupies the whole of the house; or, in other words, that two rooms in a house are a house. That would be absurd. In the case of things—such as chambers in the Inns of Court or flats—which although built in a particular way, are built as houses, they would have been houses; but rooms in a house which is built as a house would not have been “a house.” The only difficulty, therefore, with regard to chambers or flats was the fact of their being built with what I will call an inside staircase. There could not have been any difficulty, in the case of the Victoria Street flats, if they had been built as Swiss houses are built—with staircases outside, running up the outside wall—for then they would have been each built as a separate house, perfectly horizontal, and would not have wanted any communication at all with the other flats. Where, however, the staircases were built inside under the same roof, a difficulty was presented; but when it came to be considered that these staircases were built only for the purpose of affording ingress and egress it became immaterial whether they were built inside or out, for the houses were really built as separate houses. Section 61, however, first raised a difficulty as to the meaning of the term “dwelling-house,” but it is not necessary to consider it because the section has been repealed. Section 5 of the Act of 1878 replaces that section and enacts that a dwelling-house shall include any part of a house where that part is separately occupied as a dwelling; and then there is this further complication, that where the occupier is entitled to the sole and separate use of any part of a house, that part is not to be deemed to be occupied otherwise than separately, by reason only that the occupier is entitled to the joint use of some other part. With regard to the first part, it is that a dwelling-house shall include any part of a house where that part is separately occupied; but it shall not be prevented from being separately occupied as a dwelling because the occupier is entitled to the joint use of some other part. Every other consideration which is to determine whether a house is occupied as a dwelling or not remains as before.

It seems to me clear that the latter part of the section was intended to meet the question of what is called “structural severance;” but there still remains in every case the question whether that part of a house which the claimant occupies is separately occupied as a dwelling-house. Suppose a person occupies two rooms which are not on the same floor, or which are separated by a staircase, which is a common staircase, and he lives in the one room but sleeps in the other, such a case would to my mind raise some difficulty as to the nature of his occupation. It could not be said that he dwelt either in the sitting-room or in the bedroom; they would be occupied jointly by him. The same difficulty would arise in the case of a person who sleeps in a room on one side of the street, but lives during the day in a room on the other. Such difficulties as these seem to me still to remain in some of the cases which have been put into a schedule in one of these cases by one of the Revising Barristers.

It is a well-understood rule that such cases should not be put into the schedule unless they are similar to the principal case, and that the Divisional Court or the Court of Appeal ought not to be asked to distinguish them. The cases must be assumed to be similar; and there can be no decision as regards this point, so that it must be left open.

If, then, the inhabitant occupier of part of a house occupies that part separately as a dwelling, although he uses another part of the same house in common with others, he must be considered to be a person occupying a separate dwelling.

Then there is section 4 of the Act of 1867 which gives the lodger franchise, but that section does not seem to be explained by section 5 of the Act of 1878, in which a new term is introduced—“apartment,” whether furnished or not. The meaning of the term “lodger” is therefore still left to be considered. Although, in ordinary parlance, a lodging and a house must be different things, yet the moment the Legislature says that part of a house shall be a house—which in truth it cannot be—it is possible that the same thing may be occupied by a person who is a householder, as a lodger. A room is the thing which he occupies, and according to these definitions he may occupy it as a

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householder or as a lodger. The thing occupied, therefore, may be the same—namely, a room—and the mode of occupation then determines the qualification. Now what is the difference as to the mode of occupying a room as a lodger and occupying it as a householder? In order to occupy a room as a lodger, a man must lodge in a house which belongs to another. There cannot be an exhaustive statement as to what constitutes a lodger. The matter was considered in three cases—*Pitts v. Smedley* (20), *Score v. Huggett* (21), *Wansey v. Perkins* (22)—where the distinction was made to turn upon the ownership of the key of the outer door. In one case, where the owner of the house had the key of the outer door, and resided in the house, it was held that the person who occupied the rooms in that house was a mere lodger. In another of these cases, where the owner let part of the house, neither reserving any actual control over it nor keeping the key of the outer door, it was held that the occupier of part of that house was a householder. In the third case, where both the owner and the occupier had keys of the outer door, it was held that the occupier was a mere lodger.

The distinction pointed out in those cases will remain as a very good guide if the fact that the owner reserves control over the house is taken into consideration. Where the owner of the house, therefore, reserves to himself control over part of it, as he does if he resides in part of it and uses the passages and staircases, or if he does not reside in it, but by his servants performs any duty in the house or undertakes a certain control over it,—then as long as he does that any person who occupies a part of the house may be properly said to be a lodger with him.

Again, if the owner has given up actual occupation of the house to other persons, and does not reserve to himself control over any part of it, these persons may, within the meaning of the statute, and provided other conditions are fulfilled, be said to occupy a dwelling-house. Suppose a man remains in the house but lets off two rooms, the person to whom he gives the exclusive use thereof is a lodger. If he lets the next two rooms, then he will have two lodgers. But if he lets off the remaining two rooms, and leaves the house pre-

serving no actual control over it, either by himself or by his servants, those persons who were lodgers will by that fact become householders. Suppose, again, that one of those persons leaves the house during the qualifying year, and the owner thereupon resumes the control over the unlet part, then immediately, by this act, the other persons who were householders become lodgers again. That, however absurd it may seem, would appear to be the effect of these statutes. It will be necessary, therefore, for Revising Barristers to see whether the whole house has been occupied during the whole of the qualifying year under conditions that make the persons who occupy them householders; for if the owner during a part of the year has had a control over part of the house, then none of those persons have been householders for the qualifying period of one year.

In one case before the Court, the whole of the house has been let during the whole of the time, and the only part which has not been demised at all is the staircase, which therefore remains in the landlord, and is the only thing which he has reserved to himself, from the fact that he has not demised it. He has gone away and given up actual control over the house. The occupiers must therefore be held to be householders and inhabitant occupiers of a dwelling-house within the meaning of the statutes.

In the other cases, where the owner or intermediate tenant of the whole house (who is the same as the owner for this purpose) reserved to himself the control over a part of the house, the persons who occupy the other parts of that house are lodgers; and inasmuch as the value is insufficient, they cannot claim to be put upon the register at all.

The question of rating, which arises only as regards householders—inasmuch as lodgers cannot be rated—is quite as difficult a question.

Now persons who are inhabitant occupiers must, by section 3 of the Act of 1867, have been rated, and must also have paid all rates. In the third case it appears that the claimant has not been rated, but that the landlord paid all the rates; and as section 3 is not repealed, we have to see whether, under these circumstances, he is to be deemed to be rated. The first part of

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section 7 of the Act of 1867, which relates to rating, is not material, but it left the occupiers of small tenements, which are separate houses, liable to be rated instead of the owners, and so did away with Sturges Bourne's Act (59 Geo. 3. c. 12) and the Small Tenements Act (13 & 14 Vict. c. 99). The subsequent part of the section, which enacts that where the dwelling-house or tenement is wholly let out in apartments or lodgings not separately rated, then the owner is to be rated, gave rise to the case of *Stamper v. The Overseers of Sunderland* (12). There the overseers had rated the occupiers of separate rooms, who objected to be so rated, and who also knew that if they were not rated they could not be put upon the register as voters; but nevertheless they preferred not to be rated and not to have a vote, to being rated and having a vote. That is the supposition in that case, where it was clearly shewn that if the occupiers could be held to be lodgers in the ordinary sense of the word, the owner was the only person who could be rated, and consequently this enactment did not apply to them. But it seems to me that it does apply to separate rooms or lodgings which, except for this section, would have been rated or rateable; but inasmuch as the Small Tenements Act was done away with, they would have been rated unless this was put in to protect them, and it was held that this did protect them from being rated; and that in those cases where persons occupied parts of a house in such a manner as to cause them to be rated or rateable, they should not be rated, but that the owner should be rated instead of them, whereby they lost the franchise. Then came the question in *Stamper v. The Overseers of Sunderland* (12), where the persons occupied in such a way that they would have been rated but for the stipulation in their favour, and it was decided that they were not lodgers in the ordinary sense, but were persons who occupied tenements in such a manner that they would have been rateable under 43 Eliz. c. 2, and that they were protected by this stipulation.

Now all the Judges who considered that case with the greatest care were of opinion that these people were not lodgers

in the ordinary sense; but two of them said that, from the peculiarity of this definition in the statute, which says that part of a house might be a house for the purpose of the franchise, if these people were not householders within the meaning of the statute, they might be (although not lodgers in the ordinary sense) *lodgers* within the meaning of the statute.

It may be that that is the true view of all these statutes, and that persons therefore who occupy parts of houses, but who are not householders within the meaning of these Acts, must be lodgers. They must be one or the other, and whether they are occupiers of lodgings which give a qualification depends on other matters. The effect of the Act of 1878 is to get rid of what is called the structural difficulty, and also the suggested difficulty of the joint occupation of a part of a house. It leaves all other matters as they were before, except as to the question of rating.

Now these persons, being held to be the occupiers of separate tenements, ought to be rated; and by section 3 of the Act of 1867 unless they are rated they cannot vote. Then 32 & 33 Vict. c. 41, which is to explain the earlier statute, says in section 4 that the vestry may from time to time order the owners of all rateable hereditaments to which section 3 of the Act extended to be rated instead of the occupiers. The rateable hereditaments to which the Act extends are rateable hereditaments of certain values; but the question of value does not determine whether the thing is a rateable hereditament or not. Those separate occupations of parts of a house where a person can be said to be a separate householder, are declared in *Stamper v. The Overseers of Sunderland* (12) to be things which could, and which would, have been rated under the statute of Elizabeth. In my opinion that decision is right.

The moment you come to the conclusion that they are separate occupiers of that which is a separate dwelling, it follows that they must be persons rateable; and then by section 7 of the Act of 1867, except in particular cases, they must have been rated in order to obtain the franchise. But now it is said that under the Act of 1869 the vestry may, where the things are

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under a certain value, order the owners to be rated instead of the occupiers; and if that were all, it would prevent those persons having the franchise under section 3 of the Act of 1867. The moment the vestry have made this order, the overseers must rate the owners instead of the occupiers.

If the matter stood there, the occupier could not be put upon the register; but section 19 of the Act of 1869 goes on to say that the overseers in making out the poor-rate shall rate the owner in every case, whether the rate is collected from the owner or occupier, or whether the owner is liable—that is, in all the cases within section 4, where the owner is made liable instead of the occupier, who, but for this statute, would have been liable to the payment of the rate. Supposing the overseers do not put the names of the occupiers on the list, then under the first part of that section they cannot be deemed to be rated; but notwithstanding such omission, they are entitled to every qualification and franchise depending on such rating as if their names had not been omitted.

Therefore the negligence of the overseers is not to alter the rights of the occupier, who, although not rated, is to be deemed to be rated. Then arose certain suggested difficulties as to whether certain persons would be within that section or not, and section 14 of the Act of 1878 appears to me to be intended to meet difficulties of that kind. It is said that the stipulation in the Act of 1869 is to be applicable to all cases where the owner is rated instead of the occupier, who, if it had not been for that statute, would have been rated. Therefore a case, which recently came before us, where we held that these persons would have been occupiers, seems to me to be one in which, if the vestry had made the order, the owner would have been the person to be rated instead of the occupier, who, however, is to be deemed to have been duly rated whether his name has been put on the list or not. This is another instance in these statutes where a thing is to be considered that which it is not, and the occupier, though not rated, is to be deemed to have been rated.

There is another part of section 3 of the Act of 1869 which is not clear. The

occupier is to be deemed to be rated, but who is to pay the rate? If the landlord is to be the person really rated and the occupier is to be deemed to be rated, it follows that payment by the landlord is payment by the occupier, and that if the landlord has paid the rate, the occupier is to be taken as also having paid it. That seems to me to be absurd. In the case before us it is said that every condition has been fulfilled, and that it must therefore be assumed for the purposes of this case that the landlord has paid the rates, and if the occupier has been an occupier of a separate dwelling he is to be deemed to be rated, although not rated, and is to be deemed to have paid the rates. Therefore in this case, where we hold that people are occupiers of a separate dwelling, we must hold that they have fulfilled the conditions of having been rated, and having paid the rate, and are therefore entitled to be put upon the register. This result makes it unnecessary to decide another question, about which there is quite as much difficulty—whether where a person has claimed as an occupier, and the Revising Barrister has come to the opinion that he is not an occupier, he can rectify the list or the claim so as to put the claimant on the register as a lodger.

COTTON, L.J.—I agree with the other members of the Court. The question we have to consider is whether the claimants are entitled under the Act of 1867, as amended by the Act of 1878, to the franchise as householders. The Act of 1867 gives two different franchises—a lodger franchise and a householder franchise. Section 4 confers the lodger franchise, and section 3 gives the franchise to every man who, amongst other things, has been the inhabitant occupier, as owner or tenant, of any dwelling-house. There was a definition of “dwelling-house” in the Act of 1867 which gave rise to considerable difficulty, and the Act of 1878 was therefore passed to remove it. Section 5 of the latter Act removes the difficulty as regards persons who occupy part of a house separately, but who also use the other parts in common with other persons. With that one exception, however, the section simply gives a definition of the term “dwelling-house,” and removes the diffi-

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culty as to the necessity of that part of the house which is occupied by the claimant being structurally severed from the other parts. The section amounts to this, that if a man occupies part of a house, though there is no structural separation, he may be entitled, if otherwise he performs the conditions of the statute, to have the household franchise.

This section, which is not a complete enactment as to what will give a man the franchise, simply alters and defines the thing which may give it, and we must, therefore, introduce it into the previous Act to see whether the mode of occupying the thing gives a right to the franchise.

Under section 5 of the Act of 1878 the thing which conferred the franchise might be a lodging or a house—it might be so occupied as to entitle a man to the franchise either as a householder or as a lodger. The first question to be considered is, whether a man who is a lodger, and in that character occupies the thing that may give him the franchise, can say, "Although I am not entitled to the franchise as a lodger, yet I am entitled to it as a householder." I do not think this would be a fair construction of this Act, which gives two franchises. The section creates a house for a man who, independently of the Act of 1878, would not have a house at all; and gives a vote not only to him, but to his lodger who occupies part of the same house, provided the value is sufficient. If a man is a lodger he cannot also be a householder within section 3 of the Act of 1867. A lodger may be a tenant, but it must be remembered that, to entitle a man to the lodger franchise, the thing that he occupies must be of a particular value. Section 5 contains a definition both of "dwelling-house" and "lodging;" and, in my opinion, this conclusively shews that the lodger franchise was to be continued independently of the householder franchise; and that the thing may be occupied as a lodging, although it may also come within the definition of that which constitutes a dwelling-house for the purpose of the franchise.

In my opinion section 3 of the Act of 1867 must be construed as giving the franchise to inhabitant occupiers, and those who occupy otherwise than as lodgers. If, therefore, a man has in fact occupied the

thing as a lodger, he must make out his claim as a lodger, and is not entitled to the franchise under the householder clause. The question we have to consider is, whether the several claimants are "lodgers" or "householders" within the meaning of the Act. I am not dealing with the question of a person who claims to be entitled to the household franchise under the old Reform Act, but simply with the question of a person who claims a vote in respect of his occupation of a "house" under this Act. I do not pretend to give an exhaustive definition of the term "lodger," but, in my opinion, it involves that he must dwell in the house of, and lodge with, another man. The lodging in the house of another causes no difficulty; but the lodging with another man, it is said, implies that such man is the immediate landlord. It is not necessary to say that the person with whom he lodges in the house is his immediate landlord, or that the immediate landlord should have the exclusive control over the key of the outer door; but the term "lodger" does imply that there should be some control exercised by the person in whose house the lodger resides. There may be an infinite variety of cases which might occur, but it would be futile to attempt to exhaust them. We have only to consider whether, upon the facts here stated, the claimants are or are not lodgers.

In *Morfee v. Novis* the landlord occupies and lives in the whole of the house with the exception of two rooms, so that the claimant is a lodger in the house of and with another man. In *Bradley v. Baylis* also the immediate landlord exercises a control over the whole house. In both these cases, therefore, the claimants occupy parts of a house as lodgers, and are not entitled to be put on the register as householders.

In the third case it is found that the immediate landlord does not live in the house, although, according to the usual custom, he has not let the staircase, but has given a right to the tenants of the several rooms to use it in common. It is, moreover, found that he retains the right to do all the repairs, and pays the rates and taxes, but "save as aforesaid he does not by himself or his servants retain the control and dominion over the house or

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any part thereof." In my opinion the fact that the immediate landlord does the painting and repairs is not sufficient to enable him to say he exercises such a control as to make the persons who live in his house lodgers only. The claimant in this case is therefore entitled to bring himself under the household franchise, if he can do so, and this depends on the question whether he is rated. The Act of 1867 contained a condition about rating the occupier, but, the sections having been so fully discussed by Lord Justice Brett, it is sufficient to say that section 14 of the Act of 1878 does make section 19 of the previous Act general, and the matter must therefore be dealt with as if the claimant had been rated. It is sufficient under the Act of 1869 if the landlord pays the rates, and it must be taken in this case that they have been paid. This claimant is, therefore, entitled to be put on the register as a householder.

LINDLEY, L.J. (27).—In order to decide these cases, the following statutes have to be construed and applied—namely, The Representation of the People Act, 1867 (30 & 31 Vict. c. 102), ss. 3, 4, 7, 61; Poor-Rate Assessment Act, 1869 (32 & 33 Vict. c. 41), ss. 3, 4, 19; Parliamentary and Municipal Registration Act, 1878 (41 & 42 Vict. c. 26), ss. 5 and 14. Of these statutes, the first and third are *in pari materia*, and relate to the representation of the people, and to the registration of voters. The second is a Poor-Rate Assessment Act, modifying the rating clauses of the first Act, but not otherwise affecting it. The above enactments can be best studied by being divided into two groups, as follows: Group 1—Qualification group: 30 & 31 Vict. c. 102. ss. 3, 4, 61; 41 & 42 Vict. c. 26. s. 5. Group 2—Rating group: 30 & 31 Vict. c. 102. s. 7; 32 & 33 Vict. c. 41. ss. 3 and 19; 41 & 42 Vict. c. 26. s. 14.

The effect of the first group of sections is this: First, two new classes of voters are created—namely, first, the occupier class, who must be rated to the poor, but whose tenement may be of any value; secondly, the lodger class, who need not, and indeed cannot, be rated, but whose lodging must be worth 10*l.* a year unfurnished.

A careful study of the Acts of 1867

and 1869 shews, I think, conclusively that these two classes are intended to be kept distinct; but no definition of "occupier" or of "lodger" is given, although there is a description of the tenement which an occupier must have, and of the lodging which a lodger must have. The tenement which an occupier must have is described as a dwelling-house (Act of 1867, s. 3) which by the Act of 1878, s. 5, includes any part of a house where that part is separately occupied as a dwelling. The lodging which a lodger must have is described in the Act of 1867, s. 4, as a lodging, being part of a dwelling-house, which by the Act of 1878, s. 5, includes any apartment or place of residence, furnished or unfurnished, in a dwelling; and such lodging must, by the Act of 1867, s. 4, be occupied by the lodger separately and as sole tenant.

These descriptions have much in common: they both apply to persons who, in some sense, are tenants; they both apply to one or more rooms in one house, and they both require separate occupation. Moreover, "lodging" implies dwelling, so that if attention is only paid to the room occupied, and to its separate occupation as a dwelling, no distinction can be found between what is required to confer the franchise on the occupier of part of a house, and what is required to confer the franchise on a lodger. Value makes the difference in some cases, but not in all; a lodging must be of the clear yearly value, if let unfurnished, of 10*l.* or upwards. From this it follows—first, that one or more rooms in a house, separately occupied by the same person, and of the value of 10*l.* unfurnished, may confer either the one franchise or the other on their occupier; secondly, that the same rooms, if not of this value, cannot confer the lodger franchise, but may confer the occupier franchise.

I proceed now a step further. The Act of 1867, s. 3, requires the occupier to occupy as "owner or tenant;" and the same Act, s. 4, requires the lodger to occupy separately "and as sole tenant." But the occupier must also occupy separately by the Act of 1878, s. 5, so that, as far as separate occupation by a tenant or lodger is concerned, there is no difference between the two classes of voters.

The foregoing examination of the sections

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now under consideration leads to two conclusions—namely, first, that the two classes of voters are contrasted, and are intended to be kept distinct; and secondly, that, when dealing with tenants or lodgers occupying one or more rooms of one and the same house, the only difference to be found between them is the difference (if any) between a person occupying as tenant and a person occupying as lodger.

I pass now to the group of rating enactments, in order to discover what light (if any) they throw on the question. The Act of 1867, ss. 3 and 61, required the occupier to be rated to the poor, and his tenement to be separately rated; and where a house was wholly let out in apartments or lodgings, not separately rated when the Act passed, the owner of the house was the person to be rated, and not the occupiers of the apartments or lodgings—see section 7 and *Stamper v. The Overseers of Sunderland* (12).

The 61st section of the Act of 1867 is repealed by section 5 of the Act of 1878, and section 7 of the Act of 1867 is greatly modified by sections 3 and 4 of the Act of 1869; for by sections 3 and 4 of this Act, the owner of a house let out in apartments of certain specified values may become the person liable to pay the rates which would otherwise be payable by their occupiers. Moreover, by section 19 of the same Act (as modified by section 14 of the Act of 1878), whenever a rate is collected from the owner or occupier, or whenever the owner is liable to the payment of the rate instead of the occupier, the name of the occupier is to be entered in the rate-book, and he is then to be deemed to be, duly rated for the purposes of the electoral franchise, and the omission of his name from the book does not disqualify him. Whether, therefore, the occupier of a room in a house pays the rate of the room, or whether his landlord pays it, the occupier is, for the purpose of the franchise, sufficiently rated if his name is entered in the book; but his name ought not to be so entered unless the room he occupies is a rateable hereditament. A mere lodger, however, is not and never was rateable in respect of his lodgings, the occupation by a lodger of a lodging not being within the Poor-Rate Acts. The group of rating

sections therefore point to the distinction between occupation as a tenant rendering him liable to be rated, and occupation as a lodger. But what this distinction is cannot be gathered from the language of the statutes themselves.

The distinction, then, between tenants who are not lodgers and tenants who are lodgers must be discovered from other sources than the statutes, and it is extremely difficult to draw the line between them. At the same time, the word "lodger" involves the idea of lodging with some one else from whom he hires his lodging; whilst the word "tenant" does not involve, although it does not exclude, this idea; and this difference gives a clue to the distinction which the statutes have made. Taking this difference as a guide, it appears to me that, where a house is wholly let out in unfurnished apartments, separately occupied by tenants, and their landlord does not reside in the house, and has no servant in the house to look after it for him—such tenants are rateable and are not lodgers; whilst, on the other hand, where a house is let out in unfurnished apartments to tenants, and their landlord resides in the house or has a servant in it to look after it for him, then it appears to me that such tenants are not rateable and are lodgers. This is the best conclusion I can draw from the numerous decisions relating to this question, and to the enactments to which I have more particularly referred; and applying this test to the three cases before us, I think the decision of the Court below ought to be affirmed in Kirby's case and reversed in Bradley's case and Morfee's case.

Judgment accordingly.

Solicitors—Reuben Charles Green, for appellant Bradley; Baylis & Pearce, for respondent Baylis. Tamplin, Tayler & Joseph, agents for C. D. Jones & Glenister, Hastings, for appellant Morfee. Harvey, Oliver & Capron, for appellant Kirby; Samuel Price, for respondent Biffen.

1881. { THE QUEEN (on the prosecu-
 June 21, 24. { tion of the Lords Commis-
 1882. { sioners of Her Majesty's
 Jan. 10. { Treasury) v. THE MAYOR,
 &C., AND TREASURER OF
 MAIDENHEAD.

Corrupt Practices (Municipal Elections) Act, 1875 (35 & 36 Vict. c. 60), s. 22—Election Petition—Borough—Expenses of Court—Trial—Barrister's Order—Court of Record—Certificate of Treasury—Retrospective Rate—Mandamus.

The Court of a Barrister appointed to try a Municipal Election Petition is a Court of record; the acts of the Court can therefore only be proved by production of the record.

By the *Corrupt Practices (Municipal Elections) Act, 1875, s. 22*, the expenses of a Court for the trial of an election petition are to be paid by the Commissioners of the Treasury, and are to be repaid to them on their certificate by the treasurer of the borough to which the petition relates out of the borough fund or rate, unless such expenses are ordered by the Court to be repaid to the commissioners by, inter alios, a respondent who, in the opinion of the Court, has been personally guilty of corrupt practices at the election.

In March, 1875, a petition presented against the return of certain town councillors for the borough of M. was tried before a barrister, appointed under the provisions of the *Corrupt Practices (Municipal Elections) Act, 1872 (35 & 36 Vict. c. 60)*, and lasted for nine days. On the 11th of March, 1875, the barrister made an order, under the 19th section of the statute, directing that the costs, charges and expenses of the petition and proceedings in Court should be borne by the respondents in equal shares. With respect, however, to the expenses of the Court, which are provided for by section 22, no order was then made, although the barrister intended to visit them upon D., one of the respondents, and expressed such intention orally in giving judgment upon the case, when D. was adjudged personally guilty of corrupt practices. The expenses of the Court being thus unprovided for, the Commissioners of Her Majesty's Treasury paid them to the barrister and other persons entitled, and de-

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manded repayment thereof from the treasurer of the borough of M. out of the borough fund or rate. On the 6th of August, 1875, a rate was made, and afterwards collected from persons liable to be rated in the borough, there being no borough fund out of which repayment could be made to the commissioners. In September, 1875, the commissioners having communicated with the barrister, and discovered that his intention was that those expenses should be borne by D., resolved to proceed against D. for the repayment of the moneys which they had advanced, and the moneys collected from the ratepayers of M. borough were accordingly returned to them. On the 9th of December, 1875, the commissioners, after further considering the matter, again demanded payment of the said sums of money which they had advanced from the treasurer of M. borough, and issued a certificate requiring such payment to be made within a specified time:—

Held (by LORD COLERIDGE, C.J., and POLLOCK, B., dissentiente MANISTY, J.), that, upon the above facts, the commissioners had the power to issue the second certificate, and were entitled to a mandamus requiring the treasurer of M. borough to repay the amount due, after he had raised it by means of a borough rate, which could be lawfully levied notwithstanding that such rate would be retrospective.

Per MANISTY, J.—The commissioners having issued that certificate in August, 1875, and caused a rate to be made and collected, and having subsequently cancelled the certificate and caused the rate to be returned, could not legally issue another certificate.

This was a Special Case stated pursuant to an order made by Mellor, J., at the trial before him, in March, 1879, of the issues of fact arising upon a *mandamus*, granted upon the application of the Lords of the Treasury, to compel the repayment by the treasurer of the borough of Maidenhead of the sum of 376*l.* 18*s.* 10*d.*, being the amount of the remuneration and allowances paid by the commissioners to the barrister, officers, clerks and shorthand writers employed upon the trial of a petition against the return of one William Dawson as a town councillor of the borough,

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on the ground of bribery, and to compel the corporation to make and collect a borough rate for that purpose (1).

The material facts contained in the Special Case will be found set out in the judgments of Pollock, B., and Manisty, J.

A. L. Smith (Sir John Holker, Q.C., and Cowie with him), for the prosecutors.—It is not competent for the parties to reopen the judgment of the Court after all the records have been drawn up and returned. The expenses of the Court not having been dealt with by the barrister, it was the duty of the commissioners to provide them in the first instance, and to claim repayment from the treasurer of the borough. The barrister appointed to preside at the trial of a municipal election petition is a Judge of a Court of record, and what he ordered can only be proved or disproved by the record—see the judgment of Erle, C.J., in *Kemp v. Neville* (2). The Election Court is constituted under the provisions of 35 & 36

(1) By the Corrupt Practices (Municipal Elections) Act, 1872 (35 & 36 Vict. c. 60), s. 22, "the remuneration and allowances to be paid to a barrister for his services in respect of the trial of a petition, and to any officers, clerks or shorthand writers employed under the provisions of this Act, shall be fixed by a scale, which shall be made, and may be varied from time to time, by the election Judges on the *rota* for the trial of election petitions under the provisions of the Parliamentary Elections Act, 1868, with the approval of the Commissioners of Her Majesty's Treasury, or any two or more of them; and the amount of any such remuneration and allowances shall be paid by the said commissioners, and shall be repaid to the said commissioners on their certificate, by the treasurer of the borough to which the petition relates, out of the borough fund or rate. Provided that the Court, at its discretion, may order that the whole or any part of such remuneration and allowances, or the whole or any part of the expenses incurred by a town clerk for receiving the Court under the provisions of this Act, shall be repaid to the said commissioners or to the town clerk, as the case may be, in the cases, by the persons, and in the manner following—namely (a), when, in the opinion of the Court, a petition is frivolous and vexatious, then by the petitioner; (b) when, in the opinion of the Court, a respondent has been personally guilty of corrupt practices at the election, then by such respondent. And any order so made for the repayment of any sum by a petitioner or respondent, may be enforced in the same way as an order for payment of costs."

(2) 10 Com. B. Rep. N.S. 523; 31 Law J. Rep. C.P. 158.

Vict. c. 60. s. 14. Sub-section 5 of section 14 enacts that, with an exception not material, "the Court shall, for the purposes of the trial of a petition, have all the same powers and privileges which a Judge may have on the trial of an election petition under the Parliamentary Elections Act, 1868." Under the last-mentioned statute, the Court held by a Judge for the trial of an election petition is expressly declared to be a Court of record—see 31 & 32 Vict. c. 125. s. 29.

They cited also on this point *Ex parte Fernandez* (3) and *Wells v. Wren* (4).

Again, it was not competent for the barrister to make up the record on the 4th of October, more than six months after the petition had been tried; his sole duty was to try the petition—see 35 & 36 Vict. c. 60. s. 14. The written order made at the trial, and signed by the barrister himself, did not include these expenses; and it is contended that it is not competent for the Court to give effect to a mere expression of intention on the part of the barrister which is not contained in his own order.

Lastly, the Court has full power to order a rate to be made, sufficient to provide for these expenses, notwithstanding that such a rate would be retrospective. Indeed, such a rate must necessarily be retrospective, there being no machinery by which the amount of these expenses can be ascertained beforehand.

Henry Matthews, Q.C., and H. D. Greene, for the defendants.—First, it is contended that the commissioners had no power to make the order, inasmuch as Dawson was the party ordered to pay the expenses in question. The Corrupt Practices (Municipal Elections) Act, 1872, s. 22, provides that "the Court, at its discretion, may order" these expenses. Any direction about costs need not therefore be in writing; where an order or certificate must be in writing, there is an express provision to that effect—see section 15, sub-section 4. The barrister did all that was required, but the registrar omitted to make a note of the barrister's intention as expressed in his judgment at the time.

(3) 10 Com. B. Rep. N.S. 3; 30 Law J. Rep. C.P. 321.

(4) 49 Law J. Rep. C.P. 681; Law Rep. 5 Q.P. D. 529.

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Again, a Court constituted, under 35 & 36 Vict. c. 60, for the trial of municipal petitions is not a Court of record. The 14th section does not constitute it as such, and the Judge and Registrar are only appointed for a particular petition. There is no machinery for any record, nor is a record necessary. Moreover, even if the Court were a Court of record, it is not too late to make the record agree with the facts. It has been decided that an erroneous entry of a verdict on the *postea* may be altered by reference to the Judge's notes—*Newton v. Harland* (5); and in *Ernest v. Brown* (6) it was decided that the Judge who presides at a trial may at any time direct the *postea* to be amended, and the verdict entered according to the plain intention of the jury. See also *Marianski v. Cairns* (7) and *Williams v. Lord* (8).

Again, the second certificate of the commissioners was invalid; they were *functi officio* at the time it was made. The respondents acted upon the first certificate, and made and collected a rate, which was afterwards rendered unnecessary by the cancellation of the first certificate. That being so, and the parties having acted upon the first certificate, an estoppel is created—*Pickard v. Sears* (9).

Lastly, the rate asked for could not be legally made; the Court therefore will not order a *mandamus* to do what cannot be done—*In re The Bristol and Somerset Railway Company* (10). A rate must be prospective, and not retrospective in its operation—*The Queen v. Wigan* (11). And even if, as has been contended, a rate is necessarily retrospective under section 22, it should be promptly made, so that the burden as far as possible may be thrown upon those who ought to bear it.

They cited also *Dyson v. Wood* (12) and *Parr v. Hartshorn* (13).

A. L. Smith, replied.

(5) 1 M. & G. 958; 10 Law J. Rep. C.P. 11.

(6) 4 Bing. N.C. 162; 7 Law J. Rep. C.P. 145.

(7) 1 Macq. H.L. 212, 766.

(8) 4 Dowl. & Ry. 115.

(9) 6 Ad. & E. 469.

(10) 47 Law J. Rep. Q.B. 48; Law Rep. 3 Q.B. D. 10.

(11) Law Rep. 9 Q.B. 317, 326; 1 App. Cas. 611.

(12) 3 B. & C. 449.

(13) 23 W.R. 188.

The following judgments were (on Jan. 10, 1882) delivered by the Court:—

MANISTY, J.—This is an application, in the form of a Special Case, for a peremptory writ of *mandamus* to compel the repayment by the treasurer of the borough of Maidenhead to the Lords Commissioners of the Treasury of the sum of 376*l.* 18*s.* 10*d.*, being the amount of the remuneration and allowance paid by the commissioners to Charles James Coleman, Esq., barrister-at-law, for his service in respect of the trial of a petition against the return of one William Dawson as a town councillor of the borough on the ground of bribery, under the Corrupt Practices (Municipal Elections) Act, 1872 (35 & 36 Vict. c. 60), and to the officers, clerks and shorthand writers employed in and about the trial of that petition, and to compel the corporation to make and collect a borough rate for that purpose.

The petition was heard on several days in March, 1875, and on the 10th of that month Mr. Coleman gave judgment against Mr. Dawson; and on the following day certified to the Court of Common Pleas that Dawson had not been duly elected, and that he had been proved to have been guilty of personal bribery.

By the 22nd section of the Act of 1872 it is enacted that the remuneration and allowances in question shall be paid by the Commissioners of Her Majesty's Treasury, and shall be repaid to them, on their certificate, by the treasurer of the borough, out of the borough fund or rate, provided that the Court (that is, the Court by which the petition is tried) may order that the whole or any part of such remuneration and allowances shall be repaid to the commissioners by the respondent when, in the opinion of the Court, he has been guilty of corrupt practices at the election.

The first question raised in this case is whether Mr. Coleman made any such order against Mr. Dawson. I am of opinion, upon the facts as found in the Special Case which has been stated, that no such order was made; and upon this point I concur in the judgment about to be delivered by my learned brother Pollock, therefore I abstain from going further into it.

The second question is whether, under

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the circumstances and upon the facts stated in the Special Case, the commissioners are entitled to have a peremptory writ of *mandamus* to compel the defendants to repay them the 376*l.* 18*s.* 10*d.*, and to make a borough rate for that purpose, there being no borough fund out of which the repayment can be made.

The principal facts on which that question depends are as follows: The judgment of Mr. Coleman, as has already been observed, was delivered on the 10th of March, 1875, and he made his report and certificate on the following day. It does not appear on what day the commissioners paid the 376*l.* 18*s.* 10*d.*, but they certified the payment, pursuant to the 22nd section of the Act, by two documents, dated the 2nd and 25th of August, 1875, which are set out in the Special Case. The town council of the borough, in the same month of August, made a borough rate, in the nature of a county rate, of 6*d.* in the pound, for the purpose of paying the 376*l.* 18*s.* 10*d.*, and the rate was collected from the numerous persons then liable to be rated. On the 4th of October, 1875, the commissioners revoked and cancelled their certificates of August, 1875, and wrote to the defendant Morris, informing him that they had done so, stating as their reason that they had received a letter from Mr. Coleman to the effect that he had in his judgment ordered the expenses in question to be paid by the respondent Dawson. Mr. Morris therefore returned the cancelled certificate to the commissioners, and on the 3rd of December, 1875, the town council passed a resolution ordering the collector to return to the ratepayers respectively the sums which had been collected from them, and they were returned accordingly.

At the time of making the rate there were 1,472 assessments; at the time of the commencement of the present proceedings 145 of the persons rated had left the borough, thirty had died, and the population of the borough had increased considerably.

On the 9th of December, 1875, after the rate had been returned to the ratepayers, the Lords Commissioners issued a second certificate, for repayment to them of the 376*l.* 18*s.* 10*d.*, and sent it to Mr. Morris,

with the letter of that date which is set out in the Special Case.

On the 20th of December, 1875, the town clerk informed the Lords Commissioners by letter addressed to Mr. Law that the rate had been returned, and that the town council had no fund out of which they could pay the 376*l.* 18*s.* 10*d.*

No further step was taken in the matter till the 8th of June, 1876, when the Solicitor to the Treasury wrote demanding payment within a month. The money was not paid, and on the 8th of August, 1876, the Lords Commissioners applied for and obtained a rule to shew cause why a *mandamus* should not issue commanding the defendant Morris to repay them the 376*l.* 18*s.* 10*d.* out of the borough fund or rate, and commanding the other defendants to take all necessary steps to cause that sum to be repaid.

Subsequently, in the same year, the rule was made absolute, and a conditional *mandamus* was issued. The defendants made a return to the writ on the 25th of January, 1878, setting forth, among other things, the facts which I have recapitulated. The prosecutors pleaded and demurred to the return, and the defendants replied and joined in demurrer. The issues in fact came on for trial at Westminster, before Mr. Justice Mellor and a special jury, and in the result a verdict was entered for the Crown, subject to the opinion of this Court upon a Special Case, the Court to give judgment upon the demurrers as well as on the Special Case.

I am of opinion that judgment ought to be given for the defendants on several grounds.

First, I think that the commissioners, having issued their certificate in August, 1875, and caused a rate to be made and collected for payment of the 376*l.* 18*s.* 10*d.*, and having, in October, 1875, cancelled that certificate and caused the rate to be returned to the ratepayers, could not legally issue another certificate in December, 1875, and cause another rate to be made and collected. Making and collecting a rate from and afterwards returning it to each of upwards of 1,400 ratepayers is a very costly proceeding, and I know of no law by which the ratepayers can be sub-

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jected to the cost of making a second rate. Moreover, the ratepayers are a fluctuating body, and if payment of a second rate is enforced, then several ratepayers who were liable to contribute, and did contribute, to the payment of the sum in question, will be exempted from contributing anything towards it, and others who were not liable will be made to contribute to the payment of it. Surely this would be unjust. In the case of an ordinary execution against the goods of a judgment debtor, followed by a levy and sale by the sheriff, I suppose it would not be contended that the judgment creditor could issue a second execution and cause a second levy and sale to be made for the same debt, he having, owing to some mistaken notion on his part, caused the sheriff to return the proceeds of the first levy. If he could not do so, I am at a loss to understand upon what principle the Lords of the Treasury can be entitled to issue a second certificate and require a second borough rate to be levied in the present case. Suppose it had been, and, for aught that appears to the contrary, it may have been, necessary to enforce payment of the first rate by distress and sale of the goods belonging to some of the numerous ratepayers, could they have been subjected legally to a second distress and sale for a second rate made for the same purpose as the first? I venture to think they could not. If not why should those who paid the first rate without a distress be subjected to the payment of the second rate? Surely the second rate must be valid and enforceable against all or none of the ratepayers. Whether an execution could issue under the supposed circumstances to which I have adverted, or whether the Lords of the Treasury, under the circumstances of the present case, could have compelled the persons to whom the money raised by means of the first rate was repaid to refund it, on the ground that it was repaid to them under a mistake of fact, it is unnecessary to consider. For the reasons I have given I think a second rate would be illegal.

Secondly, I am of opinion that the Lords Commissioners were bound to apply promptly for repayment of the money, that they failed to do so, and that conse-

quently they are without remedy. A borough rate, made pursuant to the 92nd section of the Municipal Corporations Reform Act, 1835, must be prospective—a rate in the nature of a borough rate, made pursuant to the 22nd section of the Corrupt Practices (Elections) Municipal Act, 1872, may be, because it must be, retrospective. Nevertheless, in my opinion, it must be made promptly, so as to throw the burden as near as is reasonably possible upon those who ought to bear it. Now, in the present case, the judgment which rendered the ratepayers liable to pay the 376*l.* 18*s.* 10*d.* was delivered on the 10th of March, 1875, and it was not till the 9th of December, 1875, that the Lords Commissioners made their second certificate or order, now sought to be enforced; and it was not until the 8th of August, 1876, that they applied for a *mandamus*. I think they were too late in taking both these steps.—See *The Queen v. Wigan* (11), in the House of Lords.

Thirdly, I am of opinion that the *mandamus* which has been issued is bad on the face of it, for want of an averment that the prosecutors applied in proper time—that is, in reasonable time. In the *Wigan Case* (11), Lord Coleridge, then Lord Chief Justice of the Common Pleas, in delivering the considered judgment of the Exchequer Chamber, said—“If their not coming in a reasonable time causes the commissioners to lose their right, their coming in a reasonable time is a step in their title to the remedy, and whether they have come in a reasonable time or not is a question of fact, and this *mandamus* is bad for not averring that they had come in a reasonable time.” If such an averment had been made in the present case it would doubtless have been traversed, and the jury would, in my opinion, have been justified in finding the issue in favour of the defendants. For these reasons I am of opinion that, in point of law, the prosecutors are not entitled to the peremptory *mandamus* which they ask for.

Lastly, I am of opinion that, upon the facts found, the Court ought, in the exercise of its discretion, to refuse to grant a peremptory *mandamus*.

POLLOCK, B.—I am sorry that I feel com-

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pelled to differ from the conclusion at which my brother Manisty has arrived in this case. The question arises between the parties upon facts found in a Special Case, stated for the opinion of this Court, pursuant to an order made by Mr. Justice Mellor, at the trial before him, in March, 1879, of the issues in fact arising upon a *mandamus*, granted upon the application of the Lords of the Treasury, to enforce the payment by the defendants of the sum of 376*l.* 18*s.* 10*d.*, being the amount of the remuneration and allowances paid by the plaintiffs, as Commissioners of Her Majesty's Treasury, to the barrister, officers, clerks and shorthand writers employed, under the provisions of the Corrupt Practices (Municipal Elections) Act, 1872, for the trial of an election petition, which took place in March, 1875.

The material facts which are contained in the Special Case and the appendix thereto are as follows:—

A petition having been presented against the return of three town councillors of the borough of Maidenhead, it was tried before Mr. Coleman, the barrister duly appointed under the provisions of the Corrupt Practices (Municipal Elections) Act, 1872, in March, 1875. The enquiry lasted for nine days, during which expenses were properly incurred for providing accommodation for holding and receiving the Election Court, and also for the payment of the barrister, his registrar and clerk and shorthand writer, and for fees due to the Master of the Court of Common Pleas. On the 11th of March, 1875, the barrister made an order, under section 19 of the said Act, directing that the costs, charges and expenses of the petition and proceedings in Court by the parties thereto should be paid by the respondents in equal shares. With respect, however, to the expenses of the Court, which are provided for by section 22, and which form the subject-matter of our decision, no order was then made by the barrister; although, as appears by a letter subsequently written by him—to which I shall have occasion to refer—it was his intention to visit upon one of the respondents these costs, and he expressed this intention orally in giving judgment upon the case.

The expenses of the Court being thus

unprovided for, the Commissioners of the Treasury, who are the prosecutors, paid them to the barrister and other persons entitled, and by two certificates, dated respectively the 16th and 25th of August, 1875, they certified to the defendant Morris, as treasurer of the borough of Maidenhead, that such payments had been made, and required him as such treasurer to repay to them the amount thereof out of the borough fund and rates. At this time the borough fund was overdrawn to a large amount, and no property was then or since available to meet the demand. On the 6th of August, 1875, a borough rate, at sixpence in the pound, was made to meet the claim, and this was collected from persons liable to be rated in the borough. Subsequently to this, in December, 1875, correspondence took place between the Commissioners of the Treasury and Mr. Morris as town clerk, whence it appears that the attention of the Commissioners of the Treasury was called to the judgment delivered by the barrister at the close of the petition, which declared the respondent guilty of personal bribery, and ordered him to pay the costs of the enquiry; and thereupon the commissioners communicated with the barrister, who, on the 27th of September, wrote in reply that it had always been his intention to visit upon Mr. Dawson, the respondent, the costs relating to and belonging to the enquiry, and that he had said so in giving judgment.

On receipt of this letter, the commissioners withdrew their two orders upon the defendant for repayment of the sums which they had advanced, and instructed their solicitors to proceed against the respondent Dawson for the amount. Before, however, these proceedings commenced, the commissioners received from the prescribed officer under the Act a copy of an order made by Mr. Coleman, dated the 4th of October, 1875, in the following terms:—

“Having, upon the hearing of the petition, found the respondent William Dawson personally guilty of corrupt practices at the election, I do order that the said respondent William Dawson do pay to the town clerk the expenses incurred by him for receiving the Court under the provisions of the above-mentioned Act.”

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On the 9th of December, 1875, the commissioners wrote to the defendant Morris, calling his attention to the fact that this order related solely to the expenses incurred by the town clerk in receiving the Court, under the 20th section, and made no mention of the sums advanced by the commissioners under the 22nd section, and stating that they were advised that even if it was the intention of the barrister that the whole costs of the enquiry should be borne by the respondent, it was not then competent to him to make such an order, inasmuch as he was *functus officio*, and that the remuneration and allowances under the 22nd section must therefore be borne by the treasurer of the borough.

In reply to this, on the 20th of December, the town clerk wrote to the commissioners, stating that upon the withdrawal of their first order the town council had abandoned the rate, and had ordered the sums collected to be returned to the ratepayers, which had been done. On the 8th of June, 1876, the Commissioners of the Treasury issued a fresh certificate, by which they required the treasurer of the borough to repay out of the borough funds or rates, within fourteen days, the sums advanced by them for the costs in question; and this amount not being paid, they applied to this Court for a *mandamus* ordering the defendants to repay forthwith. The defendants in their return to this *mandamus* set forth the above facts, and issues, both in law and fact, having been joined, the case came on for trial before Mr. Justice Mellor. At the trial evidence was tendered on behalf of the defendants, in addition to the documents herein referred to, to show that the barrister did, in delivering judgment on the 10th of March, 1875, orally order that the expenses of receiving the Court, and also the allowances, remunerations and expenses to be paid to the barrister for his services in respect to the trial of the said petition, and to the officers and clerks and others employed under the provisions of the Act, should be borne and paid by William Dawson, and should be repaid to the said Lords Commissioners by him, and not by the defendants. The said evidence was objected to on the part of the prosecution,

but was admitted by the learned Judge subject to such objections.

Oral evidence was thereupon given, both by the prosecutors and by the defendants. The question of admissibility of this oral evidence was reserved for the opinion of this Court.

On behalf of the defendants it was further sought to put in as evidence a letter written by the said Charles James Coleman to the said Lords Commissioners. On objection being made by the prosecution to the reception of the same, the learned Judge ruled that it was inadmissible, and it was accordingly excluded. The letter was, however, inserted by consent in the Special Case, but subject to the question of its admissibility, and if admissible for any purpose it is to be among the facts submitted to the consideration of this Court. It is as follows:—

“Redcar, Yorkshire,
“September 27th, 1875.

“Sir,—I have the honour to acknowledge the receipt of your letter 14,422. It was always my intention to visit upon Mr. Dawson the costs relating and belonging to the inquiry. I said so in giving judgment.

“Dawson was proved to have been guilty to my satisfaction of personal bribery, and I thought the ratepayers of Maidenhead ought not to be asked to pay the expenses of an enquiry brought about by reason of his having done so.

“Mr. Lush, my registrar, is now in London, and will take any further steps, if any, which may be required in the matter.

“I have the honour to remain, Sir,

“Your most obedient servant,

“Charles J. Coleman.

“William Law, Esq.”

At the conclusion of the trial the learned Judge left the following questions to the jury:—

“Was there a direction that those costs which are included in and are incident to the enquiry—namely, the remuneration, costs of the Judge, officers and so on, as well as the town clerk's costs—should be paid by Mr. Dawson?”

To this question the jury returned the answer as follows:—

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"The jury is of opinion that there is sufficient evidence that Mr. Coleman did order the whole of the costs to be paid by Mr. Dawson, and not by the borough of Maidenhead."

The learned Judge, however, directed that a verdict should be entered for the Crown for damages, 37*l.* 18*s.* 10*d.*, and 40*s.* costs, subject to the opinion of the Court upon a Special Case; it being agreed that the Court should give judgment upon the demurrers raised on the pleadings as well as on the Special Case.

These being the facts before us, the substantial question for our determination is—whether the prosecutors, who as Commissioners of the Treasury have paid the sum in question as expenses of the Barrister's Court, are now entitled to claim repayment thereof by the defendants, and to a *mandamus* requiring them to levy the amount by a borough rate?

In my judgment they are so entitled, and, moreover, I see nothing which ought to prevent the Court, in the exercise of its discretion, making an order for the *mandamus*.

As some confusion and misapprehension appears to have arisen during the proceedings with reference to the nature of these particular expenses, it may be convenient to state shortly how the question of costs and expenses is dealt with by the Corrupt Practices (Municipal) Act, 1872. Under this Act three classes of costs are contemplated, namely—first, the costs of the petition, and proceedings consequent thereon, which may be called the costs *inter partes*. These are dealt with by section 19, which provides that they shall be defrayed by the parties to the petition in such manner and in such proportions as the Court by which the petition is tried may determine. Secondly, the expenses of the reception and holding of the Court upon the trial of a petition. These are dealt with by section 20, and are to be paid by the treasurer of the borough out of the borough fund or rate. Thirdly, the remuneration and allowances to be paid to the barrister and to any officers, clerks and shorthand writers employed under the provisions of the Act. These are to be paid by the Commissioners

of the Treasury, and are to be repaid to them on their certificate by the treasurer of the borough to which the petition relates, out of the borough fund or rate.

This section, however, contains a provision that the Court at its discretion may order that the whole or any part of such remuneration and allowances, or the whole or part of the expenses incurred by the town clerk for receiving the Court, shall be repaid to the Commissioners or to the town clerk, under certain circumstances, by the petitioner or by the respondent, and that any order so made for the repayment of any sum by a petitioner or respondent may be enforced in the same way as an order for payment of costs.

The expenses with which we have to do in the present case are these last, which are payable under section 22; and the contention of the prosecutors is that they having paid them under the provisions of this section, and no order having been made by the Court for the repayment by either the petitioner or the respondent to the prosecutors under those provisions, they, the prosecutors, are entitled to be repaid by the defendants, as treasurers of the borough, and out of the borough fund or rate.

On the part of the defendants it was contended that the verbal expression of opinion by the barrister at the hearing of the petition must be taken to amount to an order within the meaning of section 22; or, failing this, that the order made by the barrister on the 4th of October, 1875, was a valid order upon the respondent, and therefore that he and not the defendants was liable to the prosecutors. As to the first of these two questions, the defendants are entitled to the benefit of the answer given by the jury at the trial, that there was sufficient evidence that the barrister did order the whole costs to be paid by Mr. Dawson. This finding, however, must be taken subject to the facts which are now before us as stated in the Special Case, and does not appear to me to amount to anything more than a finding that the barrister, as stated in his letter of 27th September, 1875, had the intention to visit upon Mr. Dawson the costs in question, and that he said so in giving judg-

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ment; and we have it as a fact that, on the 11th of March, at the close of the enquiry, the barrister did make an order in writing, under section 19, directing that the costs of the petition and proceedings, which I have called the *inter partes* costs, should be paid by the respondents, but wholly omitting to deal with the expenses provided for by section 22. Upon reference to section 14 of the Corrupt Practices (Municipal Elections) Act, 1872, subsection 5, it will be found that the Election Court, for the trial of petitions under that Act, has all the powers and privileges which a Judge may have on the trial of an election petition under the provisions of the Parliamentary Elections Act, 1868, and, by section 29 of this Act, the Judge on the trial of an election petition has the same powers, jurisdiction and authority as a Judge of one of the Superior Courts, and as a Judge of Assize and Nisi Prius, and the Court held by him shall be a Court of record. Under these circumstances, it seems to me clear that the Court of a barrister appointed to try a municipal election petition is a Court of record; and, this being so, the acts of the Court can only be proved by record. If any authorities are needed for this proposition, they will be found in the cases of *Ex parte Fernandez* (3), and *Kemp v. Neville* (2). In looking, therefore, to see what was the order made by the Court at the time of the trial, the matter must be governed not by what the commissioner intended or said, but by the written order actually made, and which clearly did not include the costs in question.

The defendants, however, next contended that, even if it were admitted that no sufficient order was made by the barrister at the hearing of the petition, the order made by him subsequently, upon the 4th of October, 1875, was a valid and a sufficient order; or if this be not so, that the letter written by the barrister upon the 27th of September, 1875, must be taken to be a sufficient expression of his intention to visit upon Mr. Dawson, the respondent, the costs relating and belonging to the enquiry, to enable this Court to amend the record of what passed at the hearing of the petition. As to the first of

these contentions, I think it is sufficient to say that the order dated the 4th of October, 1875, in no way deals or professes to deal with the costs incurred under section 22, which are alone in question in this case. The costs with which it does profess to deal are the expenses incurred by the town clerk for receiving the Court, which are provided for by section 20. So far from assisting the defendants, this later order has a contrary effect. By a clear expression of opinion, confined to the expenses for receiving the Court, under section 20, it excludes the idea that the barrister intended to make an order dealing with the costs of remuneration to himself, the officers and shorthand writers, under section 22.

With regard to the second contention, there is no doubt but that a mistake made by the clerk or officer of a Court in entering a verdict or judgment may be amended from the Judge's notes. The older authorities are referred to in *Com. Dig.* "Amendment" P., and in *Marianski v. Cairns* (7), where the finding of issues at a trial had been entered imperfectly. The House sent the case back to have the verdict entered according to the substance of the finding, with the assistance of the Judge, who would be guided by his notes. It is to be observed, however, that this course was so adopted expressly upon the ground that what occurred amounted to a mere mis-entry of the verdict. In the present case the written order made at the trial was signed by the barrister himself. This does not include the expenses in question, although it does include other costs—namely, those *inter partes*.

Subsequently, on the 4th of October, the barrister made another order as to costs under section 20. He has never made any order as to costs under section 22, nor does it appear that any application has been made to him at any time to amend or vary either of these two orders; but it is contended that we ought now to do so, by reason of the barrister having, on the 27th of September, between the date of the two orders, written a letter to the Commissioners of the Treasury, wherein he uses these very general words—namely, "It was always my intention to visit upon

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Mr. Dawson the costs relating and belonging to the enquiry. I said so in giving judgment."

For us to amend by this mere expression of intention, which is contrary to the two written orders signed by the barrister, appears to me to be not only without precedent, but it goes to destroy the very wholesome rule that the judgment and proceedings of a Court of record must be proved by the record. For a Judge to amend his own record, or for a Court before which that record comes to amend it so as to be in accordance with the Judge's notes, is reasonable and intelligible; but for another Court to amend a record upon the suggestion of a Judge's intentions expressed by a mere letter, which is not written in consequence of an application made by one of the parties to the proceedings, nor, indeed, written to either of the parties or those who represent them, would lead to consequences tending to produce the greatest uncertainty and inconvenience.

It was further contended by the defendants that the two certificates made by the prosecutors, and dated respectively the 2nd and 25th of August, 1875, having been cancelled, and the money collected under the rate made for the repayment of the sums mentioned in those two certificates having been repaid to the ratepayers, the prosecutors had no authority to make the second certificate dated the 9th of September, 1875, requiring the defendant William Morris to pay the amount out of the borough funds; and further, that such second order would be bad, because it would make the rate levied under it retrospective, and would have the effect of visiting upon the ratepayers who existed at the date of the second order a payment which ought to have fallen upon those who were ratepayers at the date of the first certificate. These objections were presented to us—first, as matters of strict law; and secondly, as appeals to that discretion which we are entitled to exercise in considering whether we ought to allow the *mandamus* which is asked for to go.

It might well be doubted whether this discretion ought to be exercised at this stage of the proceedings, and whether, in accordance with the true practice of the

Court, this point ought not to have been taken when the rule *nisi* for the *mandamus* was moved. Our attention, however, was called during the argument to what passed upon that occasion, and this satisfied me that when the rule was granted it was intended by the Court, and so expressed by the Judges, that the question of discretion, as well as the question of legal right, should be open to the defendants upon the final argument.

It appears to me, however, that neither of these points assist the defendants. With regard to the latter point—namely, illegality or injustice of giving effect to a retrospective rate—there is no doubt that where a rate is made under the provisions contained in section 92 of the Municipal Corporation Act (5 & 6 Will. 4. c. 76), it ought not to be retrospective. This result, however, has been arrived at upon the consideration of the particular language of that section, which contains words which are in their nature prospective only, as will be seen by reference to the case of *Woods v. Reed* (14). With respect to a borough rate made for the purpose of complying with the provisions of sections 20 and 22 of the Corrupt Practices (Municipal Elections) Act, 1872, and by providing for the costs of receiving the Election Court, and repaying to the Commissioners of the Treasury what has been paid by them to the barrister, officers, clerks and shorthand writers, it is obvious that the rate made in such a case must be retrospective. No such rate could be made until the expenses had been incurred, nor would it be possible, even if the statute permitted such a course, to contemplate beforehand what would be the amount of such expenses, or, indeed, that they ever would be incurred at all.

With reference to the objection that the prosecutors having once made their first certificate were *functi officio*, and therefore had no power to make a second, I think the argument might possibly be met by saying that the prosecutors having made their first certificate were then *functi officio*, and had no power to cancel it; in which case the first certificate would

(14) 2 Mee. & W. 777; 6 Law J. Rep. M.C. 105.

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stand good, and the second would be of no effect. I should prefer myself, however, to base my judgment upon a broader ground, and to say that the act of giving this certificate is a ministerial and not a judicial act, and therefore that no question of estoppel can arise; and that if any misapprehension arose, whereby the prosecutors were misled either in giving or cancelling the first certificate, it was not only open to them to make the second certificate, but they were bound to do so, in order to carry out what is their duty under the provisions of the statute. For the same reasons I am at a loss to see why any discretion possessed by the Court should be exercised in favour of the defendants. The matter seems to me to stand thus: the expenses in question must have been and were properly incurred; when incurred they are to be paid, and have been paid by the prosecutors; and section 22 of the statute contains a provision in the clearest language that they should be repaid by the defendants. The same section, however, provides that the Court may order that they are to be repaid to the prosecutors by the petitioner or respondent.

The *onus* of proving such an order rests on the defendants, and they having failed to produce or prove any such order, they are not, in my judgment, entitled to any relief at our hands. To give effect to this argument would produce this result: that no valid order having been made by the barrister upon the respondent, the prosecutors could not obtain repayment from him, and therefore the amount which they have properly paid would fall upon the public funds—a state of things which clearly was never contemplated under any circumstances. I think therefore that our judgment should be for the prosecutors, and that the verdict entered for the Crown at the trial should stand for the full amount; and that a peremptory *mandamus* should issue to compel the defendant Morris to repay this amount after he has received it from a borough rate; and to compel the mayor, bridgemaster and burgesses and the town council of the borough of Maidenhead to take steps to cause the said sum to be collected by means of a borough rate.

LORD COLERIDGE, C.J.—This case involves a question of considerable difficulty. On the whole I agree with the judgment delivered by my brother Pollock, though not without considerable hesitation.

Judgment for prosecution.

Solicitors—The Solicitor to the Treasury, for prosecutors; C. J. Mander, agent for B. A. Ward, Maidenhead, for defendants.

[IN THE COURT OF APPEAL.]

1882. } THE QUEEN v. THE WIMBLEDON LOCAL BOARD.*
Feb. 20, 21. }

Public Libraries Act (18 & 19 Vict. c. 70), s. 6—*Public Meeting of Ratepayers—Common Law right to demand Poll*—40 & 41 Vict. c. 54. s. 1.

Any qualified person present at a meeting called under section 6 of 18 & 19 Vict. c. 70, to consider whether or not the Public Libraries Act shall be adopted for a district, has a right when the sense of the meeting has been obtained on a show of hands to demand that a poll be taken; and the right to a poll, which exists at common law, has not been taken away by 40 & 41 Vict. c. 54.

Appeal of prosecutor from a decision of the Queen's Bench Division discharging a rule for a *mandamus*.

At a public meeting of the ratepayers, duly convened under 18 & 19 Vict. c. 70. s. 6 (1), to determine whether or not the

* *Coram* Brett, L.J.; and Cotton, L.J.

(1) 18 & 19 Vict. c. 70. s. 6.: "The board of any district, being a place within the limits of any Improvement Act, and having such a population as aforesaid, shall, upon the requisition in writing of at least ten persons assessed to and paying the improvement rate, appoint a time, not less than ten days nor more than twenty days from the time of receiving such requisition, for a public meeting of the persons assessed to and paying such rate, in order to determine whether this Act shall be adopted for such district, and ten days' notice, at least, of the time, place and object of such meeting shall be given . . . ; and if at such meeting two-thirds [altered to more than one-half by 29 & 30 Vict.

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Public Libraries Act should be adopted for the Wimbledon district, a resolution in the affirmative was duly carried on a show of hands. A poll was then demanded by two ratepayers, but was not granted by the chairman, and the meeting was dissolved without adjournment.

A rule *nisi* was afterwards obtained by the prosecutor, calling on the local board to shew cause why a writ of *mandamus* should not issue, commanding them to adopt and carry out the provisions of the Public Libraries Act.

The Queen's Bench Division (DENMAN, J., and HAWKINS, J.) discharged the rule, holding, first, on the authority of *The Queen v. The Vestry of St. Matthew, Bethnal Green* (2), that a poll was demandable of right, and having been demanded but not granted, the matter was undetermined, and the board had no power to carry out the resolution; secondly, that the common law right to demand a poll was not taken away by 40 & 41 Vict. c. 54 (3).

The prosecutor appealed.

Bazalgette, for the appellant.—The common law right to demand a poll does not exist in this case. Further, the provisions of the statutes relating to this question prevent the existence of such a right. Section 6 of 18 & 19 Vict. c. 70 (1), excludes any adjournment for a poll; section 7 of 29 & 30 Vict. c. 114, abolishes the right to demand a poll in connection with the Public Libraries Act for Scotland; and 40 & 41 Vict. c. 54 (3), enables the local authority to ascertain the opinions of the ratepayers on this subject by means of

c. 114. s. 5] of such persons as aforesaid then present shall determine that this Act ought to be adopted for the district, the same shall thenceforth take effect and come into operation in such district, and shall be carried into effect according to the laws for the time being in force relating to such board."

(2) 32 Law Times, N.S. 558.

(3) 40 & 41 Vict. c. 54. s. 1: "It shall be competent for the prescribed local authority in any place or community which has the power to adopt one of the above-recited Acts, to ascertain the opinions of the majority of the ratepayers, either by the prescribed public meeting or by the issue of a voting paper to each ratepayer . . . and the decision of the majority so ascertained shall be equally binding."

voting papers, without calling any meeting, so that any possibility of a poll being demanded is thus prevented. First, as to the existence of the common law right to demand a poll: this right is confined simply to vestry meetings, and the only authorities on the subject are cases where the meetings were vestry meetings. The right does not exist where the meeting is one convened under an Act of Parliament for a special purpose, unless the right thereto is given by the statute. The case of *The Queen v. The Vestry of St. Matthew, Bethnal Green* (2), is distinguishable on three grounds: first, it is the case of a vestry meeting; secondly, it was decided on a different section of the Act—namely, section 8, and not section 6; and, thirdly, it was decided before the passing of 40 & 41 Vict. c. 54. s. 1 (3).

[BRETT, L.J., referred to *The Queen v. How* (4).]

A great distinction exists between a vestry meeting and a meeting summoned by a vestry. In the case of a vestry meeting, a poll is by custom a part of the proceedings, but that is not so where a meeting is called by the vestry under a special statute—*Campbell v. Maund* (5), *The Queen v. D'Oyly* and *The Queen v. Hedger* (6) were also referred to.

Lastly, the decision in *The Queen v. The Vestry of St. Matthew, Bethnal Green* (2), was given before the passing of 40 & 41 Vict. c. 54 (3), which takes away that right, even if it ever existed. There can be no right to a poll from that meeting to the general body of ratepayers, and there is not any authority for that proposition.

Alexander Glen, for the board, was not called on.

BRETT, L.J.—I am of opinion that the decision of the Court below was right. In this case a meeting of ratepayers was called under several Acts of Parliament relating to libraries, at which meeting it would appear that a vote was taken, and that some persons who were in the minority applied after the votes were counted that a poll of the ratepayers should be

(4) 33 Law J. Rep. M.C. 53.

(5) 5 Ad. & E. 865; 6 Law J. Rep. M.C. 145.

(6) 12 Ad. & E. 139.

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taken. The chairman declined to allow a poll to be taken, and thereupon the board refused to act upon the resolution adopted by the votes of the majority at the meeting, because a poll had been demanded and refused at the meeting. An application was then made to the Queen's Bench Division for a *mandamus* to compel the board to act upon the resolution, but the Court declined to grant it, upon the ground that there was no legal final resolution come to at the meeting, because when a poll was demanded the votes of those present were not to be considered as the legal final vote of that meeting. The proposition, in other words, is that any person dissatisfied with either the probable or the actual vote of that meeting had a right to demand a poll to be taken of the votes of all the ratepayers—that is, a right to demand that a poll should be taken not merely of the persons present at the meeting, but of all persons who might have been present if they had so chosen. The question is, whether such a poll could have been legally demanded, and whether such demand ought to have been complied with in the present case.

It was argued in the Court below that the demand of a poll was a legal right, and that the chairman when the poll was demanded had no option but to grant it, in order that the meeting might come to a legal final resolution; and it was said that that right existed because the meeting was a meeting of a large number of qualified persons who were called to act for the purposes of such meeting, but that all of them were not present, and that the matter was one of public interest and one to be decided by qualified persons; and that whenever that is so, it is a common law incident of such a meeting, unless there be some enactment to the contrary, that a final resolution cannot be come to, if a poll be demanded, unless the poll has been taken not only of the persons present but also of all persons who might have been present. It was also said that there was nothing contained in the Acts of Parliament which constitute these meetings to take away this common law right. It was, however, asserted on behalf of the appellant that there was no such common law right applicable to this meeting, even supposing

there was nothing in the Acts of Parliament to the contrary; and that even if such common law right did exist, it was taken away by these Acts of Parliament.

The first question, therefore, is whether—assuming that there is nothing in these Acts of Parliament to take away the right—such a common law right to demand a poll at such a meeting as this can be implied.

It was argued that that common law right was only applicable to the case of vestry meetings, or to the case of meetings called by vestries. If the argument had been that it was only applicable to the case of vestries, it might have been suggested that this was not a meeting of the vestry; but if it be admitted that the common law right does exist with regard to meetings called by a vestry, it seems to me that it would be difficult to say that it does not apply to meetings called by other people, or by other bodies of the same kind as those which might have been called by a vestry. The proposition, however, is larger, and the question is whether, where there is a meeting of a large body of qualified persons who have to decide upon a matter of public interest, it is not a common law attribute of such a meeting that any qualified person has a right to demand that that vote shall be taken by a poll, and whether, when he does so demand that the decision shall be taken by a poll, that does not enlarge the meeting, and make it by such enlargement to include all persons who are not actually present at the meeting but who may come to the poll. It seems to me that if the meeting is enlarged it must be enlarged until the time when the poll is finally taken.

Suppose a poll may be demanded—I mean, to be taken then and there in the room—could anybody come into the room, after the poll is demanded, and vote? Could the whole body of voters come into the room and vote, after the poll is demanded to be taken then and there? And if the body of voters was so large that they could not vote in the course of the day, can it be supposed that they could not be allowed to vote at some other time?

It seems to me that if a poll can be demanded at all it must have the effect of

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enlarging the meeting so as to comprise all the persons who choose to go to the poll.

Now, is there a right at common law to demand a poll at meetings such as I have described? The common law can only be learnt in such a case from practice, about which no evidence is required, if that common law has been enunciated by the Courts, and if this Court agrees with that enunciation. Now it seems to me clear, beginning with Lord Stowell (7), who laid it down as a rule of law when he was dealing with vestry meetings in his numerous capacities, that the right was applicable to any meetings, and was not confined to vestry meetings. Then, there is the case of *Campbell v. Maund* (5), in the Court of Exchequer Chamber, where Lord Chief Justice Tindal delivered a written judgment on behalf of all the judges—who must be assumed to have agreed to it, or they would have given differing judgments—in which, relying on the general reasoning of Lord Stowell, he enunciated the proposition as a general one and not as applicable to vestries only. This is therefore a most authentic judgment to the effect that this rule applies not only to vestry meetings, but to all meetings of the kind which I have suggested. Then, in the case of *The Queen v. How* (4) (which was one of a vestry acting not in its common law capacity of vestry, but as a body constituted by Act of Parliament to perform a particular statutory duty), the words in the present sections about the persons present at a meeting were used; and there it was held that the common law does imply to such a meeting, as well as to all meetings for a general purpose, this power of demanding a poll, and does thereby enlarge the meeting. It is therefore in terms declared that this common law right does exist, unless the Act of Parliament clearly takes it away. Both reason and authority, therefore, point to the conclusion that this common law right does exist where the meeting is one at which a large class of qualified persons might attend and vote, but at which all of them are not present, and where some of those who are present demand a poll.

The only question is whether these

(7) See *Anthony v. Segor*, 1 Hagg. Ca. Cons. Court, 13.

statutes have taken away this right. The words "the persons present at the meeting," and the word "thenceforth," were not relied on by the counsel for the appellant, because of the case of *The Queen v. How* (4), which decided that the presence of those affirmative words—and there are no negative words in any of these statutes—does not take away the common law right. There is not any enactment, therefore, which in terms takes away this common law right. The only suggestion is that it has been taken away by implication; but an implication must not be read into an Act of Parliament unless it is a necessary implication. It seems to me that there is no necessary implication here, because if the meaning of the common law rule is what I have stated—namely, that it enlarges the meeting, so that it is still the same meeting; and that the vote taken by a show of hands or in any other way at the meeting, is done away with at once by the demand of the poll, so that the meeting being enlarged there is no vote at all until the poll has been held—then every word of these Acts of Parliament can be applied. Here is the case of a meeting actually held, whereas, according to the later statutes, there need not be that preliminary of a meeting at all; but, nevertheless, the meeting being held has the common law attribute, and all the words of the Act of Parliament are satisfied, and there is no necessary implication to take away the common law right which therefore exists in this case. That is the reasoning of the Court below. Therefore, both upon principle and authority, the decision of the Court below seems to me to be correct.

COTTON, L.J.—I am of opinion that the *mandamus* was rightly refused. Two questions have to be considered—first, whether there is a common law right in any person present at a meeting of this kind to demand a poll; and secondly, whether that right has been taken away by the special enactments with reference to these particular meetings. On both these points I think the decision of the Court below was right.

This was a meeting of persons, whose

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right to vote depended upon the qualification of their being ratepayers. Now, in my opinion, the cases establish that any one of the persons present at such a meeting has a right, if he is dissatisfied with the conclusion arrived at by the chairman on a show of hands, to demand that a poll be taken; and that that poll is not a new meeting, but merely a mode of ascertaining the sense of the meeting, and of giving an opportunity to all the parishioners, if they choose, to come and express their opinion by recording their votes; and by so doing, the meeting is, in law, continued for the purpose of taking the poll. A poll is not only to give the general body an opportunity of going into the meeting and expressing their opinion—it not being possible they should do so by being present and voting at the meeting by a show of hands—but in order that, where the right to vote depends upon a particular qualification, there may be a mode of ascertaining whether the persons who propose to vote, or who have in fact voted, have that qualification or not. That right, it was conceded, belonged to the parishioners assembled in vestry, but it was said that it was confined to them alone. Now none of the cases which have been referred to limit that right to the case of a vestry. In one of those cases the reason was given—that where the right to vote depends on qualification, and where those assembled at the meeting were merely some of a larger body, all of whom have the same right to vote, there exists this common law right. There is also an express authority in favour of this, subject however to an exception which I will presently mention, that the common law right applies to a meeting called under this Act of Parliament.

In *The Queen v. The Vestry of St. Matthew, Bethnal Green* (2), Lord Chief Justice Cockburn says: "Generally speaking, wherever a decision is come to by a public body on a matter of public interest, and where the right of voting turns on a question of qualification, the rule, which has been established by a series of decisions, and which is entirely in accordance with common sense, is that a poll is demandable as of right by any person entitled to vote who is dissatisfied with the

conclusion arrived at by the president of the meeting." I entirely agree with what is there said. An attempt was made to draw the distinction that that was not a meeting called, as in the present case, by a local authority, but was a meeting called by a vestry, and was therefore a vestry meeting to which this common law right applied. In my opinion it is impossible to maintain that contention. The meeting there was called under the Act, and if the right is to be extended to a meeting called by a vestry, it must, in my opinion, be equally extended to a meeting of the same persons—ratepayers—called not by a vestry, but by another local authority constituted by the Act, and having power under the Act to call a meeting. It is the right of the persons who are called, and who are present at the meeting—not a right given to them by the persons who call the meeting—and in my opinion that case is exactly in point, and in the absence of other authority is in accordance with the law.

It was said that here the right has been taken away by Act of Parliament; and that the case is not an authority directly in point, because there the meeting was called under section 8, whereas here it was under section 6; and also that there is a later Act of Parliament which did not then exist. But in my opinion that distinction does not help the appellant here, although the words of section 6—that if the meeting shall so determine, thenceforth the Library Act shall be put in operation—are somewhat different; but in my opinion the meeting is not at an end, and has not come to its legal final conclusion, until the poll, which was demanded of right, has been held. The poll is an adjournment of the meeting, which cannot be considered at an end, or as determined at all, until that poll has been taken and the result is known. The word "thenceforth" does not therefore help the present appellant.

It was said, however, that the later Act—40 & 41 Vict. c. 54 (3)—does help the appellant; but that Act gave power to certain local authorities to dispense with the preliminary of calling a general meeting; and it enacted that the local authority might ascertain the wishes of the rate-

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payers, either by calling a meeting, or by at once sending round voting papers. There is this distinction: if there is a common law incident to a meeting that a poll is demandable, it means that the local authority may either go through the preliminary of calling a meeting subject to a poll being demanded, and held if demanded; or they may dispense with the meeting, which gives the ratepayers an opportunity of discussing the question, and at once, without any preliminary discussion, go to the poll, and express, by means of voting papers, their opinion whether the Act shall be adopted or not.

That explains the words "shall be equally binding," which are relied on by the appellant. In my opinion that Act does not take away, if it has not been already taken away, the common law right to demand a poll at a meeting held under the Public Libraries Act.

Another Act, which was to assimilate the law as to public libraries in England and Scotland, was also referred to. That Act did undoubtedly repeal the Act applicable only to Scotland, which gave power to the parties to demand a poll, but why that was done is not known. Now, although it may be some argument against the common law right, because Parliament may have supposed that the right did not exist either in Scotland or in England, yet that is not in my opinion sufficient, if it is once established that the common law right did exist independently of Act of Parliament, to shew that the Legislature has taken away that common law right.

The common law right, when established and existing, cannot be taken away by Act of Parliament, unless upon a fair construction of the Act it is clearly intended to take away that right. Here I can find no enactment which on any fair construction will take away that right. On both points, therefore, the present appeal fails.

Appeal dismissed.

Solicitors—W. F. Summerhays, for prosecution;
W. H. Whitfield, for the board.

1881. }
Nov. 26. } THE LONDON AND COUNTY BANK
Dec. 19. } v. GROOME.

Cheque—Overdue Draft—Rights of bona fide Holder.

The rule of law that the holder of an overdue bill of exchange or promissory note payable at a fixed date has it with the same title, and no other, as the person from whom he receives it, has no application to cheques. The mere fact, therefore, that a person is the holder of a cheque eight days after its date does not of itself place him in the position of a taker at his peril so as to make him stand in the same position as the person from whom he receives it. The proper question for the jury in such a case is whether the cheque was taken under such circumstances as ought reasonably to have created suspicion that it was in any way tainted with fraud.

Down v. Halling (4 B. & C. 330) explained and distinguished.

Further consideration.

This was an action brought by the plaintiffs to recover the sum of 98*l*. At the trial, before Field, J., the verdict was entered for the plaintiffs, subject to a point of law which was reserved by the learned Judge for further consideration.

The plaintiffs, by their statement of claim, alleged as follows:—

1. The defendant, on the 21st of August, 1880, by his cheque, directed to the National Bank, required the said bank to pay to one Moss or bearer the sum of 98*l*.

2. The plaintiffs became the bearers of the cheque, and the same was duly presented for payment and was dishonoured.

3. The defendant had due notice of such dishonour, but has not paid the amount of the cheque, or any part thereof.

The defendant, by his statement of defence, after denying that he had notice of dishonour, alleged as follows:—

Paragraph 3.—The defendant, on the 21st day of August, 1880, by his cheque payable to one Moss, required the National Bank to pay to the said Moss the sum of 98*l*.

4. On or about the 20th of August, 1880, the defendant handed the said cheque to one Colls, who gave defendant no con-

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sideration for the same, upon a distinct agreement and understanding that the said cheque was to be held as a security for a bill of exchange, which the said Colls had requested the defendant to procure discount of for him, the said Colls. The said Colls further promised and undertook that he would not part with nor in any way deal with the said cheque until the defendant procured discount of the said bill of exchange. The defendant was unable to procure discount of the said bill of exchange, and gave notice thereof to the said Colls before he paid the said cheque to the plaintiffs.

5. In breach of the said agreement, and in fraud of the defendant, the said Colls paid the said cheque to the plaintiffs, who had notice of the premises.

6. The defendant repeats the allegations contained in paragraphs 3, 4 and 5 of this statement of defence, and says that the plaintiffs were the agents of the said Colls for the purpose only of collecting the proceeds of the said cheque, and, if the same was paid, of placing the said proceeds to his credit. The plaintiffs had given no consideration for the said cheque, and held the same subject to the agreement before referred to and to the equities existing between the said Colls and the defendant.

7. The defendant further says that the said cheque was presented for payment by the said Colls and dishonoured by the defendant's bank, and the plaintiffs subsequently—to wit, at the expiration of eight days—took the same, with notice thereof and subject to the agreement between the said Colls and the defendant and the equities existing between the said Colls and the defendant.

Henry Matthews, Q.C., and Paget, for the plaintiffs.—The verdict was properly entered at the trial for the plaintiffs. The question is, whether a person *bona fide* taking a cheque eight days old is affected by all equities, and stands in no better position than those from whom he has taken it. The only authority for such a proposition is *Down v. Halling* (1), which was relied upon by the defendant at the trial. The decision in that case, if not distinguishable,

is in conflict with the later case of *Rothschild v. Corney* (2), where it was expressly held that the rule of law with respect to overdue bills of exchange and promissory notes has no application to the case of cheques.

They also cited *Goodman v. Harvey* (3), *Robinson v. Hawksford* (4), *The Bank of Bengal v. Fagan* (5), *Ingham v. Bemross* (6), *Brooks v. Mitchell* (7), *Brown v. Davies* (8), *Boehm v. Stirling* (9) and *Serrell v. The Derbyshire, &c., Railway Company* (10).

Rose Innes (Talfourd Salter, Q.C., with him), for the defendant.—The decision in *Down v. Halling* (1) has never been overruled, and is still considered as good law. In that case Bayley, J., said, "If a bill, note or cheque be taken after it is due, the party taking it can have no better title to it than the party from whom he takes it." It is contended, therefore on the authority of *Down v. Halling* (1), that the defendant is entitled to judgment.

Cur. adv. vult.

The following judgment was (on Dec. 19) delivered by

FIELD, J.—This is an action brought to recover 98*l.*, the amount of a cheque, of which the plaintiffs were the bearers. It was dated the 21st of August, 1880, and it directed the National Bank to pay that sum to A. Moss or bearer; and the statement of claim alleged presentment for payment, non-payment and due notice of dishonour. The defendant by his statement of defence denied notice of dishonour, and alleged that the defendant on the 20th of August handed the cheque to George Colls, under such circumstances as, if proved, and if the latter had been the plaintiff, might have furnished a good answer to his claim. The statement of defence further alleged (in paragraph 5) that Colls in fraud delivered the cheque to

(2) 9 B. & C. 388.

(3) 4 Ad. & E. 870; 6 Law J. Rep. K.B. 260.

(4) 9 Q.B. Rep. 52; 15 Law J. Rep. Q.B. 377.

(5) 7 Moo. P.C. 72.

(6) 7 Com. B. Rep. N.S. 82; 28 Law J. Rep. C.P. 294.

(7) 9 Mee. & W. 15.

(8) 3 Term Rep. 80; 11 Law J. Rep. Exch. 51.

(9) 7 ibid. 423; 2 Esp. 575.

(10) 9 Com. B. Rep. 811; 19 Law J. Rep. C.P. 371.

(1) 4 B. & C. 330.

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the plaintiffs, who had notice of the premises. As a separate defence the defendant further alleged (paragraph 6) the same circumstances, and that the plaintiffs were the agents of Colls, and had given no consideration, and held the same subject to the equities existing between Colls and the defendant. As a further defence the defendant said that the cheque was presented for payment by Colls and dishonoured, and the plaintiffs, at the expiration of eight days, took the same with notice and subject to the equities.

At the trial the plaintiffs proved that Colls was a customer having an account at one of their branches, and that he had on the 29th of August (eight days after the date) paid in the cheque to the credit of his account, and that they had given him consideration for the same. The defendant cross-examined the plaintiffs' witness, but did not elicit from them any circumstances tending to shew any notice or absence of *bona fides* on the plaintiffs' part, or anything which tended to shew that the payment of the cheque by Colls into his account was made under any circumstances which ought to have excited the suspicion of the plaintiffs, as reasonable men of business, or that the cheque was at all tainted with fraud, except the circumstance that the delivery to them was made eight days after the date of the cheque. The plaintiffs' counsel contented themselves with proving a *prima facie* case; and at the close of it Mr. Talfourd Salter said that he had no affirmative evidence to prove any notice to the plaintiffs, and did not wish to address the jury upon the question as to the consideration given by the plaintiffs, or the presentation by Colls alleged in the 5th paragraph; but he submitted that, inasmuch as the 5th paragraph alleged that the plaintiffs had taken the cheque eight days after its date, I was bound to rule that this circumstance alone was sufficient to entitle him to the benefit of the well-established rule of law as applicable to overdue bills of exchange and promissory notes, that those who take them take them at their peril, and stand in no better position than those from whom they take them as to any equities between the latter and the acceptor or maker attaching to the instrument; and for his authority on this point he cited

Down v. Halling (1). Mr. Matthews, for the plaintiffs, denied the existence of any such rule of law, and relied upon the case of *Rothschild v. Corney* (2). I, for the purpose of the day, ruled against Mr. Salter and directed a verdict for the plaintiffs, reserving, however, for further consideration the question whether the mere circumstance that the plaintiffs took the cheque eight days after its date was enough by itself, as a matter of law, to place the plaintiffs in the position of takers at their peril, so as to entitle the defendant to treat them as if they were in the position of Colls, and liable to have their title defeated by any matter attaching to the cheque, which would have amounted to an answer against Colls. The case was afterwards argued before me on further consideration, when all the authorities on both sides were ably and fully brought before me; and, having considered them, I see no reason to alter the view which I took at the trial.

That the holder of an overdue bill or note payable at a fixed date, appearing of course upon it, is in the position suggested, is established beyond all doubt; and the reason of the rule is, that, inasmuch as those instruments are usually current during the period before they became payable, and their negotiation after that period is out of the usual and ordinary course of dealing, that circumstance is sufficient of itself to excite so much suspicion that, as a rule of law, the indorsee must take it on the credit of, and can stand in no better position than, the indorser—*Brown v. Davies* (8). But with regard to cheques, no such rule has been laid down (the case of *Down v. Halling* (1), as I shall shew presently, not amounting, I think, to any such decision), and there is one case in which that proposition has been denied or doubted.

In *Rothschild v. Corney* (2) the action was brought by the maker of the cheque to recover the amount from the defendant who had obtained cash for it. The cheque was dated the 19th of January; it had been obtained from the plaintiff by the fraud of Brady; and Brady, on the 24th (five days after date), handed it to the defendant, who cashed it *bona fide*, and afterwards presented it and received the

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amount from the plaintiff's bank. At the trial the learned Judge directed the jury that if they thought the circumstances of the case were such as ought to have excited the suspicion of a prudent man, and that the defendant had not acted with reasonable caution, they should find a verdict for the plaintiff—otherwise for the defendant. A rule was then obtained for a new trial, on the ground that the Judge ought to have directed the jury that the cheque was overdue, and was therefore taken by the defendant at his peril, and that the defendant could have no better title than Brady; but after argument, in which *Down v. Halling* (1) was cited, the rule was discharged, Lord Tenterden, C.J., saying that it could not be laid down as a matter of law that a party taking a cheque after any fixed time from its date must do so at his peril. And Mr. Justice Little-*dale* observed that, although the rule of law was so as to bills of exchange and promissory notes, it could not be applied to cheques. In *Serrell v. The Derbyshire Railway Company* (10) the cheque was dated the 13th of August, and was not presented until the 6th of October; and the case of *Down v. Halling* (1) was cited by Mr. Justice Cresswell for the proposition of Mr. Justice Holroyd in it, that the defendants, having taken the cheque more than five days after date, took it at their peril; and Sergeant Byles, *arguendo*, said that *Down v. Halling* (1) was not consistent with *Rothschild v. Corney* (2). Mr. Justice Maule held that no such strict law existed that a cheque must, as against the maker, under such circumstances, be presented promptly, but that, when a reasonable time has passed a cheque stands on the same footing as a bill of exchange; and he thought that the cheque in that particular case might probably be considered in the nature of an overdue bill; and fraud being shown in its inception, the *onus* was thrown upon the plaintiff of shewing how he got it.

Of course, even with regard to cheques, there is no doubt that in the ordinary course of business they are intended almost as cash, and for early, if not prompt, payment; and it is well known law that as between the maker and payee, although there is no absolute duty to present a cheque promptly, that duty so much exists that exact rules have been

laid down beyond what period the payee may not delay presentation if he wishes to avoid the consequences of any damage caused to the maker by the insolvency of the drawee, or otherwise his. Having regard to this duty, I have come to this conclusion, that, looking to the peculiar circumstances of *Down v. Halling* (1) and the mode in which the matter was there treated, there is no conflict between that case and the case of *Rothschild v. Corney* (2), as has been supposed. In *Down v. Halling* (1) the plaintiff sought to recover the amount of a cheque for 50*l.*, dated the 16th of November, 1824. He did not shew how that cheque got out of his hands, but on the evening of the 22nd a woman unknown to the defendant bought at his shop goods worth over 5*l.*, and tendered the cheque in payment, he paying her the difference. He presented the cheque on the following day and received the amount. No evidence having been given by the plaintiff accounting for its having got out of his hands, the defendant claimed a nonsuit on that ground; but Lord Tenterden told the jury to find for the plaintiff if they thought that the defendant had taken the cheque under circumstances which ought to have excited the suspicion of a reasonable man; and, further (on the authority of *Gill v. Cubitt* (11), which has since been overruled), asked whether the defendant, although not acting fraudulently, had acted negligently in taking the cheque; and upon those directions the jury found a verdict for the plaintiff; and upon a rule having been moved for a new trial on the ground of misdirection, the Court supported the direction as to negligence upon the authority of *Gill v. Cubitt* (11); and as to the rest, Mr. Justice Bayley is reported to have said that if a cheque is taken after it is due, the party taking it can have no better title than the person from whom he took; and it is in this passage that he is supposed to lay that proposition down as a rule of law. It must be remembered, however, that Lord Tenterden was also a party to the decision in *Rothschild v. Corney* (2), and could not have intended to hold in that case contrary to the recent decision in *Down v. Halling* (1);

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and, if the language of Mr. Justice Holroyd is looked at, when he says that five days ought to have excited the defendant's suspicion, and that in the case before him a reasonable time had elapsed, I think the true result of that case is that the Court decided it rather upon its own peculiar facts than as intending to lay down any strict rule of law. In *Serrell v. The Derbyshire Railway Company* (10), Mr. Justice Maule says perhaps the two cases may be reconciled; and if my view of the character of the decision in *Down v. Halling* (1) is right, I have been able to come to the same conclusion.

I should, therefore, under ordinary circumstances, have contented myself with giving judgment for the plaintiff; but I think, assuming this to be the sound view of *Down v. Halling* (1), it follows from that case, as well as from the other cases, that the true question for the jury being whether the cheque in the present case was taken by the plaintiffs under such circumstances as ought to have excited their suspicion, and the lapse of eight days being a circumstance undoubtedly, though not conclusive, to be taken into consideration by them in considering that question, I ought to have left that question to the jury. I should, indeed, have done so if I had understood that Mr. Talfourd Salter had wished it. From what passed, however, on the argument, I think there may have been a misunderstanding on my part in the matter, and undoubtedly that question was not put to jury, and the defendant is entitled to have it put if he so wishes.

I therefore give judgment for the plaintiffs with costs, subject to the condition that, if the defendant elect within ten days after my judgment to have a new trial, he may do so; and in that event the costs of the former trial and of further consideration should abide the event of the second trial.

Judgment for plaintiffs.

Solicitors—White, Broughton & White, for plaintiffs; J. A. Hales, for defendant.

1881. }
Nov. 25. } GIBBS v. GUILD.*
Dec. 19. }

Statute of Limitations—Fraud—Concealment of Cause of Action—Discovery of Original Fraud—Time when Statute runs in case of Fraud—Absence of reasonable means of Discovery of Fraud—Judicature Act—Application of Rule of Equity.

Concealed fraud and the absence of reasonable means of discovery may be pleaded in reply to a defence of the Statute of Limitations.

Where to a claim for damages for fraudulent representations as to the value of shares in a company, the defendant pleaded the Statute of Limitations, and the plaintiff replied that he did not discover, and could not by reasonable diligence have discovered the fraud, or that defendant was a party to it, and that the defendant had actively concealed the fraud to prevent discovery till within six years before action,—Held, on demurrer, a good reply.

A rejoinder to the reply, that the several frauds and concealments alleged did not accrue within six years before the action, held bad on demurrer.

This was an action against promoters to recover damages for fraudulent representations made by them more than six years before action brought, by reason of which the plaintiff was induced to buy shares in a certain company. The statement of defence alleged that the cause of action did not arise within six years, to which the plaintiff replied that he did not discover the fraud, or that the defendant had been a party to it, and that he could not by reasonable diligence have discovered it till within six years before the action. Further, that the defendant actively and deliberately concealed the existence and means of discovering such fraud, in order to prevent and delay the plaintiff from discovering it until within six years. To this reply the defendant demurred, and rejoined further that the several frauds and concealments alleged did not accrue till within six years before action. To this the plaintiff demurred.

* Affirmed by a majority of the Court of Appeal on the 16th of March, 1882.

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W. G. Harrison, Q.C. (*A. J. Ram* with him), for the defendant, in support of the demurrer to the reply.—If this were an action for a matter which was exclusively within the jurisdiction of Courts of equity before the Judicature Act, this might be a good replication. But this is an action for damages, and the rule in equity that the statute runs from the discovery of a fraud does not apply. Then when there is a concurrent remedy at law and equity, and the Statute of Limitations would apply at law, the Courts of equity will act by analogy and impose the same limitation—*Knox v. Gye* (1). The general principle is pointed out by Lord Westbury there as having been long established. *Hunter v. Gibbons* (2) expressly decides that fraud is not an answer to a plea of the Statute of Limitations at law, and this was an authority which ought to have been followed in *The Ecclesiastical Commissioners v. The North Eastern Railway Company* (3) and *Trotter v. McLean* (4), because Pollock, C.B., said in the former case that a Court of equity would not relieve. In *Dean v. Thwaite* (5), Lord Romilly says the burden of proof is on the defendant; but if he shews that the acts complained of were done six years before action, the plaintiff has no remedy.

They referred also to *Story Equity Jurisprudence* § 64a, *Cholmondeley v. Clinton* (6) and *The Imperial Gas Company v. The London Gas Company* (7).

F. M. White and Chitty, for the plaintiff.—The rule in equity is clear; the statute does not bind the Court of equity, but it uses it to assist discretion, and it will not apply it in case of fraud before discovery—*Brooksbank v. Smith* (8), *Booth v. Lord Warrington* (9) and *Hovenden v. Lord Annesley* (10), where there is no demurrer for want of equity, the Courts will apply the rule of the analogy of the statute.

(1) 5 E. & Ir. App. at p. 674; 42 Law J. Rep. Chanc. 234.

(2) 1 Hurl. & N. 459.

(3) Law Rep. 4 Ch. D. 845; 47 Law J. Rep. Chanc. 20.

(4) Ibid. 3 Ch. D. 574.

(5) 21 Beav. 621.

(6) 2 Jac. & W. at p. 156.

(7) 10 Exch. Rep. 39; 23 Law J. Rep. Exch. 303.

(8) 2 You. & C. Exch. 42.

(9) 4 Bro. P.C. 163.

(10) 2 Sch. & Lef. 629.

[FIELD, J.—Is it not really that Courts of equity would not acknowledge the statute, but they would not help a man who knowingly slept upon his rights?]

In *Blair v. Bromley* (11), Wigram, V.C., points out that the plaintiff, not being able to evade the Statute of Limitations at law, had to come to equity to be relieved. And on appeal the Lord Chancellor does not qualify the opinion expressed by the Vice-Chancellor, though he puts the case on a different ground (12)—*Clark v. Hougham* (13). *The Imperial Gas Company v. The London Gas Company* (7) decides that this would be a case for Wigram, V.C.'s rule to be applied. This must be treated as a suit in equity, and the rule must be applied. *Hunter v. Gibbons* (2), is alluded to by Fry, J., in *Trotter v. McLean* (4), and he shewed that it was only a question of pleading an equitable replication under the Common Law Procedure Act, 1854. Since the Judicature Act the rule in equity is applicable in all actions, and the Court looking at the substance of the action, and that it is a case of fraud, will restrain the defendants from availing themselves of the Statute of Limitations. In *Knox v. Gye* (1) there was no fraud; and it is admitted that it is only in actions where equity has established the rule as to fraud that a Judge of the High Court can now be asked to apply the rule.

W. G. Harrison, in reply.

Cur. adv. vult.

FIELD, J. (on Dec. 19).—This case raises an important question as to the operation of the Statute of Limitations in bar of an action in which the plaintiff claims damages for fraudulent representations made by the defendant more than six years before the commencement of the action, and also claims to exclude the application of the statute, by reason of the non-discovery by the plaintiff of the fraud within the period of limitation, such non-discovery having been induced by the active concealment of the fraud by the defendant from the plaintiff, who could

(11) 5 Hare, at p. 559; 16 Law J. Rep. Chanc. 105.

(12) 16 Law J. Rep. Chanc. 495.

(13) 2 B. & C. 149.

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not by exercise of reasonable diligence have discovered it.

The statement of claim sets out the alleged fraudulent representations, and alleges that by reason of them the plaintiff was induced to purchase shares which were always worthless, and so the plaintiff lost the price, 2,500*l.*; and to this statement of claim (in addition to denials of the representations complained of) the defendant alleges that the cause of action did not arise within six years next before the commencement of the action.

The plaintiff in his replication, after taking issue upon the statement of defence, sets out the following averments: (b) That the plaintiff did not discover the existence of the said fraud; (c) or that the defendant had been a party to or was guilty of it; (d) and the plaintiff could not by the exercise of reasonable diligence have discovered, and had not the means of discovering, matters in sub-paragraphs (b) and (c), until within six years next before the commencement of the action; (e) that the existence of, and the means of discovering, such fraud were concealed by the defendant until within such six years; (f) that the defendant, in order to prevent the plaintiff from discovering the fraud, and that he had been guilty of it, actively and deliberately concealed the same until within six years next before the commencement of this action, and so prevented and delayed the plaintiff from discovering the same and bringing this action in respect thereof. To these averments the defendant demurred, and also alleged that the several frauds and concealments alleged in the statement of defence did not accrue within six years from the commencement of the action; and to this averment the plaintiff demurred on the ground that even if true it was immaterial, if the fact was, as alleged, that the defendant's acts prevented the discovery at whatever period they took place. These demurrers came on for argument before me.

It was contended for the plaintiff that in a case of fraud, such as the present, the period limited by the statute of Jac. 1 never did, either at law or in equity before the coming into operation of the Judicature Acts, and does not now, commence to run, until the period when the plaintiff could by the exercise of reasonable dili-

gence have discovered the fraud, and that the defendant was a party to it. The defendant's counsel, on the other hand, whilst admitting that before the Judicature Act there had been cases solely cognisable by Courts of equity in which a party coming into a Court of conscience was not permitted to avail himself of a bar to which he was not *de jure* in conscience entitled (suits in equity not being included in the statute of James), and which his own unconscientious conduct had brought into existence, contended that no such rule of equity ought to be applied to an action of the present description, in which the suitor might have resorted indifferently to a Court of law or equity, the latter in such case being bound to act in obedience to the statute. He alleged that in substance the cause of action was in the present case the subject of "an action on the case" at law, within the very language of the statute, and which therefore, he said, a Court of equity were as much bound to obey as a Court of law.

Now if I had been called upon to decide this case in the absence of the provisions of the Judicature Acts, I should have been limited to the consideration of the judicial construction of the statute as applicable to an action of law as laid down by Courts of law as distinguished from Courts with equitable jurisdiction, and it would be necessary in such a case to consider in the first place what is at law the cause of action in such a case, and at what period does it accrue. The making of the fraudulent representation complained of is no doubt the first step going to the existence of a cause of action, but the fraudulent representation does not of itself give a cause of action—damage to the plaintiff must ensue before that comes into existence. Moreover, fraud and damage only bring into existence a cause of action when the plaintiff elects to treat it as such and seeks to avoid the transaction, which in no case can he of course do until he has discovered his right to elect, or has so omitted to make use of reasonable means at his command for making the discovery, as to make it unjust not to treat the omission as equivalent to a discovery, and so to hold the plaintiff as having been put upon his election.

This question, if question it is, is in the

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present case involved in the traverse of the allegation, that the cause of action did not accrue within the six years, and it may be that if, upon that traverse, the plaintiff is able to prove the original and continuing fraud, and his inability by due diligence to discover it up to a period within six years before the commencement of the action, he may be entitled to a verdict upon that issue. But the question raised before me is on demurrer, which admitting, as it does, the averment in the plea that the cause of action did accrue more than six years, seeks to exclude the application of the statute by the allegation that he did not in fact discover, and could not by reasonable diligence have discovered the existence of his cause of action before that period, and, at all events, that the statute is no bar when the fraud has been "actively concealed" or brought about by the defendant himself.

Now at law the matter seems to have stood thus: "Action on the case" as used in the statute was a general term including actions on *assumpsit* or contract, actions for negligence or for fraud, and for other causes of action; and it was well settled that in actions on *assumpsit* the time ran from the breach, for that was the gist of the action; and the subsequent damage, although happening within the six years next before the suit, did not prevent the application of the statute—*Batley v. Faulkner* (14). The like rule obtained in action on the case for negligence—*Short v. McCarthy* (15), *Howell v. Young* (16).

In the case of actions on the case for fraud the authorities stand thus: In *Bree v. Holbech* (17), which was an action in form for money had and received, but really to avoid a transaction on the ground of fraud, in answer to a plea of the statute, the plaintiff replied that he had been induced to pay the money in consequence of false affirmations, and that he did not discover the fraud until within six years; and on demurrer to the replication, Lord Mansfield, whilst holding that the plaintiff could not recover on the ground that no fraud by the defendant in that particular

case was alleged, said, "There may be cases which fraud will take out of the Statute of Limitations," adding that "if the defendant had discovered the forgery and then got rid of the deed as a true security, the case might have been different," and gave leave to the plaintiff to amend, if upon enquiry the facts would support a charge of fraud, thus shewing that in his opinion there would then be something for the defendant to answer.

Later on, in *Clark v. Hougham* (18), the plaintiff sued in *assumpsit* to recover an over-payment of money to his landlord, alleged to have been paid upon a misrepresentation by the defendant, and the Statute of Limitations was pleaded with a replication of *accrevit infra sex annos*. It was argued that at law the statute did not run in case of fraud until discovery, and it was admitted that such had been held in equity. But whilst all the Judges held that upon the pleadings as framed, the defendant was entitled to judgment, Mr. Justice Bayley and Mr. Justice Holroyd said that there should have been a special replication—and Mr. Justice Best, having observed during the argument that the defendant had been active in concealing the fraud, said that fraud would have prevented the operation of the statute had it been specially replied, referring to what Lord Mansfield said in *Bree v. Holbech* (17).

Still later on, in *The Imperial Gas Light Company v. The London Gas Light Company* (7), the plaintiffs sued in the first count for taking away gas from the plaintiffs' pipes; and in the second count for fraudulent concealment till six years had elapsed. To the first count the defendants pleaded the statute, to which the plaintiffs replied the fraudulent concealment alleged in the second count. The defendants demurred to the second count, and also to the replication to the first count, and after argument the Court held that the second count was good, but gave judgment for the defendants on the demurrer to the replication. The Court did not give a formal judgment, or reasons for their decision, but cited the case of *Bree v. Holbech* (17), and I am not aware of any subsequent authority at law upon the point.

In the present case it is, however, unnecessary for me to decide how the matter

(14) 3 B. & Ald. 288.

(15) Ibid. 628.

(16) 5 B. & C. 259.

(17) 2 Dougl. 654.

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would have stood if my jurisdiction had been limited to that of a Court of law, for by the 24th section of the Judicature Act of 1873, I am, in a case like the present, bound to give to the plaintiff the same relief as ought to have been given to him by the Court of Chancery, in a suit instituted for the same or like purpose, and in the Court of Chancery the authorities in such a case have been uniform for nearly two hundred years.

In 1714, in the case of *Booth v. Lord Warrington* (9), Lord Warrington filed a bill to recover back a sum of 1,050*l.*, which had been obtained from him by the defendant by fraud in the year 1702, and which fraud he alleged in his bill he had not discovered for nine years, that is, not until within six years before the commencement of the suit. The defendant pleaded the Statute of Limitations, but Lord Chancellor Harcourt overruled the plea, on the ground that the plaintiff's title to relief was based upon the defendant's fraud, and his judgment was affirmed by the House of Lords, and Lord Warrington had his decree.

The grounds of the decision are not stated in the report, but the questions which were laid down for argument were—First, Would an action at law lie?—secondly, When the cause of action accrued?—and, thirdly, whether where fraud is not discovered until after six years, a Court of equity is barred from giving relief on a bill filed after that date, but within six years? But although no reasons are given there, the ground of these decisions was explained by Lord Redesdale in the subsequent case of *Hovenden v. Lord Annesley* (10), in which he said that the principle of that case was that fraud is a secret thing, and may remain undiscovered until such a time that the statute might run, but during that time the statute should not operate, because until discovery the title to avoid the transaction does not arise. A similar doctrine is laid down in the case of *The South Sea Company v. Wymondseell* (18), *Blair v. Bromley* (11), *Whalley v. Whalley* (19) and *The Ecclesiastical Commissioners v. The North Eastern Railway Company* (3).

(18) 3 P. Wms. 143.

(19) 3 Bligh, 1.

Denys v. Shuckburgh (20) was an analogous case of a bill filed for relief on the ground of mistake, and Baron Alderson, holding that the case was in reference to the question of time on the same footing as fraud, came to the conclusion that the plaintiff in that case had the means with proper diligence of discovering the mistake, and so adopted the statute as prescribing the limit with which he decreed an account. This reasonable limitation, and indeed the whole doctrine of Courts of equity on concealed fraud, are thus stated in the Limitation Act of the 3 & 4 Will. 4. c. 27. s. 26, in which statute suits in equity are referred to as being within the provisions of the statute.

In reference to the order of Vice-Chancellor Malins in the case of *The Ecclesiastical Commissioners v. The North Eastern Railway* (3) above cited, it was urged by Mr. Harrison, for the defendants, that that case was not of binding authority, by reason that the Vice-Chancellor had not duly given effect to a decision of the Court of Exchequer in the case of *Hunter v. Gibbons* (2), in which, in answer to an act of trespass, the plaintiff sought to file an equitable replication of concealed fraud to the plea of the statute. But on reference to that case of *Hunter v. Gibbons* (2), I am inclined to think that the Vice-Chancellor's view of it was well founded, and that the main ground of the decision in that case was that the replication did not shew any title in the plaintiff to such an unconditional relief as entitled him to set up the fraud in an action at law according to the construction which had been put upon the provisions of the 85th section of the Common Law Procedure Act, entitling parties to set up equitable grounds for relief.

Upon these cases and for the reasons stated in them, I have come to the conclusion that concealed fraud and absence of reasonable means of discovery, if pleaded, will prevent the application of the statute, and I therefore overrule the demurrer to the replication, and I give judgment upon it for the plaintiff.

There is also the cross-demurrer of the plaintiff to the rejoinder of *non accrevit*

(20) 4 Yon. & C. Exch. 42.

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infra sex annos to the frauds stated in the replication, and that demurrer seems to me to be well founded. In one sense those matters are not stated as causes of action in themselves, they are only alleged as the grounds why the plaintiff in the exercise of reasonable diligence was not able to discover the original fraud, but it has always been held a bad plea to say *non assumpsit infra sex annos*, the true plea being *non accrevit*, the reason being the same as exists here, namely, it is not because the frauds perpetrated for the purpose of concealing the fraud occurred more than six years, that the action is barred if the non-discovery of the fraud caused by those means lasted until within the statutable period.

Upon this demurrer I also give judgment for the plaintiff.

Judgment for plaintiff.

Solicitors—Miller, Wiggins & Naylor, for plaintiff; Clarke, Rawlins & Clarke, for defendant.

1881. { MERRICKS (appellant) v. CAD-
Dec. 7. { WALLADER AND ANOTHER (re-
spondents).

Fishing without Licence—Freshwater Fisheries Act, 1878 (41 & 42 Vict. c. 39), s. 7—Severn Fishery District—Certificate of Secretary of State—Tributary.

[For the report of the above case, see 51 Law J. Rep. M.C. 20.]

1881. } PICKERING HIGHWAY BOARD v.
Dec. 1. } BARRY.

Highway—Highways and Locomotives Amendment Act, 1878 (41 & 42 Vict. c. 77), s. 23—Excessive Weight and Extraordinary Traffic—Carting Building Materials.

[For the report of the above case, see 51 Law J. Rep. M.C. 17.]

[IN THE COURT OF APPEAL.]

1882. { *In re* FOSTER AND ANOTHER v.
Feb. 21. { THE GREAT WESTERN RAIL-
WAY COMPANY. *Ex parte*
THE GREAT WESTERN RAIL-
WAY COMPANY.*

Railway Commissioners—Jurisdiction—Discretion as to Costs—Ordering successful Defendant to pay Costs—Prohibition—Regulation of Railways Act, 1873 (36 & 37 Vict. c. 48), s. 28.

The discretion as to costs given to the Railway Commissioners under section 28 of the Regulation of Railways Act, 1873 (36 & 37 Vict. c. 48), is not greater than that given to the High Court under Order LV. rule 1, of the Rules of the Supreme Court; the Commissioners therefore have no jurisdiction to make a successful defendant pay the costs of an unsuccessful applicant.

The Railway Commissioners, in dismissing an application, ordered the defendants to pay half the costs of the applicants, on the ground that the defendants were responsible for the litigation, because they had not given public notice that they had ceased to be owners or managers of a certain canal. The defendants applied for an order to prohibit or stay proceedings upon the order of the Commissioners:—

Held (reversing the judgment of the Queen's Bench Division), that the Commissioners in making the order had exceeded the jurisdiction as to costs given to them by 36 & 37 Vict. c. 48. s. 28.

Appeal from a judgment of the Queen's Bench Division, reported *Ante*, p. 51.

The present respondents (Messrs. Foster) had instituted proceedings against the railway company before the Railway Commissioners, on the ground that the company were in default in respect of the Upper Avon river navigation, under section 17 of the Regulation of Railways Act, 1873 (36 & 37 Vict. c. 48), by which a railway company, owning or having the management of a canal, is bound to keep it in good working condition. The company denied that they were owners or managers of the canal, and satisfied the Commissioners that

* *Coram* Brett, L.J.; Cotton, L.J.

In re Foster v. Great Western Rail. Co., App.

they were not; but the company having formerly been such owners or managers, and not having given public notice that they had ceased so to be, the Commissioners considered them, under the circumstances of the case, responsible for the litigation, and made an order that they should pay half of Messrs. Foster's costs.

The company applied to the Queen's Bench Division for an order to stay the Master from taxing the costs upon, or in the alternative for a prohibition against proceeding further on, the order so made by the Commissioners.

The Queen's Bench Division (Field, J.; Manisty, J.; and Bowen, J.) refused the application.

The railway company appealed.

Webster, Q.C. (with him *R. S. Wright*), for the appellants.—The Railway Commissioners have exceeded their jurisdiction in making the defendants pay half the plaintiffs' costs. The governing words of section 28 of the Regulation of Railways Act, 1873 (36 & 37 Vict. c. 48), are identical with those of Order LV. rule 1, of the Rules of the Supreme Court, and it cannot be suggested that the words of section 28 are wider than those contained in Order LV. At no period of the proceedings, either in the Court of Chancery or at common law, has the Court ever had jurisdiction to impose costs by way of penalty upon a successful defendant; and the Courts in one or two cases have regretted that they have not power to do so—*Tidwell v. Ariel* (1), *Cooth v. Jackson* (2). Under the Judicature Act, the Court has no power to order a successful defendant to pay costs on the ground of misconduct which took place before the suit was instituted—*Dicks v. Yates* (3); *Witt v. Corcoran* (4). The discretion over costs given by Order LV. was never intended to be exercised so as to be in the nature of a penalty. In *Harris v. Petherick* (5) a

doubt was expressed by Cotton, L.J., whether a successful plaintiff could be ordered to pay the defendant's costs, but although the Court there ordered the plaintiff to pay the defendant's costs, the case turned on the meaning of the words "for good cause shewn" in Order LV. rule 1. Also in *Harnett v. Vise* (6) the Judge at the trial, under the words "for good cause shewn," deprived a successful plaintiff of his costs, and before the Judicature Act that was constantly done in the Court of Chancery. The giving of costs in equity is entirely discretionary, and the Court is not, like the ordinary Courts, held inflexibly to the rule of giving costs of suit to the successful party, but it takes into consideration the circumstances of the particular case before it, or the situation or conduct of the parties, and exercises its discretion accordingly. In exercising this discretion, however, the Court does not consider the costs as a penalty or punishment, but merely as a necessary consequence of a party having created a litigation in which he has failed—*Daniell's Chancery Practice*, c. xxxi. (7)—citing remarks of Lord Cranworth in *Clarke v. Hart* (8). It is clear, therefore, that the old Courts of Chancery and common law had no jurisdiction, before the Judicature Act, to impose costs upon a successful defendant. The discretion vested in the Railway Commissioners, under section 28 of the Act of 1873, cannot be greater than that exercised by the High Court itself under the Judicature Act.

He also referred to section 49 of the Judicature Act, 1873.

Anstis and Bosanquet, for Messrs. Foster.—The judgment of the Court below is correct. The words of section 28 are wide enough to give jurisdiction to the Railway Commissioners to make this order. The Ecclesiastical Courts have always exercised jurisdiction over costs, and prohibition was refused in a case where the Court in a criminal prosecution had given costs against a successful defendant, on the ground that it had jurisdiction over the cause and it was the usage to tax costs where the plaintiff had *causa litigandi*—

(1) 3 Madd. 403, 409.

(2) 6 Vesey, 11, at p. 40.

(3) 50 Law J. Rep. Chanc. 809; Law Rep. 18 Ch. D. 76, 84.

(4) 45 Law J. Rep. Chanc. 603; Law Rep. 2 Ch. D. 69.

(5) 48 Law J. Rep. Q.B. 521; Law Rep. 4 Q.B. D. 611.

(6) Law Rep. 5 Ex. D. 307.

(7) Vol. ii. (5th ed.), 1238, *et seq.*

(8) 6 H.L. Cas. 632, 667; 27 Law J. Rep. Chanc. 615, 620.

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(*Rolle's Abridgment*, tit. "Prohibition," P. 9).

[*Webster, Q.C.*—As regards the case cited, however, *Brownlow* (p. 36) says "that a prohibition was granted; for that it was an injustice to allow costs to one that had vexed him without cause, and when they had given sentence against the informer"—(*Viner's Abridgment*, tit. "Prohibition," P. 6). There are authorities in the books where prohibitions have been both granted and refused.]

The Commissioners have no power over costs except under section 28, which gives a very wide discretion; and costs are imposed, not as a penalty, but as compensation for the trouble and loss to which a party has been put. Moreover, it is not sufficient to say that the discretion exercised by the Commissioners is wrong or unjust, it must also be shown that they were acting *ultra vires*. In *Dufaur v. Sigel* (9) the defendant, having introduced scandalous and irrelevant matters into portions of his affidavits, was made to pay the costs occasioned by such conduct.

[*BRETT, L.J.*—There the party misbehaved in the course of the litigation, whereas here the alleged misconduct occurred before the commencement of the litigation. Is it not unjust to make a party pay costs for omitting to do that which the Legislature has not said he is bound to do?]

The analogy as to the practice in the ordinary Courts of law and equity does not apply here, because there is no reference in section 28 to costs in any Court other than that of the Railway Commissioners. The discretion over costs given by section 28 applies to costs of and incidental to all proceedings before the Commissioners.

Webster, Q.C., replied.

BRETT, L.J.—The Railway Commissioners, in an enquiry between these parties, which was certainly a matter within their jurisdiction, have given judgment absolutely, except as to costs, in favour of the railway company, on the ground that they were not in any way legally liable to the claim made against them in this litigation. The Commis-

(9) 4 De Gex, M. & G. 520; 22 Law J. Rep. Chanc. 678.

sioners then proceeded to deal with the costs, and although they have found that the company were absolutely entitled to their judgment, so that the plaintiffs were not justified in bringing this contentious litigation, they have decided that the company shall pay half the plaintiffs' costs. On the one side it is said that they have no jurisdiction, under such circumstances, to make such an order as the present one. On the other side it is said that, however erroneous the decision of the Commissioners may be, yet they had jurisdiction to deal with the question of costs; and it is further alleged on the part of the plaintiffs that it is possible that the commissioners have adjudicated that half of the plaintiffs' costs should be paid by the company, on the ground that the plaintiffs have succeeded on some of the issues of fact which have been raised between them. With regard to the latter point, it seems to me that it would be a wholly unjust, unfair and uncandid way of really supporting the judgment of the Commissioners, if we were to assume that they might have done something which by the very terms of their judgment they did not assume to have done. They have given the specific grounds of their judgment—namely, that considering the company had been managing the canal since 1860, some public notice might well have been given before the litigation was commenced that they no longer claimed or possessed any kind of interest; and that as they were responsible for the uncertainty as to ownership and liability to repair which had occasioned the proceedings, it would be reasonable that they should pay at least part of the costs of the application; and the plaintiffs were accordingly granted half their costs. I think, therefore, that this case must be decided as if the Commissioners had not dealt with any issues of fact at all; but even assuming that every issue has been found in favour of the railway company, have the Commissioners, on account of some misconduct before the litigation was commenced, jurisdiction to give the costs, or part of them, to the plaintiffs? The ground upon which they acted is clearly stated in their judgment, and the question is whether they have jurisdiction to make this order; in other

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words, have they exceeded their jurisdiction, or have they only come to an erroneous decision? It is true that, however erroneous that decision may be, if they have jurisdiction we could not interfere with it. We must, however, consider whether what they have done is an excess of jurisdiction. The argument that convinces me that it is an excess of jurisdiction is that before the Judicature Act there was a Court—the Court of Chancery—which had absolute discretion as to costs; and having that power they considered whether where a defendant had succeeded absolutely, and had shewn that the plaintiff had no title to maintain the action, they had jurisdiction to make an order that he should pay part of the plaintiff's costs. It seems to me that they came to the conclusion that they had no jurisdiction to make such an order. The terms used by Sir John Leach in *Tidwell v. Ariel* (1) and by Lord Eldon in *Cooth v. Jackson* (2) seem to me to shew that to have given costs in such a case would, in their opinion, have been to have done that which they had no jurisdiction to do. Formerly the Courts of common law had no discretion as to costs, but the Judicature Act gave them, by Order LV. rule 1, an absolute discretion as to costs. That order, which was not wanted by, and which did not include, the Chancery Division, only adopted the discretion as to costs which the Court of Chancery had, and gave it in as large terms as those in which it is now given to the Commissioners. The words of Order LV. rule 1—"subject to the provisions of the Act, the costs of and incidental to all proceedings in the High Court shall be in the discretion of the Court"—are as large as they can be. Then arose the question whether, under those words, the jurisdiction of the Chancery Division had been enlarged, or whether it was not the intention of the Legislature, notwithstanding those words, that both divisions of the High Court should have absolute discretion as to costs within, but no discretion as to costs beyond, their jurisdiction. Then came the question whether costs could be given to the plaintiff where the defendant had succeeded, and where there had been no fault on the part of the defendant as regards any allegation raised

by him in the course of the litigation. The judgments in the Court of Appeal in *Witt v. Corcoran* (4) and *Dicks v. Yates* (3) seem to shew that, in the opinion of the Judges of that Court—and that opinion is binding on us if it is the ground of the judgments—all that Order LV. rule 1 meant was that there should be an absolute discretion as to costs within the jurisdiction, but not as to those beyond it; and that the discretion as to costs within the jurisdiction should be exactly the same as it was formerly; therefore no order could be made against a defendant as to the costs of litigation where he has succeeded absolutely. That seems to be the foundation of the judgments. In *Witt v. Corcoran* (4) Lord Justice James says (at p. 69): "The defendant says he has been guilty of nothing, and if the Court had been of that opinion"—that is, since the Judicature Act—"it could not have ordered him to pay the costs any more than it could dismiss a bill and order the defendant to pay the costs of the suit." That seems to be adopting the old rule which had been laid down by Sir John Leach. In *Dicks v. Yates* (3) the Master of the Rolls says (at p. 84): "Now, if a plaintiff has no title, are the costs of the action in the discretion of the Court, so that the Court can give the whole of them to the plaintiff? It seems to me that they are not. No one has ever heard of a defendant being ordered to pay the costs of a plaintiff who has failed to make out any title. . . . I wish not to be supposed to go further than I intend. I think that the Court has a discretion to deprive a defendant of his costs though he succeeds in the action, and that it has a discretion to make him pay perhaps the greater part of the costs by giving against him the costs of issues on which he fails, or costs in respect of misconduct by him in the course of the action. But a judgment ordering the defendant to pay the whole costs of the action cannot, in my opinion, be supported, unless the plaintiff was entitled to bring the action." The meaning of this is that if the defendant had failed as regards some of the issues, or had misbehaved himself, he would, although successful, have to pay the costs caused by such failure or misbehaviour. Then Lord Justice James

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says: "There is an essential difference between a plaintiff and a defendant. A plaintiff may succeed in getting a decree and still have to pay all the costs of the action, but the defendant is dragged into Court, and cannot be made liable to pay the whole costs of the action if the plaintiff had no title to bring him there." These cases, therefore, seem to shew that the true construction of Order LV. rule 1 is that it adopts, and with the same limitations, the jurisdiction as to costs which has existed in the Court of Chancery. The question, then, is whether section 28 of the Regulation of Railways Act, 1873, is to be construed in the same way. As the section is very nearly in the same words as, and is in *pari materia* with, Order LV. rule 1, I think it ought to be construed in the same way; and therefore the same rules as to costs are applicable to the Railway Commissioners as are applicable to any division of the High Court. The Commissioners, therefore, were not giving a mere erroneous decision, but were intentionally doing something which was beyond their jurisdiction. I am of opinion that a prohibition must be granted.

CORRON, L.J.—The only question is whether the Railway Commissioners had jurisdiction to make this order. Now the costs which the defendants are ordered to pay are not the costs of any particular issues in the proceedings, but part of the general costs incurred by the plaintiffs in bringing the railway company into Court. The Commissioners have decided that the railway company were not persons who were offending against the Act of 1873; and even if the plaintiffs had ground of complaint, had the Commissioners jurisdiction to make an order that the company should pay part of the costs of the suit? It seems strange that, when one person brings another before a tribunal without any ground for so doing, nevertheless the tribunal should order that other person, who has been brought in unwillingly, to pay costs which were not incurred through any misconduct on his part. The Court can undoubtedly do so where a party has introduced irrelevant or scandalous matters into the action; but the whole question here is as to the true construction of sec-

tion 28 of the Regulation of Railways Act, 1873. Does it give jurisdiction to the Railway Commissioners, in deciding litigation between the parties, to make a person who has been improperly brought into Court pay the costs or part of the costs of the suit? In order to decide this question, it is necessary to consider what was the practice of the Courts at the time when the Act was passed. At common law the Courts had no discretion at all as to costs; they followed the result. But there was undoubtedly one tribunal—the Court of Chancery—which had a discretion as to the costs of the litigation; but that Court has always held, down to the passing of the Act, that if a party failed in his action—that is, if the Court came to the conclusion that he was entirely wrong in bringing the defendant into Court—it had no power to make the defendant, who ought never to have been brought into Court, pay the costs of the suit. Here the Commissioners have assumed to make the defendants pay the costs of the suit. One would suppose that Parliament, in giving a discretion as to costs to a new tribunal, only intended to give such a power as was exercised by the Court of Chancery; but it was said that the Ecclesiastical Courts had exercised the jurisdiction which the Commissioners exercised here, and did claim to exercise the jurisdiction so as to make a person brought in pay the costs of being so brought in. It is, however, at least doubtful whether it was not decided by the Common Law Courts that that was an excess of jurisdiction; and I should say that that was their decision, because it seems to me to be in conformity with notions of justice. But if it were not so, it would merely come to this—that a Court with a limited jurisdiction thought it right to assume power to make persons pay the costs of the litigation as a matter of correction. That, however, would not properly influence us to decide that Parliament intended to follow that judicial practice of the Ecclesiastical Courts, and did not rather intend to give to this new tribunal the power which the Court of Chancery had laid down as the proper limitation—that it should not have any jurisdiction to make a defendant pay costs when he has been improperly brought into Court. It

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is unnecessary to go through the cases which have been referred to by Lord Justice Brett, but in my opinion no power has been given to the Railway Commissioners to make the defendants in this case pay any part of the general costs of the litigation. The prohibition must therefore be granted.

Appeal allowed.

Solicitors—R. R. Nelson, for the company; Crowder, Anstie & Vizard, agents for New, France & Garraard, Evesham, for Messrs. Foster.

1882. { THE INCE HALL ROLLING MILLS
Jan. 17. { COMPANY (LIMITED) v. THE
DOUGLAS FORGE COMPANY.

Set-off—Contract of Sale of Goods by Limited Company—Delivery of Goods after Winding-up in pursuance of previous Contract.

Where an action was brought by a limited company, in the course of compulsory winding-up by the Court, for the recovery of the price of goods delivered by the company after the commencement of the liquidation but in execution of a contract entered into before liquidation, the defendants sought to set off against this debt, a debt due to them from the plaintiffs incurred prior to the liquidation:—Held (by WILLIAMS, J.), that such set-off could not be maintained, the previous contract not amounting to a bargain and sale of specific goods.

This was a Case that was argued in July, 1881, on further consideration; and a written judgment, in which the facts and arguments are very fully set out, was delivered this day.

Gully, Q.C. (Crompton with him), for the plaintiffs.

C. Russell, Q.C. (French and Moloney with him), for the defendants.

WILLIAMS, J.—The question in this case is, whether, in an action brought by the liquidators, in the course of the compulsory winding-up by the Court of a

limited company, for the recovery of the price of goods delivered by the company after the commencement of the liquidation, but in execution of a contract entered into before liquidation, it is competent to the defendant to set off against this debt, a debt due to him from the company incurred prior to the liquidation.

The action came on for trial before me at Liverpool, without a jury, being taken principally upon facts admitted by both sides.

The facts presented before me at the trial are as follows:—

The statement of claim alleged that the plaintiffs, who had carried on business as iron rollers at Ince, near Wigan, were being wound up compulsorily under an order for winding up, dated the 4th of December, 1880; that about the 26th of November, 1880, the plaintiffs supplied and sold and delivered to the defendants certain iron, the price of which amounted to the sum of 108*l.* 12*s.* 1*d.*; and that on the 9th of December, 1880, the plaintiffs supplied, sold and delivered to the defendants another lot of iron, the price of which amounted to 108*l.* 5*s.* 11*d.*; and the plaintiffs claim these two sums, amounting to 216*l.* 18*s.*, with interest. The statement of defence admitted the indebtedness of the defendants to the plaintiff company in respect of these two sums, but alleged that the contract in fulfilment of which the goods were delivered had been entered into between the defendants and the plaintiff company before the petition for winding up—namely, on the 19th of November; and they claimed a right to set off against this debt the price of certain goods previously sold and delivered by them to the plaintiffs, and for which they held the plaintiffs' dishonoured acceptances—one for 177*l.* 1*s.*, due the 13th of November, 1880; and the other for 122*l.* 16*s.* 9*d.*, due the 13th of January, 1881.

The plaintiffs, in their reply, denied the defendants' allegations, and further alleged that the contract and transaction, as relied upon by the defendants, were void as against the liquidators under the winding-up. At the trial the following facts were either proved or admitted:—

The plaintiffs had carried on business as iron rollers, and the defendants that of forging castings and making machinery

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and of buying and selling iron. The plaintiffs and defendants had had dealings together for five or six years, and during the whole of that time the defendants had bought from and sold iron to the plaintiffs.

In June, 1880, the defendants sold and delivered to the plaintiffs a quantity of iron, the price of which amounted to 177*l.* 1*s.*, and on the 10th of July, 1880, they drew upon the plaintiffs for that amount at four months, and the plaintiffs accepted the same, the bill falling due on the 13th of November, 1880.

In the September following, the defendants sold and delivered to the plaintiffs a further lot of iron, and, in like manner, on the 10th of October, 1880, drew upon the plaintiffs for 122*l.* 16*s.* 9*d.*, at three months, for the price of the same, and the plaintiffs accepted the bill, which would be due on the 13th of January, 1881.

It is the amount of these bills that the defendants seek to set off against the price of the iron bought by them from the plaintiffs, as presently mentioned.

On the 18th of November, 1880, the plaintiffs' acceptance for 177*l.* 1*s.* due on the 13th of November, came back to the defendants dishonoured. On the morning of the 19th of November, one of the defendants' firm went to the office of the plaintiffs, and there saw Mr. Kay, with whom he usually transacted such business, and informed him that they were in the market for iron, and would send into him a specification for him to quote, this being the usual way in which their contracts for iron were made, and at the same time the price of 5*l.* 15*s.* per ton was verbally quoted.

In the course of the day the defendants sent in a specification in their usual form for sixty tons of various sizes of rolled iron, requesting the plaintiffs to supply the iron "as per your quotation this morning—namely, 5*l.* 15*s.* per ton, 'on trucks, usual terms.'" To this the plaintiffs replied on the same day, stating that their price for the specification was 5*l.* 15*s.* per ton, usual terms.

This contract, which I find out now is the material thing on which my judgment turns, did not amount to a bargain and sale of specific goods, and created no debt between the parties. It amounted to no

more than an executory contract to supply, sell and deliver on the one side, and to accept on the other, certain quantities of unascertained goods at a future day. If it is material, the defendants were undoubtedly aware at this time that the plaintiffs were in failing circumstances, and being creditors of the plaintiffs, undoubtedly gave this order with a view of covering their debt.

On the 24th of November, 1880, the plaintiff company being in insolvent circumstances, a creditor petitioned the Court for a compulsory winding-up of the company.

On the 6th of December an order for the winding-up was made, and Robert Thompson was appointed provisional official liquidator.

On the 6th of December the liquidator took possession of the plaintiffs' works.

On the 10th of December an order was made authorising the liquidator to carry on the business for the purpose of winding-up.

In the meantime—namely, on the 25th of November—the defendants applied for and took delivery from the plaintiffs, under the contract of the 19th of November, of about 18 tons of iron, which was invoiced to them at 5*l.* 15*s.*, making 108*l.* 12*s.* 1*d.*, which is the first item sued for in this action. On the 8th of December the defendants, in like manner, applied for stock delivery of a further quantity, the invoice for which amounted to 108*l.* 5*s.* 11*d.*, being the second item sued for in this action; the two quantities amounting to 37 tons 14 cwt. out of the 60 tons. Shortly after this date, a discussion arose between Mr. Thompson, the liquidator, and the defendants as to the right of the liquidator to be paid in full for this iron without giving the defendants credit for their set-off, and, on the 14th of December, 1880, the liquidator wrote to the defendants as follows:—

"Dear Sirs,—Your contract with this company of the 19th ult. was for 60 tons of iron at 5*l.* 15*s.* per ton. Of this quantity I have delivered about 37 tons 14 cwt. I shall expect to be paid in full for all deliveries since the date of the liquidation, November 23. Is it your wish that I should complete the contract on the above-mentioned basis?"

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To this the defendants replied, on the 16th of December, as follows:—

"Dear Sirs,—We decline to receive the balance of iron due to us under contract with the Ince Hall Company on the terms set forth in your letter of the 14th inst."

No further iron was delivered, and the liquidator having now sued in the name of the company for the price of the iron delivered upon the 25th of November and the 8th of December, amounting to 216*l.* 18*s.*, the question is whether the defendants have a right to set off the amounts due to them from the plaintiffs upon the two dishonoured acceptances of the plaintiffs—that is, the price of the goods sold and delivered by the defendants to the plaintiffs before the commencement of the winding-up.

There is no dispute about the facts as above stated. The defendants are clearly indebted to the plaintiff company now in liquidation in the two sums of 108*l.* 12*s.* 1*d.* and 108*l.* 5*s.* 11*d.* for the price of the goods contracted for before the commencement of the winding-up, but not delivered to them till after the commencement of the winding-up, and as to the second lot not until after the order for winding-up. It is equally clear that the plaintiffs are indebted to the defendants in a larger sum of money for the price of goods sold and delivered by the defendants to the plaintiffs before the commencement of the liquidation. And the sole question is whether, under the above circumstances, the defendants are entitled to set off the latter claim against their debt due to the company in liquidation.

The plaintiffs and defendants stand in a perfectly independent relation to each other, and the ordinary rules of set-off apply to this case.

It seems to me also that it may be admitted for the purposes of this case that the mere fact that the debts, or either of them, which it is sought to set off one against the other, do not or does not become payable until after the commencement of the liquidation, does not interfere with the right of set-off, provided that the debts are in substance and in fact mutual debts, to and from the same parties and in the same interest. And it seems to me that the rights of the parties in this case

will be solved by the true answer to the question, Are the debts which are sought to be set off one against the other mutual debts between the same parties and in the same interest? If it could be correctly stated in the present case that the debt sued for by the liquidating company was a debt incurred and due upon the making of the contract of the 19th of November before the liquidation, although not payable until after the liquidation, the two sets of debts would have been mutual and in the same interest, and could have been set off one against the other.

But in reality no debt was created until the delivery of the goods after the commencement of the liquidation, and the only remaining question is, whether the fact of this delivery having taken place in a certain sense in fulfilment of a contract made before the liquidation gives the debt that character in interest and mutuality that is necessary to make it a subject of set-off against the debt of the company. In determining this question it is necessary to consider the effect upon the company and its operations of a petition for liquidation followed by a subsequent order to wind up.

In the first place the purpose of the winding-up is to make an equable and rateable distribution of all the assets of the company, from the moment of the commencement of the winding-up—that is, the presentation of the petition—amongst all the creditors of the company without favour or preference to any one, according to the legal rights of the creditors and the company at the moment of the commencement of the winding-up. All the assets of the company are to be got in and collected in the most beneficial way, and distributed *pari passu* to all the creditors. In fact, from the moment of the winding-up the company is stopped as an independent going concern. Every transaction entered into by the company from that moment is void unless sanctioned by the Court. No contracts can be executed, nor can the business of the company be carried on in a single particular except for the purposes of winding up, and for the benefit of the creditors; and although the company continues in existence and under the same name, and may, if allowed by the Court, continue to carry on its business

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and enter into or complete transactions, it does so in a new interest and a new capacity, and solely for the purpose of winding up its affairs in the interests of its creditors and shareholders, except in one class of cases which have no application to the present, namely, where transactions *bona fide* executed and carried out between the petition and the winding-up order may, in the discretion of the Court, be ratified and confirmed. The practical effect of the defendant's contention would be that the company by a transaction which is void, unless sanctioned and ratified by the Court, would be paying one creditor in full out of the assets of the insolvent company in preference to all other creditors; such a result may well make one pause before giving effect to such a contention.

Having regard to these considerations, it seems to me that the delivery of the iron by the company subsequent to the commencement of the liquidation, gave rise to a debt due to them in a new capacity and interest, and that such a debt is not liable to a set-off of a debt incurred by nominally the same company when it was carrying on its business independently and for its own benefit.

Judgment for the plaintiffs for
216*l.* 18*s.*

Solicitors—Sharpe, Parkers, Pritchard & Sharpe, agents for Peace, Ackerly & Co., Wigan, for plaintiffs; J. J. & C. J. Allen, agents for J. & H. Gregory, Liverpool, for defendants.

1881. { THE QUEEN v. THE NORTH
Dec. 5. { LONDON RAILWAY COMPANY.
WILSON AND OTHERS (*claimants*).

Lands Clauses Act—Abortive Enquiry—Costs of and incidental to—8 & 9 Vict. c. 18, ss. 34 and 51—Order LV. rule 1.

An inquisition for assessing compensation under the Lands Clauses Act was removed by certiorari into the Queen's Bench Division, and there quashed, on the ground that the under-sheriff had misdirected the jury. A further enquiry was

then held on the same warrant by the sheriff, and compensation was duly awarded to the claimants by the jury:—Held, that the claimants were entitled as well to the costs of and incidental to the abortive enquiry, as to the costs of and incidental to the inquisition which resulted in a good verdict.

The claimants being seised in fee of certain lands and premises in the county of Middlesex, on the 29th of June, 1877, duly gave the North London Railway Company notice, under the Lands Clauses Consolidation Act, 1845, that they claimed compensation from the company in respect of the said lands and premises having been injuriously affected by the company in the exercise of the powers contained in the North London Railway Act, 1874, and other Acts incorporated therewith.

In pursuance of such notice the company, on the 27th of July, 1877, duly issued their warrant directed to the sheriffs of the county of Middlesex, requiring them to summon a jury for settling the question of the compensation to be paid to the claimants, in accordance with the Lands Clauses Consolidation Act, 1845.

On the 13th of August, 1877, the enquiry as to such compensation was held before Mr. Under-Sheriff Burchell and a special jury.

On the 26th of November, 1877, the claimants moved for and obtained a rule calling upon the company to shew cause why a writ of *certiorari* should not issue to remove into the Queen's Bench Division the said inquisition and the verdict and judgment founded thereon; and on the 21st of December, 1877, the said rule was made absolute on the ground that the under-sheriff had misdirected the jury, no order being made as to costs.

On the 17th of January, 1878, the Queen's Bench Division granted a rule calling upon the company to shew cause why the said inquisition, verdict and judgment should not be quashed; and on the 31st of January, 1878, the said rule was made absolute, no order being made as to costs.

Subsequently thereto, the said under-sheriff, under the said warrant, summoned

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a jury for reholding the enquiry into the claimants' said claim, the solicitor for the company raising no objection thereto; and the enquiry was accordingly reheld before the under-sheriff and a special jury, upon the 28th of February, 1878, when the jury assessed the compensation to be paid to the claimants in respect of their claim at the sum of 525*l.*

The said sum of 525*l.* was paid by the company to the claimants, but a dispute arose between them as to whether the costs of and incidental to the first enquiry above mentioned and the said rules and the orders of the Court thereon were to be paid by the company to the claimants as part of the costs of and incidental to the second enquiry.

Application was made on behalf of the claimants to Master Manley Smith, in pursuance of the Lands Clauses Consolidation Act, 1845, to tax and settle such first-mentioned costs, but the Master refused to tax or settle them.

A rule was obtained by the claimants calling on the company to show cause why the Master should not review the taxation of costs.

Dec. 5.—*McIntyre, Q.C.*, for the company, shewed cause.—Sections 34 and 51 of the Lands Clauses Consolidation Act, 1845 (1), apply only to the enquiry where

(1) 8 & 9 Vict. c. 18, s. 34: "All the costs of any such arbitration and incident thereto to be settled by the arbitrators shall be borne by the promoters of the undertaking, unless the arbitrators shall award the same or a less sum than shall have been offered by the promoters of the undertaking, in which case each party shall bear his own costs incident to the arbitration, and the costs of the arbitrators shall be borne by the parties in equal proportions."

Section 51: "On every such enquiry before a jury where the verdict of the jury shall be given for a greater sum than the sum previously offered by the promoters of the undertaking, all the costs of such enquiry shall be borne by the promoters of the undertaking; but if the verdict of the jury be given for the same or a less sum than the sum previously offered by the promoters of the undertaking, or if the owner of the lands shall have failed to appear at the time and place appointed for the enquiry, having received due notice thereof, one-half of the costs of summoning, impannelling and returning the jury, and of taking the enquiry and recording

a final verdict and conclusion has been arrived at. The costs of the first enquiry were not incidental to the enquiry in which the jury found a verdict.

Dec. 12.—*Mellor* (with him *Harris*), in support of the rule, cited the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), ss. 34 and 51 (1), Order LV. (2), *Green v. Wright* (3), *Field v. The Great Northern Railway Company* (4).

DENMAN, J.—During the argument I thought there was some difficulty in coming to the conclusion at which I have arrived on account of the words in section 51, which regulates the question of costs in cases of compensation assessed by juries. At first the use of the words "such enquiry" seemed to point to the conclusion that the costs provided for are limited to the costs of one particular enquiry and one only. But I think this would be too narrow a construction of the Act. In this case a warrant was duly issued by the

the verdict and judgment thereon in case such verdict shall be taken, shall be defrayed by the owner of the lands and the other half by the promoters of the undertaking, and each party shall bear his own costs other than as aforesaid incident to such enquiry."

Section 52: "The costs of any such enquiry shall in case of difference be settled by one of the Masters of the Court of Queen's Bench of England or Ireland, according as the lands are situate, on the application of either party, and such costs shall include all reasonable costs, charges and expenses incurred in summoning, impannelling and returning the jury, taking the enquiry, the attendance of witnesses, the employment of counsel and attorneys, recording the verdict and judgment thereon and otherwise incident to such enquiry."

(2) Order LV. rule 1: "Subject to the provisions of the Act, the costs of and incident to all proceedings in the High Court shall be in the discretion of the Court; but nothing herein contained shall deprive a trustee, mortgagee or other person of any right to costs out of a particular estate or fund to which he would be entitled according to the rules hitherto acted upon in Courts of equity; provided that where any action or issue is tried by a jury the costs shall follow the event, unless upon application made at the trial for good cause shewn the Judge before whom such action or issue is tried or the Court shall otherwise order."

(3) 46 Law J. Rep. C.P. 427; Law Rep. 2 C.P. D. 364.

(4) 47 Law J. Rep. Exch. 662; Law Rep. 3 Ex. D. 261.

The Queen v. North London Rail. Co.

company to the sheriff, and all necessary and proper steps for holding an enquiry before a jury were taken. That enquiry ended in a verdict, but that verdict was set aside, on the ground that the view of the law taken by the assessor was wrong. In consequence the matter came again before a jury on the same warrant, who found that the claimants were entitled to compensation to the amount of 525*l*.

This latter, which was therefore really the operative inquisition, was started by the same warrant as the inoperative enquiry, and I think we are bound to interpret the words "such enquiry" as the enquiry in which the jury find a good verdict, and in which there is no informality. Such a construction seems the more correct if we look at the enumeration in section 52 (1) of certain things as costs within the meaning of section 51, in which the words "incident to such enquiry" throw a light on the previous words. The arguments derived from the decisions under Order LV. (2) do not weigh with me very much, but they shew that incidental costs are all the costs in such cases, and serve to explain the intention of the Legislature with regard to such costs. I therefore think the claimants are entitled to have the rule made absolute.

HAWKINS, J.—I am also of opinion that the claimants are entitled to have the costs as well of the enquiry made abortive by the untenable contention of the company as of the enquiry in which a good verdict was found. The object of the Legislature was, I think, to indemnify a claimant against all costs incurred in substantiating his claim. Section 34 provides for this in cases of arbitration, and section 51 in cases of an enquiry before a jury. The words in section 34 are "all the costs of any such arbitration and incident thereto, to be settled by the arbitrators, shall be borne by the promoters of the undertaking." What are "all the costs of the arbitration"? I take it to mean all the costs rendered necessary to the other side. In section 51 the words are "all the costs," in section 52 "all reasonable costs, charges and expenses incurred in summoning, impanelling and returning the jury, taking the enquiry, the attendance of witnesses, the employment of counsel and attorneys,

recording the verdict and judgment thereon and otherwise incident to such enquiry." Now I think that these costs which the claimants seek to have taxed are incident to the enquiry which was founded on the warrant issued to the sheriff, and was brought to a formal and definite conclusion. It could never have been contemplated by the Legislature that a claimant should pay the costs of an enquiry rendered abortive by an untenable objection. I therefore think that the whole of these proceedings should be taken as one enquiry. The rule will therefore be made absolute.

Rule absolute with costs.

Solicitors—Wordsworth, Blake, Harris & Pearson, for claimants; R. F. Roberts, for defendants.

1881. }
Nov. 16. }

WALKER v. MATTHEWS.

Sale in Market overt—Bona fide Purchase of Stolen Beasts—Costs of Keeping Beasts till Restitution—Conviction of Thief—24 & 25 Vict. c. 96. s. 100.

Defendant bona fide purchased some beasts sold in market overt, which had, in fact, been stolen. On conviction of the thief, the original owner claimed the return of the beasts, the property having re-vested in him by virtue of 24 & 25 Vict. c. 96. s. 100; whereupon the defendant counter-claimed for the cost of their keep between the date of his purchase and the conviction:—Held, that the counter-claim could not be maintained.

This was an action in the Huntingdon County Court, in which the plaintiff claimed two cows and two calves, which he averred that the defendant detained from him, and which he valued at 45*l*.; and he further claimed special damages for their detention by the defendant. There was a counter-claim by the defendant for the keep of the animals and expenses incurred by him while he had them; he gave credit for the milk, but claimed that the expenses were 16*l*. over and above the amount of the credit.

Walker v. Matthews.

The facts were, that on the 7th of June, 1880, the two cows in calf were stolen from the plaintiff's farm. On the 11th of June they were sold in market overt, thirty miles away, to a dealer, who afterwards sold them to the defendant. The plaintiff having traced the cows, demanded them of the defendant on the 21st of June, but he, having bought them *bona fide*, refused to give them up. The thief was subsequently caught, and convicted on the 5th of April, 1881, whereupon notice was given to the defendant and a further demand made by the plaintiff for the cows, which had meanwhile calved. At the trial the plaintiff contended that, as the cows were after sale in market overt the defendant's property, though such property was liable to be divested on conviction of the thief, the defendant could not recover for their keep; but this objection having been overruled by the Judge, a verdict and judgment were entered for the plaintiff on his claim, and for the defendant on his counter-claim.

A rule was then obtained, calling on the defendant to shew cause why the judgment on the counter-claim for the defendant should not be set aside and entered for the plaintiff. Against which

Cockerell shewed cause.—The property re-vested in the plaintiff on the conviction of the thief, by virtue of 24 & 25 Vict. c. 96. s. 100—*Scattergood v. Sylvester* (1); but as the plaintiff was entitled to recover the value of the milk, treating the cows therefore as having been always his, so he is bound to pay for their keep during the time prior to the conviction—*Nickling v. Heaps* (2); or, the defendant was a *bona fide* purchaser after sale in market overt, and had a property which would have enabled him to sell, instead of which he expended money on them. The detention was not a wrongful detention then.

[LOPES, J.—If the cows were then his own property, he cannot claim from plaintiff the cost of keeping them.]

A contract must be implied with the plaintiff to pay, if in the result the property should prove to be in the plaintiff. It is

(1) 15 Q.B. Rep. 506; 19 Law J. Rep. Q.B. 447.

(2) 21 Law Times, 754.

admitted that so soon as the detention became wrongful—that is, after conviction—no such contract could be implied.

Garth, contra, was not called on.

Per CURIAM (GREVE, J., and LOPES, J.).—The appeal must be allowed. The defendant had no right to judgment on the counter-claim.

Rule absolute.

Solicitors—Le Riche & Son, agents for W. A. Watts, St. Ives, for plaintiff; West & White, agents for Wallingford, Day & Wallingford, St. Ives, for defendant.

1882. } THE QUEEN v. BAYLEY;
Feb. 20. } in re MASON v. AIRD.

County Court—Cause remitted from Superior Court, under 30 & 31 Vict. c. 142, s. 10. — *Jurisdiction of County Court Judge*—Power to stay Proceedings.

Where an action of tort has been remitted to a County Court Judge, under section 10 of 30 & 31 Vict. c. 142, and the writ and order duly lodged with the Registrar, the County Court Judge has jurisdiction to order all proceedings in the action to be stayed until payment by the plaintiff of the costs of a prior action against the same defendant in the High Court, in respect of the same matter.

In this case an action for libel had been remitted to the County Court of Middlesex, holden at Westminster, under section 10 of 30 & 31 Vict. c. 142. By that section it is provided that a Judge may, under certain circumstances, "make an order that the cause be remitted for trial before a County Court, to be therein named," and "the County Court so named shall have all the same powers and jurisdiction with respect to the cause as if both parties had agreed by a memorandum signed by them that the said County Court should have power to try the said action, and the same had been commenced by plaint in the said County Court." The County Court Judge, after the order had been made under the above section, and the writ and order lodged with the Registrar as required, was applied to by

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the defendant to stay the proceedings until the plaintiff should have paid the costs of a previous action which he had brought in respect of the same cause of action against the defendant in the Superior Court, in which the defendant had obtained judgment with costs. The County Court Judge granted the application, and stayed all proceedings till those costs should be paid.

The plaintiff thereupon obtained a rule calling upon the Judge to shew cause why he should not proceed to hear and determine the action remitted to his Court.

C. H. Anderson (Sir H. Giffard, Q.C., with him) shewed cause, and cited Moodie v. Steward (1).

Melsheimer, in support of the rule.

FIELD, J.—I am of opinion that this rule should be discharged with costs. It is a rule for a *mandamus* to the County Court Judge to proceed to hear and determine an action in which he has in his discretion made an order that all proceedings should be stayed conditionally until payment by the plaintiff of the costs of his former action. Upon the merits of the case, if we have anything to do with them, I think that he was right, and that his order was founded in justice as well as in form.

But the question is, Was this order within the jurisdiction of the County Court Judge to make? I think it was. There is a distinction between this case and those where the record is kept in this Court, and where the Registrar of the County Court has to certify to us the result of the trial. Those cases remain in this Court, and motions for new trials are made and costs are taxed in this Court. But this is under section 10 of the Act of 1867, which provides that the plaintiff shall take the original writ and lodge it with the Registrar of the County Court; he therefore takes it out of this Court. If there had been two actions, both brought in the County Court, there could have been no doubt that it was competent to the County Court Judge to exercise his equitable jurisdiction, by ordering security to be

given for costs by the plaintiff, or by requiring the payment by him of the costs of the first trial. What is the difference in his position under the existing circumstances? The action was "remitted for trial" to his Court, but such Court is made the tribunal for all purposes, just as if the parties had consented, and as if the action had been commenced there by plaintiff. So the whole jurisdiction of the County Court is imported into the action after the order is once made remitting it. I think it is so on the true construction of an order made under this section, and that this rule must be discharged.

HUDDLESTON, B.—I am of the same opinion. If it were necessary to go into the question of discretion, I should think that the Judge had rightly exercised his; but under section 10 the question of his jurisdiction is raised whether he could make the order at all. I think, after the order remitting it, the case becomes, to all intents and purposes, one in the County Court: it has been, as is said in some of the cases, legally transferred.

BOWEN, J.—I am of the same opinion. I never doubted that when a case was remitted under this section the County Court was clothed with all the authority of the High Court. I thought, however, that it was just possible that there might be one order which the County Court could not make—that is, an order which would not expedite the trial, but stop it. Other stays of proceedings are to further the trial, and secure there being a fair trial at the end. This, on the contrary, although the case has been remitted for trial to the County Court, really stops the trial altogether. I am not prepared to differ from the rest of the Court; but I do not feel so strongly that we are right as do my brothers. In the present case, on the question of discretion, I should not interfere.

Rule discharged.

Solicitors—Smith & Howard, for plaintiff;
the defendant in person.

(1) 40 Law J. Rep. Exch. 25; Law Rep. 6 Exch. 35.

1881. }
Dec. 16. } THE QUEEN v. SLATOR.

Indictment—Information—Corrupt Practices Prevention Act, 1854 (26 Vict. c. 29), s. 7.

On an information for perjury laid by the Attorney-General against a person who has given evidence before a committee or commission for enquiring into corrupt practices, evidence of statements made by the person charged with perjury, in answer to questions put by or before such election committee or commissioners, is inadmissible.

This was a motion to make absolute a rule *nisi* to set aside a verdict of guilty obtained on an information for perjury laid by the Attorney-General against the defendant Slator, and for a new trial, on the ground of the wrongful admission on the trial of evidence of statements made by the said Slator, in answer to questions put to him by or before certain commissioners appointed to enquire into corrupt practices at elections.

The Solicitor-General (Sir Farrer Herschell, Q.C.) (with him The Attorney-General (Sir Henry James, Q.C.) and A. L. Smith), for the Crown, shewed cause against the rule.—It is true that the word used in section 7 of the Act of 1854 (1) is

(1) 26 Vict. c. 29. s. 7: "No person who is called as a witness before any election committee, or any commissioners appointed in pursuance of the Act of the session holden in the fifteenth and sixteenth years of the reign of her present Majesty, chapter 57, shall be excused from answering any question relating to any corrupt practice at, or connected with, any election forming the subject of enquiry by such committee or commissioners, on the ground that the answer thereto may criminate or tend to criminate himself; provided always, that where any witness shall answer every question relating to the matters aforesaid which he shall be required by such committee or commissioners (as the case may be), to answer, and the answer to which may criminate, or tend to criminate him, he shall be entitled to receive from the committee, under the hand of their clerk, or from the commissioners under their hands (as the case may be), a certificate stating that such witness was, upon his examination, required by the said committee or commissioners to answer questions or a question relating to the matters aforesaid, the answers or answer to

"indictment"; but to restrict the meaning of that word so as to exclude information would be to put a technical construction on a word in a general Act which in Scotland has a different technical meaning, instead of construing it in its popular and ordinary sense. That popular sense includes information, as is shewn by the fact that the Criminal Law Consolidation Act uses "indictment" only; and the Legislature could not have intended to make any difference in cases where accessories in misdemeanour become principals and so on, according as they were indicted or informed against.

Sir H. A. Giffard, Q.C. (with him Dugdale), for the respondent.—It is not contended that the word "indictment" has a special technical meaning in this Act, but that it has no other meaning than indictment. Where anything besides indictment is intended to be included in the term, the Legislature expressly says so, as in section 30 of the Criminal Law Amendment Act (14 & 15 Vict. c. 100) (2).

The Corrupt Practices Bill constituted a peculiar tribunal, and has substituted in respect of the same a peculiar course of

which criminated or tended to criminate him, and had answered all such questions or such question; and if any information, indictment or action be at any time thereafter pending in any Court against such witness for any offence under the Corrupt Practices Prevention Acts, or for which he might have been prosecuted or proceeded against under such Acts, committed by him previously to the time of his giving his evidence, and at or in relation to the election concerning or in relation to which the witnesses may have been so examined, the Court shall, on production and proof of such certificate, stay the proceedings in such last-mentioned information, indictment or action, and may, at its discretion, award to such witness such costs as he may have been put to in such information, indictment or action, provided that no statement made by any person in answer to any question put by or before such election committee or commissioners shall, except in cases of indictments for perjury, be admissible in evidence in any proceeding, civil or criminal."

(2) 14 & 15 Vict. c. 100. s. 30: "In the construction of this Act the word 'indictment' shall be understood to include 'information,' 'inquisition' and 'presentment'; . . . and the term 'finding of the indictment' shall be understood to include 'the taking of an inquisition,' 'the exhibiting of an information,' and 'the making a presentment.' . . ."

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procedure for that which is ordinary. A man's right to refuse to answer, if thereby he may criminate himself, is taken away, and he is bound to answer. Provision is made that if he do answer, he shall not be imperilled by having that answer put in evidence against him, except in the course of one particular proceeding, namely, an indictment for perjury—that is, after twelve men have decided that there is a *prima facie* case of perjury against him.

DENMAN, J.—Counsel for the Crown having admitted that if this point is decided against them, it is impossible for them to further resist the making absolute of this rule, I think that the rule must be made absolute for a new trial. The point taken is a very short one, and lies within narrow limits. As a matter of fact, it was not taken until the termination of the first argument of the rule, and then not by counsel, but was suggested by my brother Hawkins, and it was thought right that it should be argued out. I think it is not desirable for us to express any opinion upon the points first argued. So far as the present case is concerned, the point now taken renders those other points unimportant as between the defendant and the Attorney-General. It all turns on the construction of a few words in section 7 of 26 Vict. c. 29. By that section it is in substance provided that no person called as a witness before any election committee or commissioners shall be excused from answering any question relating to any corrupt practice, on the ground that the answer may tend to criminate himself, but if his answer be such as may criminate or tend to criminate him, he shall be entitled to receive a certificate, stating that such witness was required by the said committee or commission to answer. So far the words of the section are not important to this case; but it is further enacted that “if any information, indictment or action be at any time thereafter pending, in any Court, against such witness for any offence under the Corrupt Practices Prevention Acts, or for which he might have been prosecuted or proceeded against under such Acts, . . .

the Court shall, on the production and proof of such certificate, stay the proceedings in such information, indictment or action.” These words are material, as directly pointing out the three well-known and different modes of proceeding, two criminal in their character, and one civil. So far the Act is only contemplating offences committed before the enquiry by the committee or commission, and there is nothing as to perjury committed at that enquiry up to this point. But then come the important words: “Provided that no statement by any person in answer to any question put by or before such election committee or commissioners shall, except in cases of indictments for perjury, be admissible in evidence in any proceeding, civil or criminal.” On behalf of the defendant it is contended that, whilst the words of this proviso are as wide as possible in their application to all answers of whatsoever kind, whether in criminal or civil proceedings, the exception is limited to indictment. In answer to this, it is said that the proviso must be read as though “indictment” meant any criminal proceedings. There are, however, reasons against so reading it, which are, I think, fatal. In the first place, the word “indictment” has a well-known legal meaning. In this country, at least, the modes of criminal proceeding known as indictment and information are distinct and separate. Information is of a twofold character, one granted by the Queen's Bench at the relation of a private person, and the other laid by the Attorney-General *ex proprio motu*, as the officer of the Crown. But these well-known forms of procedure are quite distinct from an indictment, which is clearly described in *Chitty's Criminal Law* (2nd ed.), vol. i. p. 161 (3). The Solicitor-General, however, argued that we ought to put a larger construction on the word “indictment,” because the Act contemplates proceedings in Scotland, and in that country the mode of proceeding called indictment more

(3) Chitty on Criminal Law (2nd ed.), vol. i. p. 161: “An indictment is a written accusation of one or more persons of a crime preferred to and presented upon oath by a grand jury returned to enquire of all offences in general in that county.”

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nearly resembles an information laid by the Attorney-General. But that argument cannot be acceded to so fully as would be necessary to support the contention of the Solicitor-General. If it were shewn that there was no such thing as an indictment in Scotland, it might be an argument for an alteration of the plain meaning of the word "indictment," but there is such a thing, and it would be contrary to the well-known canons of construction were we, without the most cogent reason, not to give a word its well-known meaning, but to construe in some other way. I think that here we must construe the word as meaning one thing in England and another in Scotland, rather than to say that the word means neither the English nor the Scotch indictment, but something different. This would be to legislate, if we were to import an interpretation clause and new enactment into this Act. I think, therefore, that "indictment" is here used with its well-known and ordinary meaning, and that all evidence of answers given before the Commissioners was inadmissible on the trial of this information, and the verdict must therefore be set aside and a new trial had.

HAWKINS, J.—I am of the same opinion. There is, and has long been, a well and universally recognised difference and distinction between an indictment and an information, which is clearly defined in *Burns' Justice* (30th ed.), vol. iii. p. 2. It is clear that, as to enquiries before election commissioners, the ordinary common law right of a person summoned to give evidence to refuse to answer if thereby he would criminate himself is taken away, but that a person so summoned is entitled to a certificate of his having so answered; and then section 7 of 26 Vict. c. 29 provides that "no statement by any person in answer to any question put by or before such election committee or commissioners shall, except in cases of indictment for perjury, be admissible in evidence in any proceeding, civil or criminal."

Now, it is said that we ought to construe the word "indictment" as meaning "any criminal proceeding." But, if that contention be right, what is the reason of the use,

a few words further on, of the term "proceedings, civil or criminal"? It is quite clear that, as regards these, the Act contemplates something other than that intended by the use of the word "indictment." I think we are bound to construe the word "indictment" in its well-known sense, as an accusation found to be well laid by twelve grand jurors, and that, in fact, the word itself excludes a proceeding like an information by the Attorney-General, which is initiated on evidence given without the sanction of an oath. If we look to the four corners of the Act, and not strain the words so as to include an *ex-officio* proceeding as against a man who has been compelled to give the answers which it is sought to bring in evidence against him, we shall see that, by using the words "indictment or information," a few lines before, the Legislature clearly intended by the use of the word "indictment" that which is generally understood to be the meaning of the word by all lawyers. We are not at liberty to amend the Act, but must construe and use the words in their ordinary sense, and not strain them in support of the prosecution.

BOWEN, J.—The distinction between indictment and information is well-known. There are two great ways of prosecution—one indictment on the finding of twelve men that there is a *prima facie* case made out against the person charged; the other information, which is two-fold, according as the initiative is taken by the Crown *ex proprio motu*, or by the Crown at the relation of a private person. It is asked by counsel for the Crown that we should construe the word "indictment" as including information—that is, that species A, so to speak, includes species B; but the contention fails if it be not shewn that, in some popular and well-recognised sense, "indictment" does include "information." It has no such popular sense among lawyers, and the sense it may have among those ignorant of legal matters must be immaterial. It was also remarked upon that this point was not noticed till the arguments were finished. But a blot is no less a blot, because it is not hit, or only discovered late in the day. Three lines higher up the Legislature uses indictment as distinct from information. But it is said that to

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so construe it here would be an anomaly, as the word has a different meaning in Scotland from the meaning it has in England. This argument loses all force unless it could be shewn that in Scotland indictment meant nothing in the nature of a criminal proceeding. But in Scotland it has a meaning proper to itself, and I think, as regards Scotland, the word must have its Scotch meaning, and in England its English meaning. There has, therefore, no doubt, been a mis-trial here, and the rule must be made absolute for a new trial.

Rule absolute for new trial.

Solicitors—Solicitors to the Treasury, for the Crown; Collyer-Bristow, Withers & Russell, agents for Millington & Simpson, Boston, for defendants.

[IN THE COURT OF APPEAL.]

1882.
Feb. 24, 25, 27.
March 2.

THE LAW SOCIETY OF THE
UNITED KINGDOM v.
SHAW AND ANOTHER.
THE SAME v. WATER-
LOW AND OTHERS.*

Solicitor and Proctor—Unqualified Person acting as—Proceeding in the Court of Probate—Action for Penalties—23 & 24 Vict. c. 127. s. 26.

By 23 & 24 Vict. c. 127. s. 26, every person, not duly qualified, who in his own name or in the name of any other person, or in any wise acts as a proctor in or with respect to any proceeding in the Court of Probate, is made liable to a penalty.

The defendants, law stationers, licensed to sell stamps, but not qualified to act as solicitors or proctors, receive from solicitors, both in London and in the country, wills to copy and engross; the solicitor at the same time sends to the defendants the documents required for the purpose of obtaining probate, and also a letter of instructions. The defendants, in accordance with these instructions, send the wills and other necessary documents to the Probate registry, leave them there and take a re-

ceipt for them; this receipt, like all the papers, bears the name of the solicitor. If any question arises as to the documents so left, the defendants communicate with the solicitor; if the documents are satisfactory, the defendants after the lapse of a few days call at the registry, produce the receipt and receive the grant of probate. The defendants pay a charge for the necessary stamps, and transact the business by a clerk or messenger. They only charge the solicitor a messenger's fee for the time occupied in going to and attending at the Probate registry.

In an action for penalties, under 23 & 24 Vict. c. 127. s. 26,—

Held, that the defendants did act with respect to a proceeding in the Court of Probate, but that they did not contravene the provisions of the statute, for that they did not act as proctors in their own name or in the name of any other person.

Appeals of the defendants, in both cases, from the judgment of Grove, J., at the trial without a jury.

The plaintiff society sued, with the sanction of the Attorney-General, for penalties, on the ground that the defendants acted as proctors with respect to Probate proceedings in the Probate Division, although they were not qualified to act as attorneys or solicitors or proctors, pursuant to 6 & 7 Vict. c. 73. s. 2 (1), and 23 & 24 Vict. c. 127. s. 26 (2).

(1) 6 & 7 Vict. c. 73. s. 2: "No person shall act as an attorney or solicitor, or as such attorney or solicitor sue out any writ or process, or commence, carry on, solicit or defend any action, suit or other proceedings in the name of any other person or in his own name, . . . in any Court of civil or criminal jurisdiction . . . or act as an attorney or solicitor in any cause, matter or suit, civil or criminal . . . unless such person shall have been . . . admitted and enrolled and otherwise duly qualified to act as an attorney or solicitor . . . and unless such person shall continue to be so duly qualified and on the roll at the time of his acting in the capacity of an attorney or solicitor as aforesaid."

(2) 23 & 24 Vict. c. 127. s. 26: "Every person who acts as an attorney or solicitor, contrary to the enactment in section 2 of the first hereinbefore mentioned Act"—that is, 6 & 7 Vict. c. 73—"or who in his own name or in the name of any other person, in any wise acts as a proctor in or with respect to any proceeding in the

* *Coram* Brett, L.J.; Cotton, L.J.; Holker, L.J.

The Queen v. Sator.

nearly resembles an information laid by the Attorney-General. But that argument cannot be acceded to so fully as would be necessary to support the intention of the Solicitor-General

were shewn that there was nothing as an indictment might be an argument of the plain meaning, but there would be contraventions of canons of construction the most cogent in its well-known

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the course of business of defendants is as follows:—
“Solicitors practising in the country forward to the defendants original wills, for the purpose of being engrossed on parchment in order to obtain probate.
“Accompanying the will is a letter of instructions to the defendants to perform the acts hereinafter mentioned as being performed by them, also the document called the ‘oath’ and the ‘affidavit’ in the form hereunto annexed, and marked ‘A’ and ‘B.’
“In accordance with such instructions the original will and the engrossed copy, together with the ‘oath’ and ‘affidavit,’ are sent by a clerk or messenger in the employ of the defendants to the principal registry office at Somerset House. The defendants provide the necessary Inland Revenue stamps to discharge the fees payable at the registry office—the defendants being licensed dealers in stamps—a clerk in the registry office gives to the defendants’ clerk or messenger a stamped receipt for the above-mentioned documents, which are left in the name of the solicitor, and not in the name of the defendants, and the receipt so states. At the end of two days the clerk or messenger calls, in order to be

Court of Probate or the Court for Divorce and Matrimonial Causes, without being duly qualified so to act, . . . shall, in addition to any other penalty or forfeiture and to any disability to which he may be subject, forfeit and pay for every such offence the sum of 50*l.*, to be recovered with full costs of suit by action brought with the sanction of Her Majesty’s Attorney-General in the name of the Incorporated Law Society”

a few words

the documents are in order the clerk or messenger within one or two days on production of the receipt, the question should arise as to the correctness or sufficiency of the documents, such question is communicated to the clerk or messenger, and by him to the defendants, who inform the solicitor from whom they received the documents thereof. When a satisfactory reply is given, the same procedure is observed as before. Throughout all the proceedings the name of the solicitor from whom the document is received alone appears. The defendants have pursued this course, with the knowledge of the officials at Somerset House, for some years. Upon the second visit of the clerk or messenger, he, if the documents are satisfactory, hands in a stamped form, purchased from the Commissioners of Inland Revenue and paid for by the defendants’ cheque. The defendants make a charge, and in making this charge they only calculate the time occupied by the clerk or messenger in his visits to the registry and stamp office. In all cases the country solicitor is also a customer in the defendants’ stationery business. The messenger or clerk has had no legal training, but is apprenticed to the defendants as law stationers. In some of the cases in the statement of claim the solicitor charges the full fee allowed by the Probate Court to his client for obtaining grants of probate; in other cases the solicitor charges only the sum paid to the defendants.”

Grove, J., gave judgment for the plaintiff society.

The defendants in both cases appealed.

Clarke, Q.C. (with him *Brenner*), for the defendants, in the first case.—Admissions have been agreed on in this case, and it is submitted that they shew that the defendants—Shaw and Blake—who act only for solicitors living in London, have not done anything which brings them within the provisions or the mischief of the statutes which relate to this matter. Those statutes are 22 Geo. 2. c. 46. s. 12, 6 & 7 Vict. c. 73. s. 2 (1); and 23 & 24 Vict. c. 127. s. 26 (2). The decision of the learned Judge, who tried the case

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without a jury, is that the defendants have acted as proctors within the meaning of the last-mentioned Act; but it is submitted that the statute points to proceedings other than the mere registration of documents. The defendants prepare nothing and exercise no discretion; their clerk acts merely as a messenger and is paid as such; he exercises no skill and no judgment, and does nothing which any ordinary casual messenger could not do—*Ex parte Whatton* (3), *In re King* (4), *In re Garbutt* (5) were cited.

The Attorney-General (Sir H. James, Q.C.) (with him Willis, Q.C., and Finlay, Q.C.), for Messrs. Waterlow, the defendants in the second case.—It is submitted—first, that taking out probate is not within section 26 of 23 & 24 Vict. c. 127 (2); secondly, that even if taking out probate is within that section, still that the acts done by the defendants do not come within the section; thirdly, that the defendants have not acted in the name of any other proctor, nor in their own name, so as to make them liable to a penalty. The judgment of Grove, J., rested on the ground that the defendants had acted as proctors. 23 & 24 Vict. c. 127 (2), according to the recital, was passed to amend 6 & 7 Vict. c. 73 (1), an Act relating to solicitors alone. The reason for extending the provisions of that Act was that the Probate Court had in the meantime come into existence, and the Act was therefore made to extend to both solicitors and proctors. Section 26 (2) deals with “solicitors” and “proctors.”

It becomes, therefore, important to consider the position of a proctor before 6 & 7 Vict. c. 73. In *Richards v. Lord Suffield* (6) it was held that section 2 of 6 & 7 Vict. c. 73 (1) applied to litigious business only—that is, only to business in Court, as distinguished from any other business, and it was held that it must be shewn that the person was an attorney within the provisions of section 2 (1). That section was directed at suits and proceedings between the parties to those suits, and the intention of the later Act was to bring proctors within the conditions applying to solicitors.

(3) 5 B. & Ald. 824.

(4) 1 Ad. & E. 560.

(5) 9 Moo. 157.

(6) 2 Exch. Rep. 616; 17 Law J. Rep. Exch. 362.

Sections 8 & 9 of 53 Geo. 3. c. 127 bear upon this point, and it is to be remarked that in section 9 the words “probate of wills,” which appear in section 8, are omitted. Sections 9 & 10 of 54 Geo. 3. c. 68, an Irish Act, are identical, and *Stephenson v. Higginson* (7), which was decided on those sections, is very nearly in point in this case. There Higginson did more than the defendants have done in this case, and yet it was held that no penalty had been incurred. In order to make the defendants liable they must have done acts which appertain and are legally incident to the office of a proctor.

[BRETT, L.J.—Do we rightly understand that case to decide that section 10 of the Irish Act does not include things mentioned in section 9?]

That is the decision. The proctors are brought into the section, not for the purpose of extending the prohibitory enactments, but merely because the Probate Court was established. Before 33 & 34 Vict. c. 97. s. 60, which is not directly in point, but only so by analogy, no penalty was imposed for drawing instruments. Then the words of 40 & 41 Vict. c. 62. s. 2, (8) as to taking instructions for, or drawing or preparing any papers on which to get a grant of probate or letters of administration, are important. The effect of that Act is to declare that such things might formerly have been done.

It appears from the admissions that the defendants have done far less than Higginson did; and, under the Act of 1870 (33 & 34 Vict. c. 97), s. 60, might even have drawn wills themselves; but the question is whether what the defendants do comes within section 26 of 23 & 24 Vict. c. 127 (2). It is admitted that they have not done the acts in their

(7) 3 H.L. Cas. 638.

(8) 40 & 41 Vict. c. 62. s. 2: “Any surrogate or other person, not being a qualified practitioner, who for or in expectation of any fee, gain or reward, either directly or as the agent of any other person, whether a qualified practitioner or not, takes instructions for or draws or prepares any papers on which to found or oppose a grant of probate, or of letters of administration, shall be guilty of an offence within the meaning of the 12th section of the Attorneys and Solicitors Act, 1874; but nothing in this section contained shall be construed to affect any remedy against any such person under any other Act or Acts whatsoever.”

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own name, but it is said that they have infringed the law in some other person's name; and if they have obtained probate in the name of a solicitor, that is an offence for which a penalty can be claimed. In order to be liable for the penalty the defendants must have acted as proctors, whereas they have not done so, and *Stephenson v. Higginson* (7) applies on this point. The question, therefore, is, whether obtaining probate is a proceeding within the section. The rules of the Probate Court define non-contentious business (9). Rule 2 (9) enables an application to be made "through" and not "by" a solicitor; if the latter word had been used, it might mean that the application must be made "in person," but the evident meaning of the rule is that an agent may be employed. *Green v. Reece* (10) was cited.

Sir H. Giffard, Q.C. (with him *G. Fitzgerald* and *R. T. Reid*), for the plaintiff society.—The question turns on the construction of the rules made under section 30 of 21 & 22 Vict. c. 22 (9). The subject divides itself into two heads—first, what is the thing done? and, secondly, who is the person who does it? First, the thing done is the obtaining of probate; it is a proceeding in the Court of Probate, and one which, except in the case of an executor himself, must be done by a qualified person. If that proposition be proved to be established by law, then *Stephenson v. Higginson* (7) is quite beside the present question. Moreover, it

(9) "Rules for the registrars of the principal registry of the Court of Probate, made under the provisions of the statutes 20 & 21 Vict. c. 77 and 21 & 22 Vict. c. 95, in respect of non-contentious business:—

"1. Application for probate or letters of administration may be made at the principal registry in all cases.

"2. Such applications may be made through a proctor, solicitor or attorney, or in person by executors and parties entitled to grants of administration; but these latter applications will not be received by letter, nor through the medium of any agent.

"3. The registrars are not to allow probate or letters of administration to issue until all the enquiries which they may see fit to institute have been answered to their satisfaction. The registrars are, notwithstanding, to afford as great facility for the obtaining grants of probate or administration as is consistent with a due regard to the prevention of error or fraud."

(10) 8 Com. B. Rep. 88.

was decided on the particular circumstances of the case, and in relation to ecclesiastical practice in an Irish diocese. No one can now perform these acts except a qualified person. By section 45 of 21 & 22 Vict. c. 77, solicitors were for the first time entitled to practise in the Probate Court. Then the rules (9) made under that statute shew what the practice must be. Rule 2 is decisive of the first question as to what is the thing done. An executor may himself go and obtain probate; but he can only obtain it himself or through an agent—that is, a qualified person. The word "application" means the actual going with the documents themselves to Somerset House.

[BRETT, L.J.—If "application" means "personal presence" an executor could not send his servant; but could a solicitor send his clerk?]

He could do so if the relation of master and servant existed between him and his clerk; for whatever may be done by a solicitor can be done by a qualified agent. The act of sending to the office and asking for these documents is acting as a solicitor. The rules shew that this, although it is non-contentious business, must be done with particular care, and the Legislature contemplated that it should be done by a qualified person.

Next, as to the person who does the thing. It must be done by a qualified person—that is, qualified in the terms of the statute. A different certificate is required for persons practising in London from that which country solicitors take out; here the papers are in some cases sent up to the defendants in town, and if they are not acting as proctors, then the persons sending them up to town are acting as proctors in town without having the proper certificate. A London agent must have a London certificate. This question depends on 33 & 34 Vict. c. 97.

Willis, Q.C., in reply.

Cur. adv. vult.

BRETT, L.J. (on March 2).—The question raised for our decision by these appeals is whether Messrs. Waterlow or the other defendants are liable to the penalties imposed by section 26 of 23 & 24 Vict. c. 127 (2). The question is raised on admitted facts, and we have to decide whe-

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ther, assuming those facts to be true, Messrs. Waterlow or the other defendants have acted as proctors "in or with respect to any proceeding in the Court of Probate." It appears to me that the admitted facts are substantially as follows: Messrs. Waterlow—to take one set of defendants—are law stationers; they are persons entitled to sell stamps; they are persons who, as law stationers, engross certain documents and copy certain other documents; they have solicitors and proctors who employ them both to engross and to copy documents. Now these persons who so employ them are persons who carry on business—some in London and others in country; they send to Messrs. Waterlow wills to be engrossed, and with the wills they send documents, which are documents necessary for the purpose of obtaining probate of a will—that is to say, affidavits and other documents. When a will has been engrossed Messrs. Waterlow then take the original will and the other necessary documents to the registry of the Probate Court; if all these documents are satisfactory and in order, they are left for a time in the name of the solicitor or proctor, and a receipt is taken for them in the name of that solicitor or proctor. The Registrar examines the documents, exercises his discretion on them, and if they are satisfactory, he gives the probate to Messrs. Waterlow, who send it to those who employ them; if the documents are not satisfactory, the Registrar makes certain requisitions, which are sent by Messrs. Waterlow to the solicitor, who makes the necessary enquiries, and sends any further documents required to Messrs. Waterlow, who again send to the registry and then receive the grant of probate.

In these proceedings Messrs. Waterlow are not paid the fee which a proctor or solicitor would receive, nor do they receive any sum resembling such a fee; they charge their employers only for the time spent in going to and from or in waiting at the Probate registry. The question then is whether, these being the circumstances, the defendants are liable to the penalties imposed by the statute to which reference has been made.

It was urged in argument, indeed, that even though the facts stated amounted to a proceeding in the Court of Probate,

nevertheless the defendants would not be liable because the provisions of section 26 (2) only apply to things done which can be called contentious business. Then, a case of *Stephenson v. Higginson* (7), which was a decision on certain provisions of an earlier Irish statute relating to solicitors and proctors, was cited, and it was urged that that decision laid down the principle contended for in argument. It is, however, to be observed that the statute constituting the Probate Court came into force subsequent to that decision, and before the passing of the statute which we are now considering. By the rules of Court made for the Court of Probate, obtaining probate has been declared to be an application which may be "made through a proctor, solicitor or attorney or in person by executors." Now the ground of the decision in *Stephenson v. Higginson* (7) was, that what had there been done could be done by a person who was not a solicitor or proctor; and thus the reason of that decision does not apply to the present case. As it seems to me, the defendants did, in fact, do the last act which was necessary for obtaining probate; and as obtaining probate is a proceeding in the Court of Probate, the defendants have, in fact, done an act in that which is a proceeding in the Court of Probate. Section 26 of 23 & 24 Vict. c. 127 says that every person "who, in his own name or in the name of any other person, in any wise acts as a proctor in or with respect to a proceeding in the Court of Probate," shall be liable to a penalty. Now, in my opinion, what this section strikes at is that a person should not act as a proctor for himself, either in his own name or in the name of any one else, if he is not duly qualified; and, as it seems to me, it does not apply to the case of a person who does not act for himself, but who is only an agent for a solicitor, with whose authority and consent, and in whose name, he acts. The defendants act for a solicitor as mere agents, in the name, with the authority and with the consent of that solicitor, and do not act, in any sense, as proctors on their own behalf. If, indeed, the defendants were to act as partners with a solicitor, and were to receive benefit from so acting in partnership, then they would, in fact, be acting for themselves,

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and they might well be liable to the penalty imposed by section 26 of 23 & 24 Vict. c. 127 (2); but, in my opinion, the circumstances of this case do not shew that the defendants are in any way so acting as partners. The defendants are only paid as messengers, and receive that kind of fee, so that they cannot be said to be partners with the solicitor. We have to construe a penal statute, and I do not think we ought to hold that these defendants come within its provisions. It seems to me that the statute was intended to hit persons who, being not qualified, practise deception and impose upon the Court. That is sufficient to decide this case, and it is not necessary to go farther; but, as reference has been made to a more recent statute—40 & 41 Vict. c. 62 (8)—I may say that the defendants, on the facts of these cases, do not come within the provisions of this statute any more than they fall within the provisions of the statute under which this action is brought; but, that if they go further and do more than they appear on these admissions to have done, if they were to draw documents and prepare affidavits necessary for obtaining probate, then they would be liable to the penalties imposed by 40 & 41 Vict. c. 62 (8); but that, as I have said, they are not liable on the facts as confined within the limits of this case. The appeal must be allowed, but we do not consider that we are differing from any opinion entertained by Mr. Justice Grove, as it is clear that he was requested to give what was, in fact, a formal judgment, and that he did not express his considered view of the statute.

COTTON, L.J. — These cases turn on 23 & 24 Vict. c. 127. s. 26 (2) alone, and I do not think it necessary to consider the earlier or later statutes to which reference has been made, and which have been cited for the purpose of illustrating the particular section under consideration. The first question is, whether the proceeding referred to is a proceeding in the Court of Probate. In my opinion it is such a proceeding. It is an application on behalf of executors to obtain probate. One of the papers sent in is a paper which states that the executor desires to get probate, and it is headed "In the High Court of Justice,

Probate, Divorce and Admiralty Division (Probate), the principal registry," so that it is a proceeding in the Court in which a grant of probate is obtained. Then the question arises whether these defendants have acted as proctors within the meaning of the statute. Now I am of opinion that if any persons were to do on their own behalf what the defendants have done for other persons, they would, in fact, be acting as proctors in the Court of Probate. They would then be applying for probate, and the rules of the Court direct that applications for probate "may be made through a proctor, solicitor or attorney, or in person by an executor." In my opinion, then, any one, not being an executor in person, who applies for probate, and does what that implies on his own behalf, does, in fact, act as a proctor in the Court of Probate. It was urged that the rules of the Court of Probate cannot make a person liable to the penalties of a statute that is so; but I am of opinion that, however that may be, the rules can prescribe what the Court desires should be done exclusively by a proctor or solicitor.

It was then urged that the provisions of section 26 of 23 & 24 Vict. c. 127 are confined to contentious business, and that there is an authority in the House of Lords to that effect. Of course, if that authority were in point I should accede to it at once; but I am of opinion that it was a decision prior to and independent of the probate rules, and that it does not apply to the case now before us. It was then said that proceedings in the Court do not commence until there is some opposition to the grant of probate. I cannot agree. There are, both in the Chancery Division and in the Court of Probate, many cases in which there is no opposition, and yet they are all proceedings in the Court, so that a person may act in non-contentious proceedings, and yet act as a proctor in a proceeding in the Court. The question then remains whether these defendants have so acted as to be liable to the penalties imposed by this statute. I am of opinion that it would be a wrong construction of the statute to hold that they have so become liable. The statute does not apply to a person who thus acts *bona fide* and by the authority of a duly qualified practitioner. I had at one time some doubt whether a mere

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messenger could properly represent a solicitor in proceedings such as these; but that is a question for the Court of Probate and not one for us to decide.

I would add one word as to the different circumstances of the two cases now before us. In one case the defendants act for London solicitors only; in the other they act for country solicitors as well. I do not think that in either case the defendants are liable in these actions. I do not give any opinion as to whether country solicitors who have not taken out a London certificate may or may not be liable on that account; and I would add, by way of caution, that if the defendants, nominally acting as messengers for solicitors, were really to act on their own behalf and to receive a share of the profits, they would then be liable to the penalty imposed by the statute.

HOLKER, L.J.—I am of the same opinion; and as the matter has been fully dealt with in the judgments which have been delivered, I do not think it necessary to add much. The two cases are practically the same in their circumstances. They both turn on the provisions of a statute, which enacts, in effect, that persons who act as proctors in proceedings in the Court of Probate without being duly qualified shall be liable to certain penalties. It may be that the statute in question was intended to meet such a case as the present. It may be that the object of the statute was to enforce the provisions contained in the rules made for the Court of Probate, which direct that applications for grants of probate must be made either by proctors or solicitors, or by the parties themselves. I am however of opinion that the defendants have not acted as proctors either in their own names or in the names of other persons. It is admitted on all sides that if a solicitor were to employ an office-boy to do what the defendants have done no objection could be taken. Can it, then, make any difference if a solicitor employs the defendants, who send one of their clerks to take the papers necessary to the registry? It is clear that Messrs. Waterlow and the other defendants do not act in their own names: they act solely and entirely under the authority, in the name, by the instructions and with the consent

of the solicitors who employ them. The defendants do nothing more than any messenger might do; and they are therefore not liable in this action.

Appeal allowed.

Solicitors—C. O. Humphreys & Sons, for plaintiffs; Ashurst, Morris & Co., for defendants Shaw and another; Layton, Son & Lendon, for defendants Waterlow and others.

1881. }
Nov. 19. } HALE AND ANOTHER v. BOUSTEAD
Dec. 20. } AND OTHERS.

Jurisdiction—High Court—Bankruptcy Court—Claim for Fraud—Declaration against Trustee in Liquidation of Right of Proof.

In an action against certain of the defendants for advances obtained by fraud, a declaration may be claimed against another defendant, the trustee in liquidation of such defendants, that the plaintiffs are entitled to prove for the amount of such advances either against the joint estate of the liquidating debtors, or their separate estate, as they may elect.

Demurrer to the statement of claim by the defendant Arthur Cooper, so far as it related to any claim against him.

The statement of claim alleged that the defendants, Boustead and Ridley, falsely and fraudulently represented that they were owners of certain estates in Ceylon, with intent to obtain advances from the plaintiffs, which advances were made on the faith of such representations; that the said defendants, in July, 1879, instituted proceedings for liquidation by arrangement, and that the defendant Arthur Cooper was appointed trustee of their joint and separate estates; and claimed the advances so made from the defendants Boustead & Ridley, and a declaration that the plaintiffs are entitled to prove for the amount of the said advances and interest at five per cent. to the date of the said liquidation, either against the joint estate of the said liquidating debtors, or against the separate estate, as they may elect.

Hale v. Boustead.

J. Thompson, for the demurring defendant.

The Solicitor-General (Sir Farrer Herschell) (*Moulton* with him), for the plaintiffs.

The arguments sufficiently appear from the judgment.

CAYE, J., delivered the following judgment on Dec. 20 :—

In this case the plaintiffs bring an action against Boustead and Ridley and their trustee, claiming as against the two former defendants a judgment for the amount of certain advances made by the plaintiffs to those defendants, and a declaration that those advances were obtained by fraud, and as against the trustee a declaration that they are entitled to prove for the amount of those advances either against the joint estate of the liquidating debtors or their separate estate, as they may elect. The trustee has demurred, on the ground that the claim discloses no ground of action as against him.

In *The Emma Silver-mining Company v. Grant* (1), a case which in its facts was not very dissimilar to this, the plaintiffs brought an action against Grant to make him liable for a secret profit he had made on the sale of a mine to the company which he had formed for its purchase. After a specific sum had been found due from him to the plaintiffs on that footing, Grant presented a petition for liquidation, and the trustee having been joined as a defendant by order of revivor, the plaintiffs moved for and obtained judgment against the trustee that they should be at liberty to go in and prove under the liquidation for the specific sum found due, and also against Grant for payment of the debt or so much thereof as should not be received by the company under the liquidation. This appears to me to involve the proposition that upon the facts alleged the plaintiffs in this action may obtain some relief against the trustee. It is said that the right of the plaintiffs to relief against the trustee was not questioned in *The Emma Mining Company's Case* (1), but I find that Mr. Whitehorne, on behalf of the trustee, did submit that the Court had

no jurisdiction to give leave to prove, and the notice of motion was altered so as to ask that the plaintiffs should be "at liberty to go in and prove" instead of "admitted to prove."

Then is there any authority the other way? Mr. Thompson, who argued the case very ably for the trustee, says that there is, and refers me to *Barter & Co. v. Dubeux & Co.* (2), but that case does not decide that no relief can be given in this Division in such an action as the present, but only that the trustee under the circumstances of that case ought not to have been joined as a defendant under Order L. rule 2, because the only relief which could be given against him would be more properly given in the Court of Bankruptcy. It is obvious that it is quite one thing to say that a discretion to join the trustee, which is only to be exercised if it is deemed necessary for the complete settlement of all the questions involved in the action, was wrongly exercised in a particular case, and quite another thing to say that when an action for advances obtained by fraud is brought against a liquidating debtor in the High Court no relief can be obtained against the trustee who is a party to the action.

If it is objected that this decision will enable litigants to prove their debt in the High Court instead of the Bankruptcy or County Court, the answer is that the trustee may move the Bankruptcy Court to restrain the action so far as he is concerned. It may be, looking at the cases of *Ex parte Smith*; *in re Collie* (3) and *Ex parte Coker*; *in re Blake* (4), that such an application would not meet with success in all cases, but that is an argument rather against than in favour of the demurrer.

There must be judgment for the plaintiffs with costs.

Judgment for the plaintiffs.

Solicitors—Linklater, Hackwood, Addison & Brown, for plaintiffs; Hollams, Son & Coward, for defendants.

(2) 50 Law J. Rep. Q.B. 527; Law Rep. 7 Q.B. D. 413.

(3) 45 Law J. Rep. Bankr. 116; Law Rep. 6 Ch. D. 51.

(4) 44 Law J. Rep. Bankr. 126; Law Rep. 10 Chanc. 652.

(1) 50 Law J. Rep. Chanc. 449; Law Rep. 17 Ch. D. 122.

[IN THE COURT OF APPEAL.]

1882. } YORK TRAMWAYS COMPANY
 March 20, 21. } (LIMITED) v. WILLOWS.*

*Company — Articles of Association—
 Board to be appointed by Subscribers—
 Appointment of Quorum—Qualification—
 Casual Vacancy—Estoppel—Allotment of
 Shares.*

By the articles of association the business of a company was to be managed by a board, which was to consist of the directors for the time being, or a quorum of such directors assembled at a meeting constituting a board for the transaction of business. The number of the board was not to be less than three, nor more than seven. The first directors were to be determined by the subscribers to the memorandum of association, and until the directors were appointed the subscribers were to be the directors. The first directors had power to add any persons to their number, within a certain time, provided the total number of the board did not at any time exceed seven. No person, except the first directors and such persons as were added to their number, was qualified to be a director, unless he was the registered holder of shares of a certain value for at least three months. Any casual vacancy in the board was to be filled up by the board, which was empowered to continue to act notwithstanding such vacancy. The board was also empowered to determine the quorum necessary for the transaction of business. All acts of the board, or of any person acting as one of the board, were to be valid, notwithstanding the discovery afterwards of any defect in the appointment or qualification of any of the board.

Four out of seven of the original subscribers only were present at the first meeting of the company; three of their number were elected first directors, and a resolution was passed that two of such directors should form a quorum. At the next meeting of the board, F., H. and E. were appointed directors, and at a subsequent meeting the resignations of the three original directors were accepted. F. shortly afterwards sent in his resignation by letter. At a meeting of the board on the 28th of October, 1880, at which H. and E. were the

* *Coram* Lord Coleridge, C.J.; Brett, L.J.; Holker, L.J.

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only directors present, fifty shares were allotted to the defendant; F.'s resignation was accepted, and the defendant was appointed director to fill up the casual vacancy caused thereby. The defendant joined the board, and on the 15th of November acted as a director, confirming, amongst others, the resolution passed at the previous meeting allotting fifty shares to him. In an action for calls on the shares allotted to the defendant:—

Held,—that the first directors had been properly appointed by four out of seven subscribers to the memorandum of association; that the quorum appointed by the subscribers at the first meeting was not properly appointed, and ought to have been appointed by the board; that the defendant having been added to the board by the first directors, was duly qualified to be a director without being the registered holder of shares for the period of three months;

Held (per LORD COLERIDGE, C.J.; BRETT, L.J.; HOLKER, L.J., diss.),—that the defendant, in the absence of any proper quorum, was duly appointed by a majority of the board, namely, two out of three, to fill up the casual vacancy caused by F.'s resignation; and that the allotment of shares to the defendant on the 28th of October was a valid allotment;

Held (per BRETT, L.J.),—that what took place at the meeting on the 15th of November amounted to an allotment of the shares to himself by the defendant, who was therefore estopped from saying that they had not been allotted to him.

*Appeal by the defendant from a judgment of Manisty, J., at the trial without a jury, in an action to recover 500*l.* due on fifty shares which had been allotted to the defendant in the plaintiff company.*

The company was constituted by the signing, by seven subscribers, of the memorandum and articles of association, which, so far as material, are as follows:—

Article 2. “‘The board’ shall mean the directors for the time being, or, as the case may be, a quorum of such directors assembled at a meeting thereof, constituting a board for the transaction of business.”

Article 62. “The business of the company shall be managed by the board. . . .”

2 I.

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Article 66. "The office of any one of the board shall (subject as hereinafter mentioned) be vacated, if he delivers to the board or to the secretary a notice in writing of his resignation of his office of director . . . provided that there shall be a resolution of the board to the effect that such vacation of office shall take place, in passing or not passing which resolution the board shall have full discretion."

Article 68. "The number of the board shall not be less than three, nor more than seven."

Article 69. "No person, except the first directors and such persons as may be appointed by them under the next clause, shall be qualified to be a director who is not the registered holder of shares in the company of the nominal value of 100*l.*, and who has not been the holder of such shares for at least three months."

Article 70. "The first directors shall be determined by the subscribers to the memorandum of association. Until directors are appointed the subscribers to the memorandum of association of the company shall be the directors of the company. The first directors shall have power to add to their number any other person or persons at any time before the third ordinary general meeting, but so that the total number of the board shall not at any time exceed seven. The first board, and those who may be added to their number, as in the present clause provided, shall continue in office, unless they die, or resign, or become disqualified, until the third ordinary general meeting . . ."

Article 72. "Any casual vacancy occurring in the board may be filled up by the board. The continuing board may act notwithstanding any vacancy in their body."

Article 74. "The board may meet together for the despatch of business, adjourn and otherwise regulate their meetings as they think fit, and determine the quorum necessary for the transaction of business. . . ."

Article 76. "The board shall cause minutes to be made, in books provided for the purpose, of the following matters—namely, of all appointments of officers, servants and sub-committees made by the board; of the names of the persons present at every meeting of the board, and of all

orders, resolutions and proceedings of all general meetings and of the board. All acts done by a meeting of the board, or by any person acting as one of the board, shall, notwithstanding that it be afterwards discovered that there was some defect in the appointment of any of the board, or of such person acting as aforesaid, or that they, or any of them, were or was disqualified, or had in any way vacated their or his office, be as valid as if every such person had been duly appointed and was duly qualified."

At the first meeting of the company in January, 1879, at which four only out of the seven subscribers were present, three of their number were elected first directors, and then it was resolved that two of such directors should form a quorum. At a meeting of the board held in May, 1880, Fry, Heseltine and Everitt were appointed directors; and at a subsequent meeting of the board in June, 1880, at which Fry and Everitt were present, a resolution was passed accepting the resignation of the three subscribers who had been appointed first directors at the meeting in January, 1879. On the 16th of August, 1880, Fry, being one of the three directors, wrote resigning his seat on the board. On the 26th of October, 1880, the defendant applied by letter for fifty shares, and at a meeting of the board on the 28th of October, 1880, Heseltine and Everitt, who were the only two directors present, allotted fifty shares to the defendant, and having at the close of the meeting accepted Fry's resignation, resolved further that the defendant be elected a director to fill up the casual vacancy caused by such resignation.

At a meeting of the board, held on the 15th of November, 1880, at which Heseltine, Everitt and the defendant were present, the minutes of the meeting held on the 28th of October were read and confirmed. The board then proceeded to transact the business of the company, and various resolutions were passed, *inter alia*, that the shares allotted to the defendant should be paid up in full forthwith; that the York City and County Bank be appointed bankers to the company; that all cheques be signed by one of the directors, and be countersigned by the secretary, &c. Shortly after this meeting the defendant wrote

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proposing to resign his seat on the board; and at a meeting of the board on the 28th of November, at which Heseltine and Everitt were the only directors present, the minutes of the previous meeting were read and confirmed, and a resolution was passed that the defendant be requested to pay in full all the shares, in accordance with the resolution passed on the 15th of November.

The defendant having failed to comply with that request, the present action was brought to recover the sum due from him. At the trial, Manisty, J., gave judgment for the plaintiffs.

The defendant appealed.

Murphy, Q.C., and *Edwyn Jones*, for the defendant.—There never was any valid allotment of shares to the defendant, for there had never been any board in existence to whom any valid application for shares could have been made; consequently there could not have been any contract—see articles 62, 68, 69, 72. Out of seven subscribers to the memorandum and articles of association, only four attended the meeting at which the first directors were appointed; the board was, therefore, never validly appointed, so that there was not any casual vacancy within the meaning of the articles, and the election of the defendant on the 28th of October was invalid. The facts of this case bring it within the decision in *In re The Alma Spinning Company: Bottomley's Case* (1).

[BRETT, L.J., referred to *In re The Phosphate of Lime Company, Limited: Austin's Case* (2)].

The meeting at which the defendant was elected a director was held in an irregular way, and nothing which happened at any subsequent meeting cured the invalidity. By article 68, the board is not to consist of less than three directors, but at the meeting of the 28th October, two directors only were present. In *Lindley on Partnership* (3), it is said that "speaking generally it is clear that if a person appoints six others to be his agents jointly, he is not bound by the acts of any five,

four, three, two or one of them. Therefore, if the affairs of a company are entrusted to the management of not less than a fixed number of directors, it is *prima facie* not bound by the acts of a fewer number"—*Kirk v. Bell* (4) and *The Thames Haven Dock Company v. Rose* (5), referred to and considered by Jessel, M.R., in *Bottomley's Case* (1). That principle is applicable here, and the acts of the two directors who elected the defendant a director are invalid. The case of *The Howbeach Coal Company v. Teague* (6) shews that the defendant is not estopped from shewing what the real facts are; and there is no estoppel here, for the position of the company has not been altered. Lastly, the defendant was not qualified to be a director, because he had not been the holder of shares for at least three months. See article 69.

W. Willis, Q.C., and *Horne Payne*, for the plaintiffs.—This action is maintainable. At the meeting held on the 15th of November, three persons, amongst whom is the defendant, are present professing to act as directors; the defendant was a party to the resolutions then passed, and in fact acted as a director. *Bottomley's Case* (1), even assuming it to be correct, does not touch the present case, for here there were three persons acting as directors—see Articles 62, 68. The judgment of Lord Cairns, moreover, in *Murray v. Bush* (7) shews that in the absence of fraud, no objection can be taken to the validity of the appointment of a director where the error of appointment, which has been discovered afterwards, was merely a mistake as regards the method of appointment. A defect, therefore, in the appointment of persons professing to act as directors cannot affect their transactions. The question here is, whether the defendant *bona fide* acted as a director, notwithstanding that he had not held the shares for the requisite number of months within the meaning of article 69. The entries of the

(1) 16 Q.B. Rep. 290.

(5) 4 Man. & G. 552; 5 Sc. N.R. 524; 12 Law J. Rep. C.P. 90.

(6) 5 Hurl. & N. 151; 29 Law J. Rep. Exch. 137.

(7) 42 Law J. Rep. Chanc. 586 Law Rep. 6 H.L. Cas. 37.

(1) 50 Law J. Rep. Chanc. 167; Law Rep. 16 Ch. D. 681.

(2) 24 Law Times (N.S.) 932.

(3) Vol. 1, p. 244 (4th ed.).

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minutes of the proceedings clearly shew that the defendant acted as a director; every act, therefore, which has been done by him is binding. Any defect in the defendant's qualification has been cured by article 76, which is substantially the same as section 30 of 7 & 8 Vict. c. 110. That section applies to the case of directors who, although not qualified, yet have been directors *de facto*, and all their acts done before the discovery of disqualification are as binding as if the persons acting as directors had been duly appointed or qualified—*Murray v. Bush* (7), *Hallows v. Fernie* (8). Article 76 is quite as strong as section 30 of 7 & 8 Vict. c. 110, which is substantially the same as section 67 of the Companies Act, 1862 (25 & 26 Vict. c. 89). Next, the resolution of the 15th of November constituted not merely an acceptance of the shares but an allotment of them to the defendant; as regards the estoppel, the question is, whether a person who has allotted shares to himself is not estopped from denying that he is a shareholder. Directors are supposed to know the regulations of their own company; and if a person becomes a director, and acts as such, he will not be allowed to take advantage of the fact that he was not duly qualified to act in that capacity—*Lindley on Partnership* (4th ed.), p. 543, citing *In re The Great Oceanic Telegraph Company: Harvard's Case* (9), and *In re The British and American Telegraph Company: Fowler's Case* (10). The estoppel, therefore, goes to this, that a person who himself acts as a director cannot afterwards be allowed to say that he is not a director because there was some secret defect in his appointment. *The Howbeach Coal Company v. Teague* (6) is not in point, because there the defendant was not a party to the resolution imposing the calls. The defendant here at the meeting held on the 15th November acted as director, took part in the proceedings of the board, and accepted the shares which had been allotted to him by three persons who *bona fide* believed that

they were directors. If the defendant was a director, then the allotment was valid; if he was not a director, then he is estopped by his conduct from saying that he is not.

Murphy, Q.C., in reply.—Any irregularity in the appointment of the directors renders their acts invalid as between themselves and the shareholders, even where there is a provision rendering valid what may be done by persons acting as directors, notwithstanding the subsequent discovery of a defect in their appointment—*Lindley on Partnership*, p. 543.

LORD COLERIDGE, C.J.—In this case a great many difficult points have been raised, and I am far from confident that I can deal with all of them, but on the whole I am of opinion that the judgment of Mr. Justice Manisty was correct and ought to be affirmed. The action was brought by the plaintiffs against General Willows to recover the amount of calls on certain shares which he says have not been allotted to him and which he is therefore entitled to repudiate. In order to ascertain whether or not they have been so allotted, it is necessary to examine carefully the constitution of the company and the facts under which the plaintiffs' claim arises.

The company was constituted by the signing of the memorandum and articles of association by seven subscribers a considerable time before the matter which we have to examine arose. Then at the meeting of the subscribers of the memorandum to which they were all summoned, but at which four only attended, three directors were appointed to be directors of the company. Those three directors continued to act for some time, and afterwards appointed three other directors, so that there were at one time six directors in existence. The three original directors resigned, and the company was left with three directors only. After some time, and before any question arose between the plaintiffs and the defendant, one of those three directors by letter, in the month of August, did all that in him lay to resign, but no act was done by the remaining two directors until the meeting of the 28th October, when the allotment of shares to the defendant took place. The defendant applied for these fifty

(8) 36 Law J. Rep. Chanc. 267; Law Rep. 3 Chanc. App. 467.

(9) 41 Law J. Rep. Chanc. 283; Law Rep. 13 Eq. 80.

(10) 42 Law J. Rep. Chanc. 9; Law Rep. 14 Eq. 816.

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shares on the 26th of October, and on the 28th the two remaining directors—Fry having tendered his resignation—met and allotted, as appears from the minutes, these fifty shares, and resolved that the defendant should be elected a director, and at the end of the meeting resolved also that Fry's resignation should be accepted. Whether at some point of time there may have been four directors—that is to say, whether the defendant was appointed a director before the resignation of Fry—I am really not prepared to say, but I am inclined to think that Fry continued to be a director until the conclusion of the second meeting. Whether Fry and the defendant were directors together is not material, because the defendant was not elected a director until after the shares were allotted to him, and one of two states of things must have existed, either that Fry remained nominally a director, the other two acting alone, or else that Fry, having resigned, was not a director at all, so that there were only two directors, and they acted. At any rate this allotment was made to the defendant on the 28th of October. The defendant then joined the board and attended one or two meetings, and was present when the resolution was passed confirming the allotment to himself; he accepted the shares and signed a paper ordering the bankers to honour his signature together with that of the other directors, and he also joined in a resolution as to the particular mode in which the money due on his shares should be paid. In all these resolutions the defendant concurred, and undoubtedly at one, if not more, of those meetings he acted as a director and accepted the shares and joined in the operations of the company, at all events to that extent. What changed the defendant's views is not now material. This took place in October, but at another meeting in November he received some document calling upon him to pay a sum of money in respect of his shares, and thereupon he withdrew his application for shares, withdrew from the board and declined to pay the money. The question is, whether an action will lie at the suit of the company to recover the price of the calls upon these shares which have been allotted to the defendant under the circumstances mentioned.

The company has been formed in accordance with the memorandum and articles of association; and it must be assumed that the attention of the Court has been called to those articles which are material. Article 2 says that "the board" shall mean the directors for the time being, or, as the case may be, a quorum constituting the board for the transaction of business. That is what the word "board" throughout the articles of association means. Then article 62 states that the business of the company shall be managed by "the board" which has been already defined in article 2. Article 68 provides that the number of the board shall not be less than three, nor more than seven; so that "the board," which means the directors for the time being, shall not be less than three, nor more than seven. Article 69 deals with the qualifications of the members of the board, and states, with certain exceptions, that no person shall be a director unless he has a particular qualification. Article 70 is very material, and provides that the first directors shall be determined by the subscribers to the memorandum, and that until such appointment has been made the subscribers shall be the directors. Then the first directors, that is, the persons determined by the subscribers to the memorandum, shall have power to add to their number any other persons at any time before the third and ordinary general meeting, but so that the total number of the board does not exceed seven; and the first "board," which is for the first time mentioned in that sense, and which seems to me to shew that there has been no board prior to this within the meaning of the articles of association, shall continue in office for a certain time. Then Article 72 provides that any casual vacancy may be filled up by the board, and that the continuing board may act notwithstanding any vacancy in their body. The expression "any casual vacancy" seems to me to mean any vacancy which may be caused, not by flux of time, but by death, resignation or bankruptcy, or which does not occur in the ordinary course of things; and a vacancy so caused may be filled up by the board. The board, although it has one vacancy in it, may nevertheless continue to act and fill up that vacancy. If,

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therefore, Fry's resignation created a vacancy, so that there was a casual vacancy within the meaning of these provisions at any time, I am of opinion that the remaining members of the board were competent to fill up that vacancy by electing some one else. Article 74 is material, because it provides that the board shall determine the quorum necessary for the transaction of business. But I think that no quorum within the meaning of this article has been determined by the board, because if the construction I put upon Article 70 be correct, the board cannot come into existence until after the original subscribers have ceased to be directors; and a resolution appointing a quorum was passed before the creation of the first board, which resolution is not a valid one, and therefore not an appointment of a quorum within the meaning of the articles of association. The plaintiffs, therefore, cannot rely on that. I think these are the only articles so far which it is necessary to consider. Now how do they bear on the facts of the present case?

It seems to me that at the time when the defendant applied for the shares the board still continued to consist of three members, but I will assume against my own view for the purposes of this case that the resignation of Fry was complete by his letter, and that at the time when the shares were allotted the board was reduced to two. Then the question is raised that the board, being reduced to two by the casual vacancy, was incapable of acting, because the affairs of the company are to be managed by the board, and that as the number of the board is not to be less than three, the acts of the board were bad and the allotment invalid.

I am of a different opinion, and it seems to me upon the true construction of these articles—no quorum having been ascertained in the manner pointed out by the articles—that the board was to act in the way in which boards ordinarily do act, namely, by a majority, the majority here being two out of three. If the board did consist of three, then they had acted by a majority; but if the board did not consist of three, then those members of it who remained acting constituted "the board" within the meaning of article 68, and that board, as a continuing body, must always

have been kept up to three—subject to this, however, that if the board which need not be more than three is by a casual vacancy reduced below three, it may do the acts of the board and may conduct the business of the company, which necessarily does not come to a standstill because of the casual vacancy which reduces it below three.

Upon any other construction of these articles a board which within the strict rule is full—that is, a board of three, which by hypothesis is a perfectly well constituted board, and one which can perfectly well manage all the affairs of the company—will by the accidental death of one of its members be brought to an end, and the whole affairs of the company must come to a standstill. But I do not think it necessary to arrive at such a conclusion. Supposing, however, that Fry remained a member of the board until the letter of resignation was accepted, which most probably is the right view, then there being no quorum legally appointed, and the words of article 68 being that the number of the board shall not be less than three, the board must act like all other boards by a majority, and as there were three directors until Fry's resignation was accepted, the board acted, as it ought to have acted, by a majority, and the meeting of the 28th of October was a valid and good meeting. That would dispose of a good many of the objections raised in this case, because if this were a valid meeting and shares were validly allotted to the defendant, the case seems to me to be at an end, and it is not suggested that anything which happened afterwards invalidated the allotment made by persons who were competent to allot them, and therefore the defendant is liable for these shares.

As regards the other objections which have been raised, it was first of all said that the defendant was unqualified to be a director; but, on the other hand, it was suggested that when he was elected a director he recognised the allotment, and at the meeting accepted, and agreed to pay for the shares, and did several other acts as a director of the company. I am of opinion that what took place when he was present at the meeting of the directors, was equivalent to an allotment to him of these shares, and that he accepted them properly, and had a perfect right to join

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as a director in allotting them to himself; and even if the first allotment of shares was invalid, his acceptance of them and his joining in that acceptance would equally bind him in respect of these shares. But to that view several objections have been made. It was said that the defendant was not a duly qualified director; but to that there are several answers. First of all, according to the very terms of the articles of association, he did not require any qualification, for he was appointed or added to the number of directors by persons who, within the true construction of article 70, were first directors; and if he was so added then he was within the exemption contained in article 69, and did not require any qualification, and it was admitted that this was done before the third ordinary meeting. For the reasons given I think that the defendant was rightly appointed, and therefore, upon the true construction of the terms of the contract between himself and the company, he required no such qualification as he now insists upon. But supposing that that was not so, it appears to me that he is directly within the authority of 25 & 26 Vict. c. 89. s. 67, the words of which, it is admitted, are substantially the same as 7 & 8 Vict. c. 110. s. 30. The defendant also seems to me to be within the terms of the latter half of article 76, which is identical with the terms of the Act of Parliament, whether we consider the provisions of general law, or the particular provisions between himself and the company.

It seems to me that article 76 and the Act of Parliament are equally strong or applicable for the purpose of shewing that the company has a right to insist upon this appointment, and that the absence of the qualification is not an objection upon which the defendant can rely. It has been suggested that this is not a case in which the words "notwithstanding that it be afterwards discovered" will apply; and that, on the authority of Lord Chelmsford in *Murray v. Bush* (7), these words do not mean discovered in the course of the litigation, or anyhow, but discovered afterwards by the person himself, and have therefore no application where other persons have knowledge of it. It suffices to say that in that case Lord Cairns and

Lord Hatherley differed from Lord Chelmsford, and so far as that difference entered into the decision of the case, it is binding upon this Court. That seems to me to get rid of the objection as to the qualification.

Then supposing the defendant was properly appointed a director—and whether he was properly appointed or not is immaterial, for he accepted these shares, and himself joined in the allotment of them to himself, and accepted them, so that this objection cannot prevail.

The question is whether or not the defendant was estopped from setting up the defence by the acts which I have described. I think that *Harvard's Case* (9), before Vice-Chancellor Malins, and *Fowler's Case* (10), before Vice-Chancellor Bacon, are very much in point, and especially the judgment of Vice-Chancellor Malins, which is very strong to shew that if he had had to decide this case he would have said that there was an estoppel between the defendant and the company arising from the conduct pursued by the defendant; and I think Vice-Chancellor Bacon would have said the same thing. The conduct of the defendant here is such that, if it were necessary to do so, I should not hesitate to decide this case upon the ground of estoppel, but I prefer merely to say that I do not care to differ from the judgment of Mr. Justice Manisty.

The only question remaining to be considered is whether the present decision conflicts with any of the cases which have been cited. The whole point in *The Howbeach Coal Company v. Teague* (6) was, that what had been done there had never from the beginning had a proper foundation. A certain number of directors were to be created by the company, and of these directors a certain number were to be appointed a *quorum*, with power to act. The *quorum* had acted; but as there never had been the number of directors requisite to give the *quorum* power to act, the Court said that there had never been a legal foundation for what had been done, and that there had never been a power competent to delegate its authority; for although the number of the quorum was sufficient, yet it had never been legally appointed. For the reasons given in the earlier part of my judgment that case does

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not apply here, because if my view of this case be correct, the right number of directors has been appointed and has acted.

In *Bottomley's Case* (1) also the right number of directors had never existed at all. The articles of association provided that the business of the company should be conducted by not less than five, nor more than seven directors. The number of directors was reduced to four, although the articles provided that there should never be less than five; and the remaining number made a call. The Master of the Rolls said that where the number had been reduced below the lowest number fixed by the articles—namely, five—the company would not be bound by four. It is quite true that in the course of the judgment of the Master of the Rolls there is a view of the case of *Kirk v. Bell* (4), but it is one which I think was certainly not well-founded, and his Lordship either misapprehended that case or stopped short in the quotations from it, and thought that it proceeded upon distinctions which it certainly did not proceed upon. But in *Kirk v. Bell* (4), as well as in *Bottomley's Case* (1), the number of directors had been reduced below the lowest number required by the articles of association, and, as was pointed out in the judgment of the Court, the business—being extraordinary business—could not be transacted by a quorum of the smaller number. It seems to me, therefore, that neither *Bottomley's Case* (1) nor *Kirk v. Bell* (4) have any bearing on this case, when carefully looked at and properly understood. Before passing from the cases I may observe that the reasoning upon which I have relied for my construction of the words of the articles of association in this case will be found to derive great support from the *dicta* contained in the judgment in *The Thames Haven Dock Company v. Rose* (5), although I do not cite that case as an authority in point here, because I do not say that the articles are directory and not mandatory; but the consequences which would follow from these words, as construed by the defendant, are met by the very cogent observations made by the Judges who decided that case, which, therefore, has a very material bearing on the present one.

For these reasons I am of opinion that the judgment of Mr. Justice Manisty was correct, and must be affirmed.

BRETT, L.J.—I hardly think I ought to add anything, but in order to shew how entirely I agree with Lord Coleridge, I will shortly glance at each point which has been taken. The action was brought by the company to recover certain calls from the defendant, and the defence is that he is not liable because no shares have been validly allotted to him. In order to shew that no shares were allotted to him, the counsel have found fault with what has been done at every stage of the proceedings, from the beginning of the company down to the commencement of the action. The first objection was that the three directors were not well appointed, and that their appointment was void, and that every act done by them was void, because they had been appointed by four only out of seven directors, and not by all the seven. If the board had only been appointed by three out of seven directors, then the case of *The Howbeach Coal Company v. Teague* (6) would have been an authority to shew that the appointment was bad. But the appointment here was made by four out of seven; and therefore, unless it can be maintained that no less than the whole seven could appoint, then the majority must be able to appoint.

I know of no law which prevents a majority from appointing, if it be a majority of the whole number of persons who have to act, and if all the remainder have an opportunity of being present. The appointment by four subscribers was, therefore, a good appointment. It was said that Heseltine, Everitt and Fry were not duly qualified, but I agree with Lord Coleridge that it was not necessary that they should be qualified, and therefore that they were well appointed.

The next objection is, that on the 28th of October, when it was alleged the first allotment was made, only two directors were present, or that there were only two directors in existence, and therefore in either case that the allotment was bad. But, I think, for the reason already stated by Lord Coleridge, that there was no

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power given to this board of directors to act by a quorum. The only persons who could appoint a quorum to act was the board of directors, and the original subscribers are not the persons who, within the meaning of the articles of association, could appoint what number of the board should act as a quorum.

Then comes the question whether, assuming the board at that time to consist of three, an allotment by two would be a good allotment. Unless that is forbidden by the articles, the same reasons apply as applied to the question of the appointment of the directors; and if all the board have an opportunity of being present two would be sufficient. It was said that the articles did forbid this. Now the articles provide that the business shall be managed by "the board," which shall consist of not less than three. The board does here consist of three, and the rule is that the business shall be done by the board. There is nothing in these articles which forbids the board to act in the usual way by a majority when all the members of it have an opportunity of being present. If *Bottomley's Case* (1) was decided in a different way it was because the articles there were differently expressed, and it is therefore no authority in the present case.

There is also another reason why the allotment was good, because if it be considered that Fry was not a member of the board at that time, then his resignation caused a casual vacancy. The board would, therefore, consist of two, in consequence of the casual vacancy, and this case differs in that respect from all the other cases which have been cited. Here the remaining members of the board were empowered to act when a casual vacancy occurred. In either way the allotment of the 28th of October was good. Even supposing it was not good, what was done on the 15th of November was equivalent to an allotment. The defendant was present the whole time, and being present was acting as a director, for he agreed with the other two directors that his name should be entered on the register as a shareholder, and that he should pay calls on these shares. That seems to be equivalent to an allotment and acceptance, in fact, by the defendant of the fifty shares from that moment. But

it was said, assuming that to be so, it was not a valid allotment because he was not a director, and there were only two directors, and they could not allot. The objection here is partly the same as the objection to the allotment of the 28th of October. It was said that the defendant could not be properly appointed a director because there were only two persons to appoint him. But the same reasoning applies—namely, that there was a casual vacancy. Then it was said that the defendant was not a qualified person; but, for the reason pointed out by Lord Coleridge, he did not require any qualification, and as he was appointed a director and took part in what amounted to an allotment to himself, I think that it was a good allotment. But assuming that the defendant was not a director, nevertheless he acted as a director and in the *bona fide* belief that he was a director.

The reasoning of Lord Cairns in *Murray v. Bush* (7), although applied in fact to a statute, but to one which is equivalent to the 76th article of association in the present case, is one with which I agree. It seems to me that on the principle there laid down by his Lordship as applicable to the then existing statute, and therefore to these articles of association, no objection can be taken that the defendant was not qualified, and as he acted *bona fide* as a director, he must be treated as such. The allotment on the 15th of November was therefore a good allotment.

I feel a little stronger than my Lord as to the next point, that even if that be not so, yet, nevertheless, the defendant is estopped. In this view I do not quite agree with one of the grounds of the decision stated in *The Howbeach Coal Company v. Teague* (6), and I prefer to follow the doctrine laid down in *Harward's Case* (9), *Fowler's Case* (10) and *Hallows v. Fernie* (8). I think the estoppel was raised in this way—namely, that the defendant, acting as director, allotted fifty shares to himself. He then accepted the shares, not as a director, but as an allottee, and cannot therefore at all events take any objection to the allotment. Having dealt with the shares, having allotted and accepted them, he cannot afterwards be allowed, because he objects to them, to say that they were

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not allotted. On all grounds agreeing with the criticisms and distinctions between the cases pointed out by Lord Coleridge, I am of opinion that the appeal ought to be dismissed.

HOLKER, L.J.—It is unnecessary after the elaborate judgments which have been pronounced to go through the cases in detail. As to the first point I do not quite accept what has been said by my Lords, but in respect of the other matters I agree with them. I concur with Lord Coleridge on the question of estoppel, rather than with Lord Justice Brett, who takes a somewhat different view. It is provided by article 62 that the business of the company is to be managed by the board, which by article 2 is to "consist of the directors for the time, or as the case may be, a quorum of such directors assembled at a meeting thereof constituting a board for the transaction of business." Then it is further provided by article 68 that the number of the board shall not be less than three. It is said that where there is a board of three it is enough for a majority of the three to act together and manage the business of the board. I think, however, the better view is that the persons engaged in getting up a company have agreed that the company shall not be managed by less than three directors. Take, for instance, the business of allotting shares—it seems to me that it cannot reasonably be said that the shares are properly allotted unless they are allotted by three members of the board. I do not myself see, taking that illustration of the business of allotting shares, how it can be said that that business is managed by the board when it is provided that the board shall consist of at least three persons, and one of those persons is not present when the allotment is made. In such a case the board would not be managing the business of the company. That is the only point upon which I take a view somewhat different from that of the other members of the Court. On all the other points I substantially agree.

Appeal dismissed.

Solicitors—Best, Webb & Templeton, for plaintiffs; A. C. Spaul, for defendant.

[IN THE COURT OF APPEAL.]

1882. }
March 11. } FERGUSON v. DAVISON.*

Practice—Costs—Reference by Consent—Costs of the Action to abide Event—Award for less than 20l. in Action of Contract—Plaintiff not entitled to Costs—County Courts Act, 1867 (30 & 31 Vict. c. 142), s. 5.

Where an action has been referred by consent upon the terms that the costs of the action shall abide the event, and the award is for less than 20l. in an action founded on contract, the plaintiff is deprived of his costs by section 5 of the County Courts Act, 1867, unless an order or certificate has been obtained.

Jones v. Jones (7 Com. B. Rep. N.S. 832; 29 Law J. Rep. C.P. 151) *overruled*.

This was an action commenced in the Newcastle-upon-Tyne district registry to recover a sum of 24l. 1s. 11½d., due on a contract. The plaintiff applied for judgment under Order XIV., and the defendant was ordered to pay into Court the sum of 15l. 14s. 7d., which he admitted to be due. It was further ordered that the action and all matters in difference between the parties be referred to arbitration, "the costs of the action, reference and award to abide the event."

The arbitrator found that the sum of 3l. 8s. was due to the plaintiff from the defendant. The plaintiff then took out a summons before the district Registrar for judgment with costs, or for an order for costs, under 30 & 31 Vict. c. 142. s. 5. The district Registrar made an order for judgment as to the sum of 3l. 8s.; but made no order as to costs.

On appeal, Pollock, B., at chambers and the Divisional Court, refused to disturb the decision of the Registrar as to costs.

The plaintiff appealed.

Gainsford Bruce, for the plaintiff.—The question here is whether the plaintiff is deprived of the costs of the action by virtue of section 5 of the County Courts

* *Coram* Brett, L.J.; Holker, L.J.

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Act, 1867. The order of reference as drawn up provides that the costs of the action are to abide the event; and although the plaintiff has recovered less than 20*l.* in an action of contract, yet the event has been found in his favour, and he is entitled to the costs of the cause. In *Jones v. Jones* (1), which was an action transferred from the County Court into the Superior Court, the cause was referred by consent upon exactly the same terms as to costs as in the present case; and the arbitrator having found that a sum of 3*l.* odd was due from the defendant to the plaintiff, the Court held that the plaintiff was entitled to his costs, because the event of the cause had been found in his favour. That case is precisely in point. See also *Wigens v. Cook* (2). The case of *Moore v. Watson* (3) is no doubt against the plaintiff's present contention; but that case is disapproved of by the Court of Appeal in *Galatti v. Wakefield* (4).

[BRETT, L.J.—The case of *Moore v. Watson* (3) turned on the costs of the reference, and does not touch the question of the costs of the cause.]

It does not appear from the order of reference here that the action was compulsorily referred; and it must have been referred by consent. The remarks of Bramwell, L.J., in *Galatti v. Wakefield* (4) tend to shew that there is no difference between a compulsory reference and a reference by consent; but the parties here, instead of standing on their strict rights, have agreed to a particular course, which makes the costs follow the event; and this must mean that the party in whose favour the award is made is to be entitled to the costs of the cause.

[BRETT, L.J.—The plaintiff here has got the judgment of the Court. Does not section 5 of the Act of 1867 apply? The real question here is whether the plaintiff has recovered judgment in an action.]

The section does not apply where the

parties, instead of standing on their strict rights, have agreed that the costs shall abide the event. The cases which are inconsistent with the plaintiff's contention are open to review in this Court.

[BRETT, L.J., referred to *Forshaw v. De Witt* (5).]

A. T. Lawrence, for the defendant.—

All the incidents of a compulsory reference attach here, whether this was a compulsory reference or a reference by consent. The only ground for the plaintiff's contention is that this is a reference by consent; and although in *Galatti v. Wakefield* (4) Bramwell, L.J., says that it is impossible not to hold that parties to an action may contract themselves out of the statute, yet there the parties had referred the matter by consent, and therefore contracted themselves out of the statute. *Jones v. Jones* (1) has been overruled by *Cowell v. The Amman Colliery Co.* (6), in which Mellor, J., adopted the rule already laid down by Bramwell, B., in *Smith v. Edge* (7)—namely, that wherever the plaintiff is entitled to judgment in the action and gets his damages in the action, and the case is such that if there had been no reference the plaintiff would, by virtue of the County Courts Act, have lost his costs in the cause, so does he equally lose them when there is a reference which fixes the amount, unless he has succeeded in getting the necessary certificate.

BRETT, L.J.—In this case, the action which was brought in the Superior Court was referred to arbitration; and I think we must take it that it was referred by consent, upon the terms that the costs of the action should abide the event. The arbitrator found in favour of the plaintiff in an action founded on contract for a sum less than 20*l.*, and judgment was given for the plaintiff for that sum. The question is whether the plaintiff, having recovered less than 20*l.* in an action of contract, is deprived of his costs by reason of section 5 of the County Courts Act, 1867 (30 & 31 Vict. c. 142). Upon the true construction of the words of that section,

(5) 40 Law J. Rep. Exch. 153; Law Rep. 6 Exch. 200.

(6) 6 B. & S. 333; 34 Law J. Rep. Q.B. 161.

(7) 2 Hurl. & C. 659; 33 Law J. Rep. Exch. 9.

(1) 7 Com. B. Rep. N.S. 832; 29 Law J. Rep. C.P. 151.

(2) 6 Com. B. Rep. N.S. 784; 28 Law J. Rep. C.P. 312.

(3) 36 Law J. Rep. C.P. 122; Law Rep. 2 C.P. 314.

(4) 48 Law J. Rep. Exch. 70; Law Rep. 4 Ex. D. 249.

Fergusson v. Durison, App.

I think the plaintiff would be deprived of the costs of the action. By that section, if, in any action brought in the Superior Courts and founded on contract, a plaintiff recovers in that action less than 20*l.*, "whether by verdict, judgment by default, or on demurrer or otherwise," he is deprived of his costs unless he has obtained the necessary certificate. The question is, whether the sum recovered by the plaintiff is not a sum recovered by judgment entered up in an action in the Superior Court otherwise than by means of a verdict, judgment by default, or on demurrer. It seems to me that on the words of the Act of Parliament itself, and even if there were no authority on the subject, the plaintiff has here recovered judgment in an action. No authority, however, has been cited which is absolutely binding on this Court. The only case cited in favour of the plaintiff's contention is *Jones v. Jones* (1); while all the other cases, including *Moore v. Watson* (3), are against his contention. It is not, however, necessary for us to overrule *Jones v. Jones* (1), because that was done in *Cowell v. The Amman Colliery Company* (6), which was the case of a reference by consent in the same terms as here; and there the Judges of the Court of Queen's Bench, having consulted with the Judges of the Courts of Common Pleas and Exchequer, came to the conclusion that the plaintiff was deprived of his costs. I entirely and absolutely agree with that decision, and therefore *Jones v. Jones* (1) must now be taken to have been overruled by the Court of Appeal. It is not necessary to consider whether or not *Moore v. Watson* (3) was rightly decided, because that case referred to the costs of the reference and award; but I must say that I doubt whether it can be supported.

HOLKER, L.J.—The application made on behalf of the plaintiff is simply for the costs of the cause; and whether they can be recovered depends upon the Act of Parliament, which seems to be very clear and very wide in its terms. I certainly think that a man cannot be said to have contracted himself out of the Act unless he does so by language which is very

express, and for my part I do not think he can do so at all. With regard to authority, *Jones v. Jones* (1) was cited by Mr. Bruce; but that case has been distinctly overruled.

BRETT, L.J.—The present decision does not apply at all to an arbitration which is not in an action.

Appeal dismissed.

Solicitors—Pattison, Wigg & Co., agents for R. S. Hopper, Newcastle-on-Tyne, for plaintiff; Brownlow & Howe, agents for Edward Clark, Newcastle-on-Tyne, for defendant.

1881. }
Nov. 7. } HICKS v. FAULKNER.
Dec. 9. }

Malicious Prosecution — Direction to Jury—Reasonable and Probable Cause—Probable Cause how far Question for Jury — Evidence of Malice, what is—Burden of Proof.

An action for malicious prosecution for perjury was founded on the following circumstances:—

The plaintiff's father had been tenant of a house to the defendant, and was sued in the County Court for rent in arrear. The defence was surrender before any rent due, and the plaintiff as a witness swore that he, at the defendant's request, gave him up the key on a particular day. Upon this evidence perjury was assigned, and the plaintiff was indicted, tried and acquitted. He then brought this action.

The Judge directed the jury—first, if they believed that the plaintiff did give up the key, and the defendant, knowing that he had done so, indicted him for perjury, they should find for the plaintiff; secondly, if they did not believe the plaintiff, they should find for the defendant; thirdly, if they were in doubt as to which party was speaking the truth, they should find for the defendant, as the plaintiff would not have made out his case; fourthly, alternatively, if they thought that the plaintiff did give up the key, but the defendant having forgotten the fact prosecuted him under an honest impression that he had corruptly

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sworn that he had done what he had not done, they would not be justified in finding that the defendant had maliciously and without reasonable and probable cause prosecuted the plaintiff, but might find for the defendant:—

Held, a right direction.

In this case, which was an action for malicious prosecution, tried before Huddleston, B., and in which a general verdict had been returned for the defendant, a rule for a new trial was subsequently obtained by Grantham, on the grounds of misdirection and that the verdict was against the weight of the evidence.

Against this rule *Willis, Q.C.*, and *McLeod*, shewed cause.

Grantham, Q.C., and *Agabeg*, supported the rule.

The facts and arguments appear sufficiently in the judgment of the Court (Huddleston, B., and Hawkins, J.), which was, on the 9th of December, delivered by

HAWKINS, J.—This is an action for malicious prosecution. It was tried before my brother Huddleston, at Westminster, on the 20th of June last, and the verdict was for the defendant. Subsequently the plaintiff obtained a rule *nisi* for a new trial, on the grounds, first, that the learned Baron misdirected the jury; and secondly, that the verdict was against the weight of the evidence. This rule was argued before my brother Huddleston and myself, on the 7th of November, and I have now to deliver judgment upon it.

The defendant was the landlord of a house in the Belgrave Road, St. John's Wood. The father of the plaintiff was tenant of that house. In the month of February, 1879, an action which the defendant had brought in the County Court against the father for rent alleged to be in arrear, and to have accrued due after the month of December, 1877, came on to be tried before the County Court Judge. The defence set up was that before any rent became due—namely, on the 17th of December, 1877—there was a surrender of the tenancy, and that on that day, in completion of the surrender, and by way of

giving up possession of the premises, the key of the house was delivered to and accepted by the defendant.

To support this defence the plaintiff was called as a witness for his father, and swore that he, on the last-mentioned day, at the request of the defendant, gave him up the key. Of the materiality of this statement there could be no doubt. After the determination of the County Court action the defendant indicted the plaintiff for perjury at the Central Criminal Court. On the trial of the indictment the plaintiff was acquitted. He then commenced this action for malicious prosecution. On the trial before my brother Huddleston the plaintiff repeated the evidence he had given at the County Court. On the other hand, the defendant on his oath expressly denied the truth of the statement, and in confirmation of his own testimony referred to his diary and other corroborating circumstances, to which it is not necessary to allude more particularly. The result I have already stated.

I proceed now to deal with the motion for a new trial, and first with the alleged misdirection.

In summing up the case the learned Baron told the jury that if the plaintiff had satisfied them he was telling the truth—that he really did give up the key—and that the defendant, knowing he had done so, indicted him for perjury, the plaintiff would be entitled to their verdict. On the other hand, he told them that if they believed the statement on oath by the plaintiff was untrue, and that he made it knowing it to be so, the defendant was justified in the course he took. To neither of these propositions could any objection be made. The learned Baron also told the jury that if in substance they believed the plaintiff's version, their verdict ought to be for him; but that if they thought the defendant was speaking the truth, he was entitled to their verdict. To this, too, most properly no objection was made—although, no doubt, as an abstract proposition, the plaintiff might have spoken the truth, and still the defendant, for reasonable cause, might have believed him to be guilty. So, on the other hand, the defendant might have spoken the truth as to the key, and yet have no rea-

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son to suppose the plaintiff's oath to the contrary was other than the result of innocent forgetfulness.

The learned Baron's direction, however, must be construed, as the summing-up of a Judge always ought to be, in connection with the particular circumstances of the case then before him. In the present case those circumstances were such that it was difficult to suppose either of the parties in giving his evidence could be labouring under any mistake. The learned Baron, however, thought it right to provide for an alternative view of the case—namely, the event of an inability on the part of the jury to agree upon either of the questions so submitted to them. He accordingly told them, if they thought the matter was left in such doubt that they could not arrive at a conclusion as to which of the parties was speaking correctly, then they were left in this position: that the plaintiff had not made out his case to their satisfaction, and the defendant would be entitled to their verdict.

The learned Judge then proceeded to present another alternative view to the jury, and told them that it might be they would come to the conclusion that the plaintiff did in fact deliver up the key, as he swore, and that the defendant had a very treacherous memory, and had forgotten all about it, and went on with the prosecution under the impression that he never had the key; nevertheless, if that was an honest impression, the upshot of a fallacious memory, and acting upon it he honestly believed the plaintiff had sworn falsely and corruptly, no jury would be justified in saying the defendant maliciously and without reasonable or probable cause prosecuted the plaintiff, because the best probable and reasonable cause would be that he honestly believed it. With this direction the case was left to the jury, who returned a general verdict for the defendant. Upon the point of misdirection, Mr. Grantham, for the plaintiff, confining his objections to the two latter alternatives, argued that as the verdict was a general one, and it was uncertain whether it was based upon the belief of the jury in the defendant's version or upon one of these alternatives, there ought, if either of his objections was

sustained, to be a new trial. In this I think he was right. It becomes, therefore, necessary to consider these objections separately. The first was to the learned Baron telling the jury that if they were left in doubt their verdict should be for the defendant. I think this direction is not open to exception. To succeed in an action for malicious prosecution, the plaintiff must allege and establish two things—absence of reasonable and probable cause, and malice. The affirmative of these allegations is upon him. Failing to establish both of them, he fails altogether. It is an essential element in his case that the jury should, under the Judge's direction as to what facts will suffice for that purpose, find affirmatively the non-existence of probable cause, and they have no right to assume it without proof. If on the trial of such an action the plaintiff were to offer no other evidence than that the defendant caused him to be indicted, even from the most vindictive motives, the defendant would be entitled to a verdict—see *Mitchell v. Jenkins* (1), per Mr. Justice Parke. In this respect the action for malicious prosecution does not differ from any other action in which the plaintiff is called upon to prove his case. If further authority on this point were necessary, it is to be found in the *dictum* of Lord Colonsay, in *Lister v. Perryman* (2). With regard to that *dictum*, however, I must observe that in uttering it the learned Lord must have been under the impression that the action under consideration was for a malicious prosecution, whereas it was for false imprisonment, there being this recognised distinction between the two actions, that in false imprisonment the *onus* lies upon the defendant to plead and prove affirmatively the existence of reasonable cause as his justification, whereas, in an action for malicious prosecution, the plaintiff must allege and prove affirmatively its non-existence. With regard to the last alternative presented to the jury, Mr. Grantham contended, as a general proposition, that where a defendant relies upon his own memory for the facts

(1) 5 B. & Ad. at p. 594.

(2) 39 Law J. Rep. Exch. 177; Law Rep. 4 E. & Ir. App. 542.

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which go to make up a probable cause, he must prove to the satisfaction of the jury that his memory of the facts is accurate, and if he fails to do so, he must be taken in law to have acted without that reasonable or probable cause which the facts if true would have established. In other words, he contended that, giving a defendant full credit for honesty, if he relies upon his own memory for his justification, he must stand or fall by its accuracy; and, applying this general proposition to the present case, he argued that the learned Baron ought to have told the jury that, if they believed the plaintiff did in fact deliver the key to the defendant, and the defendant unfortunately acted upon a fallacious memory and in forgetfulness of the circumstance which once was clearly within his knowledge, and which forgotten circumstance would, if recollected, have established a clear want of reasonable and probable cause, his belief in the accuracy of his memory and in the guilt of the plaintiff, however conscientious, would not afford him justification or excuse. In support of his argument he cited the case of *Turner v. Ambler* (3), and, moreover, informed us that Mr. Justice Denman and Baron Pollock had virtually so ruled. I do not assent to this proposition. I do not find in the case cited anything which favours it, and I have the best reason for saying that my brothers Denman and Pollock have been altogether misunderstood.

That brings me to the consideration of what is reasonable and probable cause.

Now I should define reasonable and probable cause to be, an honest belief in the guilt of the accused based upon a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances which, assuming them to be true, would reasonably lead any ordinarily prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed. There must be—first, an honest belief of the accuser in the guilt of the accused; secondly, such belief must be based on an honest conviction of the existence of the circumstances

which led the accuser to that conclusion; thirdly, such secondly-mentioned belief must be based upon reasonable grounds—by this I mean such grounds as would lead any fairly cautious man in the defendant's situation so to believe; fourthly, the circumstances so believed and relied on by the accuser must be such as amount to reasonable ground for belief in the guilt of the accused.

The belief of the accuser in the guilt of the accused; his belief in the existence of the facts on which he acted, and the reasonableness of such last-mentioned belief, are questions of fact for the jury, whose findings upon them become so many facts, from which the Judge is to draw the inference, and determine whether they do or do not amount to reasonable and probable cause. This also is an inference of fact, not of law as is sometimes erroneously supposed; and the Judge is to draw it from all the circumstances of the case—*Lister v. Perryman* (2), per Lords Chelmsford and Westbury. This inference is certainly not to be interfered with upon lighter grounds than if it had been intrusted by law to the jury. In practice, everybody knows the Judge may, and often does, anticipate the findings of the jury alternatively in summing up, as the learned Baron did in this case.

If in the case now under discussion the jury found their verdict for the defendant upon the last alternative presented to them by the learned Baron, I think the undisputed circumstances were such that they must be taken to have found that in fact the plaintiff was not guilty, but that an honest and reasonable belief was entertained by the defendant to the contrary, and in the existence of facts which, if true, justified that conclusion. True it is that, according to the hypothesis involved in the last alternative, the defendant's belief in the one great fact mainly relied on by him, namely, that the key was not delivered to him by the plaintiff, must have been found by the jury to be erroneous, and the supposed fact to have had no real existence. It does not, however, follow that because the supposed fact had no real existence the belief was unreasonable. Yet this is what Mr. Grantham in substance contended for. Let us consider

(3) 10 Q.B. Rep. 252; 16 Law J. Rep. Q.B. 158.

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this for a minute or two. If a man has never seen reason to doubt, but, on the contrary, has ever had reason to trust the general accuracy of his memory, and that memory presents to him a vivid apparent recollection that a particular occurrence took place in his presence within a recent period of time, is it not reasonable to believe in the existence of it? The more especially if, as in the present case, his diary and other surrounding circumstances appear to confirm his memory. What more reasonable ground can be suggested for a belief that any particular act was done than the conviction of the person believing that he remembers it as having been done in his presence before his own eyes? Would it not under such circumstances be most unreasonable, if not impossible, to disbelieve? Mr. Grantham admitted (indeed it was impossible to dispute it, for a long roll of authorities, notably among them *Lister v. Perryman* (2), might be cited to establish the proposition) that a person may reasonably institute a prosecution solely upon information given to him by another, and which he honestly believes to be true. What does this admission, coupled with his argument, amount to? That a prosecutor may trust, provided he knows no grounds for distrust, the memory of another, but may not give credit to his own. I cannot recognise such a distinction either in law or common sense, and no authority, as far as I know, can be found to warrant it. The question of reasonable and probable cause depends in all cases not upon the actual existence, but upon the reasonable *bona fide* belief in the existence of such a state of things as would amount to a justification of the course pursued in making the accusation complained of, no matter whether this belief arises out of the recollection and memory of the accuser, or out of the information furnished to him by another. It is not essential in any case that facts should be established proper and fit, and admissible as evidence, to be submitted to the jury upon an issue as to the actual guilt of the accused. The distinction between facts to establish actual guilt and those required to establish a *bona fide* belief of guilt should never be lost sight of in considering such cases as that I am now discussing. Many

facts admissible to prove the latter, would be wholly inadmissible to prove the former.

It cannot, of course, be laid down as an abstract proposition that an accuser is justified in acting either upon the credited statement of an informant, or upon his own memory. The question must always arise according to circumstances, whether it was reasonable to trust either the one or the other. A person who acts upon the information of another, trusts the veracity, the memory and the accuracy of that other, in each of which he may be completely deceived. His informant's veracity may be questionable, his memory fallacious and his accuracy unreliable. Yet it does not follow that it was unreasonable to believe in his information if he never had cause to doubt him. In like manner a man may be deceived by his own memory, yet it does not follow that it was unreasonable to trust it if he never before knew it to be defective. Why, I ask, if he may rely on the memory of another, may he not rely upon his own? The reasonableness or otherwise of this reliance, I have already said, it is for the jury to determine. If the informant were known by the accuser to be a person in whose veracity, memory, power of observation and accuracy, no confidence could be placed, no jury I should think would hesitate to find that a belief based solely upon information from such an informant was unreasonable. The same observation would apply if an accuser acted wholly upon the information of his own memory, knowing that it was untrustworthy.

In short, it would be unreasonable to rely, either on an informant known to be untrustworthy, or a memory known to be unreliable, without substantial confirmation, especially where the liberty of another is concerned.

I am of opinion, then, that there was no misdirection, and this being so, the jury, under the learned Baron's direction, must be taken to have found that absence of reasonable cause was not established, and the verdict was rightly returned for the defendant.

Under these circumstances it becomes unnecessary to consider the question of malice—*Mitchell v. Jenkins* (1). I cannot, however, refrain from referring to an

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argument of Mr. Grantham, that if the learned Baron ought to have told the jury there was a want of reasonable cause, that of itself was evidence of malice. I do not agree in this. It is true, as a general proposition, that want of probable cause is evidence of malice; but this general proposition is apt to be misunderstood. In an action of this description the question of malice is an independent one—of fact purely—and altogether for the consideration of the jury, and not at all for the Judge. The malice necessary to be established is not even malice in law, such as may be assumed from the intentional doing of a wrongful act (see *Bromage v. Prosser* (4), per Mr. Justice Bayley), but malice in fact—*malus animus*—indicating that the party was actuated either by spite or ill-will towards an individual, or by indirect or improper motives, though these may be wholly unconnected with any uncharitable feeling towards anybody. In order to arrive at a conclusion on the question the jury are to take into consideration all the circumstances of the case, and to form their own opinion upon them uninfluenced by any opinion of the Judge, unless that opinion accords with their own view. If among the circumstances it appears to the jury that there was no reasonable ground for the prosecution, they may—though by no means bound to do so—well think that it must have been dictated by some sinister motive on the part of the person who instituted it. Absence of reasonable cause, to be evidence of malice, must be absence of such cause in the opinion of the jury themselves, and I do not think that they could be properly told to consider the opinion of the Judge upon that point, if it differed from their own—as it possibly might, and in some cases probably would—as evidence for their consideration in determining whether there was malice or not. In no case, however, will their finding relieve the Judge of the duty of determining for himself the question of reasonable cause as an essential element in the case. Want of reasonable cause is for the Judge alone to determine, upon the facts found by the jury; as evidence of malice it is a question wholly for the jury,

who, even if they should think there was want of probable cause, might nevertheless think that the defendant acted honestly and without illwill, or any other motive or desire than to do what he *bona fide* believed to be right in the interests of justice, in which case they ought not, in my opinion, to find the existence of malice—*Mitchell v. Jenkins* (1), *Turner v. Ambler* (3), *Lister v. Perryman* (2), per Lord Westbury.

It is an anomalous state of things that there may be two different and opposite findings in the same cause upon the question of probable cause—one by the jury and another by the Judge—but such at present is the law.

With regard to that part of the rule which complains that the verdict was against the weight of evidence, my brother Huddleston thinks the verdict was right. Having considered the whole case I am of the same opinion. The rule, therefore, fails upon every point, and must be discharged.

Rule discharged.

Solicitors—W. J. Child & Son, for plaintiff; G. T. Robinson, for defendant.

1881.
Dec. 16, 20.

{ THE QUEEN v. BATON AND
OTHERS, JUSTICES OF THE
COUNTY OF NORTHAMPTON.

Elementary Education—Jurisdiction of Justices over Offences under By-laws—Attendance Order—Petty Sessional District comprising Parts of several Counties—Union extending into several distinct Jurisdictions—30 & 31 Vict. c. 106 (Poor Law Amendment Act, 1867), s. 27—39 & 40 Vict. c. 79 (Elementary Education Act, 1876), ss. 12 and 34.

[For the report of the above case, see 51 Law J. Rep. M.C. 31.]

[IN THE COURT OF APPEAL.]

JESSEL, M.R.

BRETT, L.J.

COTTON, L.J.

1881.

July 27.

WALLER v. LOCH.

Libel—Privilege—Public Policy—Society to suppress Mendicity.

A society established for the suppression of mendicity published a libellous report of the plaintiff. The report was prepared for and communicated to persons who made enquiries of the society respecting the plaintiff with the view of assisting her or of recommending her to others. In an action by the plaintiff against the society for damages for the libel contained in the report,—Held, that the report, having been published in the discharge of a moral and social duty, was privileged.

This was an appeal from a decision of a Divisional Court refusing the plaintiff a rule nisi for a new trial.

The plaintiff was a daughter of a Colonel Waller, deceased, and brought the action to recover damages for a libel alleged to be contained in a report concerning her, published by the Charity Organisation Society, and signed by the defendant as the secretary of the society.

The matter in the report complained of was as follows:—

"Since 1872 Miss Waller appears to have been a confirmed begging-letter writer. She admits that she has for some time received on an average 12s. a week in reply to her appeals for assistance. She generally offers pieces of needlework for sale, and represents herself as suffering from very bad health. She has only lived at her present address about eighteen months, where she nominally lodges with a Mrs. Potts with whom she was acquainted previously. At a previous address Miss Waller is represented to have lived very extravagantly, and is said to have been in the habit of consuming 2s. or 3s. worth of brandy a day. Her statements as to the condition of her health seem to be considerably exaggerated, though it is probable that her health is by no means good. In some recent appeals she represents herself as having been injured by a gas explosion,

but enquiries have tended to throw doubt on the truth of this statement. With the exception of having been employed by a lady as an amanuensis for a few months, which employment terminated many years ago, she does not seem at any time to have attempted to earn her own living. She is now dependent on a pension of 25*l.* a year from the United Kingdom Beneficent Society, and the money she receives in reply to her appeals. She appears to have lived in this way for a long time, and to have always been well supplied with the means of support. The society does not recommend assistance to be given to the applicant."

The defendant, by his statement of defence, denied the publication of the alleged libel, or that, if published, it was published maliciously; and pleaded further, that the publication thereof was privileged, and that it was fairly and honestly published under the following circumstances: "The defendant was and is the Secretary of the Charity Organisation Society, a society having for one of its objects the repression of mendicity. In this capacity he was requested by divers subscribers to the said society to make and institute enquiries as to the genuineness of certain allegations made in certain letters written by the plaintiff to the said subscribers and divers other persons, in which she solicited pecuniary relief, and as to whether the plaintiff was a fit object for pecuniary and charitable relief, and the result of such enquiries was embodied in the report (complained of). The said enquiries and the said report, the result thereof, were *bona fide* instituted by the defendant without malice in the discharge of his duty as such secretary, and the publication was made to the said subscribers being interested in the said enquiries and the result thereof, and by way of caution to them in dispensing relief to the plaintiff." The defendant also pleaded that the alleged libel was true.

The defendant also, in answer to the plaintiff's interrogatories, stated, "The said report was made to any one who asked for it, provided that an appeal had been made to them, also provided that they shewed that such an appeal had been made, and that they wished to give assistance or that they were legitimately interested."

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There was evidence that a subscriber of the society asked for information respecting the plaintiff, that it was collected and embodied in the report in question, which was sent to a Miss Saunders and a Miss Druce. Miss Saunders was to a certain extent interested in the matter, but Miss Druce was not.

The plaintiff admitted having written appeals for charity to various persons, and having received relief from some of them, but denied all the other charges made against her in the report.

At the trial, Grove, J., held that the report was privileged, and the jury found for the defendant.

An *ex parte* application for a rule *nisi* for a new trial, on the ground of misdirection, and that the verdict was against the weight of evidence, having been refused by Grove, J., and Huddleston, B., sitting as a Divisional Court—

Tatlock, and *Rose-Innes*, now moved *ex parte*, by way of appeal, from such refusal.

The following authorities were referred to:—*Parsons v. Surgery* (1), *Davies v. Snead* (2), *Botterill v. Whytehead* (3), *Simpson v. Robinson* (4), *Lewis v. Levy* (5), *Corker v. Wildes* (6), *Fisher v. Clement* (7), *Fountain v. Boodle* (8), *Pattison v. Jones* (9) and *Martin v. Strong* (10).

JESSEL, M.R.—I am of opinion that no rule ought to be granted. The application is really founded on the allegation that the communication in question is not privileged; for if it is privileged it is quite clear that there is no evidence on which the jury could properly have found that there was actual malice. They found there was none. It appears to me that the communication was privileged. The Charity Organisation Society is instituted for the purpose of conferring a great benefit

on the public—namely, of protecting charitable and benevolent persons from being the victims of impostors on the one hand, and, on the other hand, of seeking out and recommending to charitable and benevolent persons who are desirous of assisting those who are deserving of charitable relief persons of that description. I cannot conceive any greater service to persons who are deserving of charitable relief on the one hand, and persons who are desirous of giving it on the other. If, then, a person who is desirous of giving charitable relief or of recommending persons deserving of it to those who are disposed to give it, goes to the society and asks a question about some persons *bona fide*, and the society *bona fide* answers that question, it appears to me that the answer is privileged. If the answer is given in the discharge of a moral and social duty, or if the person who gives it believes it to be so, that is enough. It need not even be an answer to an enquiry, but the communication may be a voluntary one. The law is concisely stated by Lord Blackburn (then Mr. Justice Blackburn), in the case of *Davies v. Snead* (2), thus: "I think the result of the two Judges' opinions in *Coxhead v. Richards* (11), which were soon afterwards followed in the case of *Blackburn v. Pugh* (12), is, that where a person is so situated that it becomes right, in the interests of society, that he should tell to a third person certain facts, then, if he *bona fide* and without malice does tell them, it is a privileged communication." If the secretary of the society believed that Miss Druce was *bona fide* enquiring with the intention of assisting Miss Waller herself, or with the intention of inducing other persons to assist her, it was plainly his duty to tell what he knew. If he *bona fide* believed this, he was justified in giving the information to Miss Druce. I may also refer to the judgment of Mr. Justice Lindley in the case of *Robshaw v. Smith* (13), in which he says, "I think it would be a lamentable state of the law, if when a person asks another for information, that

(1) 4 Falc. & F. 247.

(2) 39 Law J. Rep. Q.B. 262; Law Rep. 5 Q.B. 608.

(3) 41 Law Times, 588.

(4) 12 Q.B. Rep. 511; 18 Law J. Rep. Q.B. 73.

(5) E. B. & E. 557; 27 Law J. Rep. Q.B. 282.

(6) 5 E. & B. 328.

(7) 10 B. & C. 472.

(8) 3 Q.B. Rep. 5.

(9) 8 B. & C. 578.

(10) 5 Ad. & E. 535.

(11) 2 Com. B. Rep. 569; 15 Law J. Rep. C.P. 294.

(12) Ibid. 611.

(13) 26 W.R. Dig. 122; 38 Law Times, N.S. 423.

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other could not give such information as he possessed without exposing himself to the risk of an action. The law on this point seems to me to have been perfectly well settled for a long time. Mr. Smith was under no duty to speak, it is true; but he was entitled to say what he knew if he choose to do so. There could be no such thing as confidential communication between man and man if such an action as this was to lie. The case of *Davies v. Sneed* (2) quite bears out this." It appears to me that if you ask a question of a person who you believe has the means of knowledge about the character of another person with whom you wish to have any dealings whatever, and he answers *bona fide*, that is a privileged communication. I might illustrate this by the instances of enquiries being made of a friend or a neighbour about a tradesman, a doctor or a solicitor. Society could not go on without such enquiries. The whole doctrine of privilege must rest upon the interests and the necessities of society. If every one was open to an action for libel or slander for the answers he might make to such enquiries, it would be very injurious to the interests of society.

BRETT, L.J.—I am of the same opinion. The question of privilege is for the Judge, not for the jury, and I gather from what has been stated that Mr. Justice Grove did not leave that question to the jury, but intimated to them his opinion that the communication was privileged. The questions left to the jury were—first, whether this writing was a libel, and I suppose the jury found that it was; and secondly, whether there was malice in fact, and the jury must be taken to have found that there was not. It is immaterial whether there was justification of the libel—that is, whether it was true—if the occasion was privileged and there was no malice in fact. Was, then, this communication a privileged one? I think that the definition given by Mr. Justice Blackburn in the case of *Davies v. Sneed* (2) is the best that could be given; it left out the misleading word "duty." The question is whether the facts of the present case bring it within the rule, and I am of opinion that they do, if the person who was asking the question would reasonably be supposed by the defendant to be

asking it in order to be able to form an opinion whether charitable relief should be given or continued to a supposed recipient of it. It is not necessary that the question should have been really asked for that purpose if the defendant reasonably supposed that it was. It is difficult to suppose, however, that any person would make an application to such a society for any other purpose. The defendant might have reasonably believed that the question was asked by Miss Druce for that purpose. If so, was the Charity Organisation Society so situated that it became right in the interests of society to give the information? It appears to me that it was; and that, therefore, the case comes within the rule that the occasion was privileged. If that is so, the question of malice in fact was properly left to the jury. I should have been very much astonished if the jury had found that there was malice in fact, and very much inclined to set aside their verdict if they had.

COTTON, L.J.—The principal question is, whether the occasion was privileged? I think the occasion is privileged when a communication is made in answer to an enquiry whether or not the person of whom it is made believes it to be made by a person who has some interest in the matter, and if he believes that he is making the communication in discharge of a duty, legal, moral or social. It is no doubt an imperfect obligation, but it is the duty of every one to do that which it is right in the interest of the public should be done. "Right" is as difficult a word to define as "duty." With that explanation I agree with Lord Justice Brett. I am of opinion that the case falls within the rule. The communication was privileged, and the only question is, whether the jury were right in finding that there was no malice in fact. In order to set aside the verdict of a jury on such a question the Court must be satisfied that they could not have reasonably found as they did. I am satisfied that the finding was reasonable.

Solicitor—G. Johnson, for appellant; Wontner & Sons, for respondent.

[IN THE COURT OF APPEAL.]

1882. } KEEN v. THE MILLWALL DOCK
March 15. } COMPANY.*

Employer's Liability Act (43 & 44 Vict. c. 42), ss. 4 and 7—Notice of Injury—Requirements of.

The plaintiff, a workman, was injured by an accident while in the employ of the defendants; he at once told an inspector of the defendants the circumstances of the accident, and the inspector made a written report on the accident to the defendants. The solicitor of the plaintiff wrote to the defendants within a week asking for compensation, mentioning that the defendants' superintendent knew the particulars, but not referring in terms to the written report made by the inspector; no other notice was given within six weeks:—Held, that there was no sufficient notice in writing to satisfy the requirements of the Employer's Liability Act, 1880.

Moyle v. Jenkins (Ante, Q.B. p. 112) approved.

Appeal from the Queen's Bench Division.

The plaintiff brought an action in the County Court, under the Employer's Liability Act, 1880, to recover damages for injuries received by him while in the employ of the defendants. He was nonsuited, on the ground that no sufficient notice had been given to the defendants pursuant to the requirements of sections 4 and 7 of the Act (1).

* *Coram* Lord Coleridge, C.J.; Brett, L.J.; Holker, L.J.

(1) 43 & 44 Vict. c. 42. s. 4: "An action for the recovery under this Act of compensation for an injury shall not be maintainable unless notice that injury has been sustained is given within six weeks, and the action is commenced within six months from the occurrence of the accident causing the injury, or, in case of death, within twelve months from the time of death; provided always, that in case of death the want of such notice shall be no bar to the maintenance of such action if the Judge shall be of opinion that there was reasonable excuse for such want of notice."

Section 7: "Notice in respect of an injury under this Act shall give the name and address of the person injured, and shall state in ordinary language the cause of the injury, and the date at which it was sustained, and shall be served on the employer, or if there is more than one

The accident by which the plaintiff was injured occurred on May 31, when he was taken into an office at the defendants' works, and there gave information to an inspector of the defendants, called Reed, who made the following report to Campbell, one of the defendants' superintendents:—

"Millwall, No. 56, 31/5/81. Memorandum from Inspector Reed to Campbell.

"Sir,—George Keen, No. 74, whilst lashing a copper ore shoot (for phosphate rock) against the side of the steamship *Ayrshire*, a prop which was holding the shoot frame against the ship gave way, and he was pinned between the shoot and the ship; he has been to the hospital.

"Witness, shipworker Green. No Clubs. Married. Address, Rhodeswell Road, Limehouse.

"Yours obediently,

"R. Whyberd, for Reed."

On the 4th of June the solicitor acting for the plaintiff wrote the following letter to the defendants' secretary:—

"Sir,—I am instructed by George Keen, of 136 Rhodeswell Road, Limehouse, to apply to you for compensation for injury received at your dock, particulars of which have been already communicated to your superintendent."

No other notice was sent until after the lapse of more than six weeks.

The Judge of the County Court nonsuited the plaintiff, and the Queen's Bench Division refused to grant a rule for a new trial.

Leave was given to appeal.

The plaintiff appealed.

employer, upon one of such employers. The notice may be served by delivering the same to or at the residence or place of business of the person on whom it is to be served. The notice may also be served by post by a registered letter addressed to the person on whom it is to be served at his last known place of residence or place of business. . . . A notice under this section shall not be deemed invalid by reason of any defect or inaccuracy therein, unless the Judge who tries the action arising from the injury mentioned in the notice shall be of opinion that the defendant in the action is prejudiced in his defence by such defect or inaccuracy, and that the defect or inaccuracy was for the purpose of misleading."

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Crispe, for the plaintiff.—It is admitted that the notice must be in writing—*Moyle v. Jenkins* (2)—but in this case a notice in writing can be gathered from two documents, the report and the letter of the plaintiff's solicitor; there is no reason why the whole of the notice should be contained in one document.

[LORD COLERIDGE, C.J.—There is a statutory provision which speaks of the notice.]

The only object is that a defendant should have all the information necessary to enable him to defend, and in this case the defendants knew from the report sent to their inspector all the circumstances of the case.

LORD COLERIDGE, C.J.—I am of opinion that this rule ought to be refused. I desire to be considered as speaking only for myself in the reasons which I now proceed to give. It appears that the statute under which this question arises comes now for the first time under the consideration of the Court of Appeal. That statute is a statute which extends and alters the law, and gives the workmen of England a new remedy against the employers of England, that is a remedy which they would not otherwise have. The statute limits the operation of that remedy by the terms of the enactment, and amongst those terms is the term that an action for compensation cannot be maintained unless a notice has been given in accordance with the provisions of section 4 (1). I agree with the decision of the Queen's Bench Division in *Moyle v. Jenkins* (2) that if section 4 (1) stood alone it would not have been manifest that the notice ought, in order to satisfy the requirements of the statute, to be in writing; but I also agree that if section 7 (1) is read with section 4 (1) then the enactment cannot be fairly fulfilled, except by a notice in writing; the words of section 7 (1) are words apt to apply to a written document, and they are not apt words to refer to a notice not in writing. It is then said that a notice will suffice which refers to other documents, and that a notice which will satisfy the requirements of the statute can be constructed

(2) *Ante*, Q.B. 112; Law Rep. 8 Q.B. D. 116.

out of several documents. Speaking for myself, I am clearly of opinion that this is not so; and I am of opinion that even if the letter from the solicitor which has been read had referred to the document or report previously sent to the inspector, still there would not have been a sufficient compliance with the plain words of the statute. From my point of view the statute describes a notice one and single, delivered at one and the same time, containing in it at one and the same time all the incidents which the statute has made a condition precedent to the right to maintain an action. It is, however, not necessary to decide this point, and I believe the other members of the Court do not agree with my view. The particular notice which we have to consider will not suffice, for the letter of the solicitor on which reliance is placed does not in terms refer to any other document which can be said to contain the particulars required by the statute.

BRETT, L.J.—I also consider that in this case the condition precedent, for such I hold it to be, has not been complied with, that is, there has been no notice in writing, the whole of which writing must be served on the employer whom it is sought to sue within six weeks from the date of the injury.

This notice, which must be in writing, must satisfy the conditions mentioned in section 4 (1), and it must be served within six weeks; it must also contain the particulars specified in section 7 (1); but then that section enacts that a notice shall not be "deemed invalid by reason of any defect or inaccuracy," unless the Judge shall be of opinion that the defendant is prejudiced or that there was an intention to mislead.

Now it seems to me that the effect of these words is that a notice may avail, although there may be some defect in it—if, for instance, it should not name the day, or if the cause of the injury be inaccurately described—in the one case there would be a defect, in the other there would be an inaccuracy in the notice—and yet that defect or that inaccuracy could be supplied, and the notice would not necessarily be invalid. I agree that, as a rule,

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the notice should be one notice; but I am not prepared at present to say that the fact of its being contained in two documents would be fatal to it, and that it would be more than an inaccuracy which could be remedied. Suppose that the injured person were to write a letter containing the particulars of the injury received, but omitting his name and address, and were then to write a second letter containing the name and address, I am not prepared now to say that the second letter if sent in time, and if it referred to the first letter, could not be taken so to incorporate the first letter as to cure the inaccuracy of the first notice, and thus render it a valid notice. If in the present case the letter of the solicitor had referred in terms to the written report sent to the inspector, I should not, as at present advised, be prepared to say that the reference in the second writing might not have incorporated the particulars contained in the report; but the letter of the solicitor has here no such reference, so that it seems to me that we cannot hold that a notice in writing has been given on behalf of the injured person within the terms of the statute, and therefore that this rule must be refused. I agree with the decision in *Moyle v. Jenkins* (2) that all the circumstances specified in section 7 (1) must be detailed in writing and served on the employer.

HOLKER, L.J.—I am of the same opinion. I should require further consideration before I could say that a notice under this statute cannot be a good notice because it is contained on more than one piece of paper. I am not prepared to say that there might not be cases in which a man injured away from home might not send an account of his injuries to a friend, which, when sent in to the employer with a letter giving his name and address, might not be held to constitute, when read together, a good notice within the statute.

Rule refused.

Solicitors—Noon & Clarke, for appellant; Blurt, Tebbs & Lawford, for respondents,

1881. }
Dec. 14. } FEAR v. CASTLE AND WIFE.

Husband and Wife—Married Women's Property Act Amendment Act, 1874, ss. 2 and 5—Debts contracted by Wife before Marriage—Extent of Husband's Liability—“Subsequent action.”

By the Married Women's Property Act (1870) Amendment Act, 1874 (37 & 38 Vict. c. 50), ss. 2 and 5, a husband married after the passing of the statute is made liable by action for his wife's debts contracted before marriage to the extent, inter alia, of the personal estate in possession of the wife which shall have vested in the husband; but it is provided that “when the husband after a marriage pays any debt of his wife, or has a judgment bona fide recovered against him in an action, . . . then to the extent of such payment or judgment the husband shall not in any subsequent action be liable.”

The plaintiff on the 7th of March, 1881, commenced an action against the defendants, who were married in January, 1881, for a debt contracted by the wife whilst a feme sole. At the time of the marriage the wife was in possession of personal estate to the value of 50l., which had vested in the husband. On the 5th of March, 1881, a similar action had been brought against the defendants by a third party, and judgment signed on the 19th of March following for 50l., in respect of the assets already referred to, which were subsequently seized by the sheriff and sold:—Held, that the plaintiff's action was a “subsequent action” within the meaning of the proviso above referred to, though commenced before judgment had been obtained in the first action.

This was a Special Case, of which the following is the material portion.

The defendant Annie Castle was married to the defendant A. B. Castle in January, 1881.

On the 31st of December, 1875, the defendant Annie Castle, then Annie Arney, by her promissory note, now overdue, promised to pay to the plaintiff 50l. and interest, and the sum of 55l. 9s. was, at the commencement of this action, due to the plaintiff upon the same note. An

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action against the defendants to recover these moneys was commenced on the 7th of March, 1881.

At the commencement of the action the defendant A. B. Castle was possessed of certain furniture and a mare, of the value of 50*l.*, formerly the property of his wife, but which upon the marriage vested in him. Except as aforesaid, no personal estate had come into his possession in right of his wife.

On the 5th of March, 1881, an action was brought against both defendants for another debt contracted by her before marriage, and judgment was signed on the 19th of March, 1881, for the sum of 50*l.* against the said A. B. Castle, in respect of the assets already referred to. Execution issued and the goods were seized by the sheriff and sold.

The question for the opinion of the Court was whether the plaintiff was entitled, under the provisions of the Married Women's Property Act (1870) Amendment Act, 1874, to judgment against the defendant A. B. Castle, jointly with his wife, or otherwise (1).

K. E. Digby, for the plaintiff.—The question here turns on the meaning to be given to the words "subsequent action" in the proviso to the 5th section. It is contended that the words "subsequent action" mean subsequent to the judgment recovered in the previous action, and the intention of the statute was only to protect a husband in the case of an action brought after a judgment has been recovered in a prior action. Here the second action was

(1) By the Married Women's Property Act (1870) Amendment Act, 1874, it is provided (sections 1 and 2) that a husband married after the passing of the statute shall be liable in an action for the debts of his wife contracted before marriage, to the extent of the assets therein-after specified. By section 5: "The assets in respect of and to the extent of which the husband shall in any such action be liable are" (*inter alia*) "the value of the personal estate in possession of the wife which shall have vested in the husband. . . . Provided that when the husband after marriage pays any debt of his wife, or has a judgment *bona fide* recovered against him in any such action as is in this action mentioned, then, to the extent of such payment or judgment, the husband shall not in any subsequent action be liable."

brought before judgment had been signed in the first.

C. R. Poole, for the defendants, was not called upon.

FIELD, J.—I think that this is a perfectly clear case. The wife contracted certain debts as a *feme sole*; upon her marriage some furniture, and a mare of the value of 50*l.*, which were formerly hers, passed to her husband the co-defendant. On the 5th of March last an action was commenced against both the defendants for the debts contracted by the wife before marriage, and there being no defence to such action, judgment was shortly afterwards signed against the husband for 50*l.*, the amount of the assets which had become vested in him upon his marriage, and which he had reduced into possession. The sheriff then came and seized and sold the goods in question. It is not suggested that the action was otherwise than a *bona fide* one; yet it is argued that the husband, although he has not a farthing left out of his wife's property, is still liable to pay the plaintiff in this action, which was commenced on the 7th of March. Now I am of opinion that the Legislature in the proviso to section 5 used language which should be interpreted in its ordinary and natural sense. The words "subsequent action" mean action that follows after another action. What action did it follow? Why, the action commenced on the 5th of March. Mr. Digby has contended that these words "subsequent action" must be construed to mean action brought after judgment in the previous action; but that does not seem to me to be at all a reasonable interpretation of the statute, which was only intended to make a husband liable to the extent of his wife's assets. Under these circumstances our judgment must be for the defendants.

CAVE, J.—I am of the same opinion. The construction which Mr. Digby has sought to put upon the proviso to section 5 seems to me to be repugnant to the spirit of the Act, and might, if allowed to prevail, inflict great hardship. In cases where this ground of defence does not arise until after the second action has been brought, the proper course for the defendant seems to be to plead it as having arisen after

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action brought, under the provisions of Order XX. rule 2; and the plaintiff can then, under rule 3 of the same Order, deliver a confession of such defence and sign judgment for his costs up to the time of pleading such defence.

Judgment for defendant.

Solicitors—Torr & Co., agents for Barham & Son, Bridgewater, for plaintiff; Pridaux & Sons, agents for J. R. Poole & Son, Bridgewater, for defendants.

1882. }
Feb. 13, 23. } TOKE v. ANDREWS.

Practice—Counter-claim by the Plaintiff in Reply as to Matters arising after Writ, and before delivery of Statement of Defence and Counter-claim—Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 24, sub-ss. 3 and 7—Orders XIX. rule 19, XX. rules 1 and 2, XXIV. rules 2 and 3, XXVII. rule 1.

The plaintiff brought an action to recover arrears of rent of a farm down to Midsummer, 1881. The defendant by his counter-claim, delivered after the 29th of September, claimed the amount due to him on a valuation as outgoing tenant. The plaintiff in reply, "by way of set-off and counter-claim," claimed the quarter's rent due on the 29th of September, and also a sum paid by him for tithe rent-charge left unpaid by the defendant. On application by the defendant to strike out this reply,—Held, that the plaintiff was entitled to set up such counter-claim in reply.

This was a motion to rescind an order of Williams, J., dismissing an application to strike out matters alleged by the plaintiff in answer to a counter-claim by the defendant, and which was said to be embarrassing to the fair trial of the action within Order XXVII. rule 1. The plaintiff brought his action against the defendant as tenant of a farm to recover rent (446*l.* 17*s.* 3*d.*) in arrear at Midsummer, 1881. The writ was issued on the 26th of August, and the statement of claim was delivered on the 29th of November. In the mean-

time (on the 29th of September) another quarter's rent had become due to the plaintiff, and by the determination of the tenancy on that day the defendant had become entitled to an outgoing valuation, the amount of which he claimed in his statement of defence and counter-claim (delivered on the 22nd of December), claiming 575*l.* 8*s.* 9*d.*, if the hay, straw and fodder on the farm ought to be calculated at "market" price, and 339*l.* 3*s.* 3*d.* if at "fodder" or "consuming" value.

In reply to this counter-claim, the plaintiff, "by way of set-off and counter-claim," claimed 157*l.* 5*s.* 9*d.* for the quarter's rent which had so become due on the 29th of September, and also 95*l.* 1*s.* 1*d.* for tithe rent-charge left unpaid by the defendant on quitting, and necessarily paid by the plaintiff, and these were the "matters" which the learned Judge was asked to strike out.

Denman, in support of the appeal, contended that the plaintiff had no right to counter-claim at all, as his proper course was to amend his writ.

[FIELD, J.—But here the plaintiff could not amend, as the matter as to which he counter-claims did not arise till after the issue of the writ, and Order XX. rule 1 (1) only applies to grounds of defence arising after defence delivered.]

The words of Order XXIV. rule 2 (2)

(1) Order XX. rule 1: "Any ground of defence which has arisen after action brought, but before the defendant has delivered his statement of defence, and before the time limited for his doing so has expired, may be pleaded by the defendant in his statement of defence. And if, after a statement of defence has been delivered, any ground of defence arises to any set-off or counter-claim alleged therein by the defendant, it may be pleaded by the plaintiff in his reply, either alone or together with any other ground of reply."

Rule 2: "Where any ground of defence arises after the defendant has delivered a statement of defence, or after the time limited for his doing so has expired, the defendant may, and where any ground of defence to any set-off or counter-claim arises after reply, or after the time limited for delivering a reply has expired, the plaintiff may, within eight days after such ground of defence has arisen, and by leave of the Court or a Judge, deliver a further defence or further reply, as the case may be, setting forth the same."

(3) Order XXIV. rule 2: "No pleading subsequent to reply other than a joinder of issue

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throw light on this point, for were the plaintiff allowed to counter-claim, the defendant would be put to the inconvenience of having to obtain leave to plead further, and would then have only four days in which to deliver the pleas—Order XXIV. rule 3 (2). Counter-claim by a plaintiff is unknown to any Order or rule, and such a right must be given in express terms, and cannot arise by implication only.

It is essential that there should be some limit to pleadings in order to enable the parties to know when they will get to trial, and if the defendant would get leave as of course to plead further, there is nothing to prevent his counter-claiming again if a further right of action accrues, and the plaintiff counter-claiming again, and so on *ad infinitum*. Order XIX. rule 19 (3) says expressly that all new grounds of claim must be pleaded by way of amendment. *Beddall v. Maitland* (4) applies only to counter-claim by a defendant.

R. Vaughan and Williams.—All the plaintiff's claims and counter-claims arise in respect of matters connected with the relation between the parties of landlord

and tenant, and he is entitled to uphold his plea as a set-off or as a counter-claim. Set-off before the Judicature Act was a defence, and is so now, but counter-claim is the creature of the Judicature Act. Fry, J., in *Beddall v. Maitland* (4) says, "I think that the general spirit of the Judicature Acts is to prevent multiplicity of suits, and especially to prevent multiplicity of procedure, and to enable parties to settle, so far as may be, by one hearing and one judgment all the questions in controversy between them." Unless there be a rule inconsistent with section 24, sub-section 7, of the Judicature Act, 1873 (5), that section stands, and under it the Court is

shall be pleaded without leave of the Court or a Judge, and then upon such terms as the Court or Judge shall seem fit."

Rule 3: "Subject to the last preceding rule, every pleading subsequent to reply shall be delivered within four days after the delivery of the previous pleading, unless the time shall be extended by the Court or a Judge."

(3) Order XIX. rule 19: "No pleading, not being a petition or summons, shall, except by way of amendment, raise any new ground of claim or contain any allegation of fact inconsistent with the previous pleadings of the party pleading the same."

Rule 3: "A defendant in an action may set off, or set up by way of counter-claim against the claims of the plaintiff, any right or claim, whether such set-off or counter-claim sound in damages or not, and such set-off or counter-claim shall have the same effect as a statement of claim in a cross action, so as to enable the Court to pronounce a final judgment in the same action, both on the original and on the cross claim. But the Court or a Judge may, on the application of the plaintiff before trial, if in the opinion of the Court or Judge such set-off or counter-claim cannot be conveniently disposed of in the pending action, or ought not to be allowed, refuse permission to the defendant to avail himself thereof."

(4) 50 Law J. Rep. Chanc. 401; Law Rep. 17 Ch. D. 174,

and every Judge thereof, shall also have power to grant to any defendant in respect of any equitable estate or right, or other matter of equity, and also in respect of any legal estate, right or title claimed or asserted by him, all such relief against any plaintiff or petitioner as such defendant shall have properly claimed by his pleading, and as the said Courts respectively, or any Judge thereof, might have granted in any suit instituted for that purpose by the same defendant against the same plaintiff or petitioner, and also all such relief relating to or connected with the original subject of the cause or matter, and in like manner claimed against any other person, whether already a party to the same cause or matter or not, who shall have been duly served with notice in writing of such claim pursuant to any rule of Court or any order of the Court, as might properly have been granted against such person if he had been made a defendant to a cause duly instituted by the same defendant for the like purpose; and every person served with any such notice shall thenceforth be deemed a party to such cause or matter, with the same rights in respect of his defence against such claim as if he had been duly sued in the ordinary way by such defendant."

Sub-section 7: "The High Court of Justice and the Court of Appeal respectively, in the exercise of the jurisdiction vested in them by this Act in every cause or matter pending before them respectively, shall have power to grant, and shall grant, either absolutely or on such reasonable terms and conditions as to them shall seem just, all such remedies whatsoever as any of the parties thereto may appear to be entitled to in respect of any and every legal or equitable claim properly brought forward by them respectively in such cause or matter; so that, as far as possible, all matters so in controversy between the said parties respectively may be completely and finally determined, and all multiplicity of legal proceedings concerning any of such matters avoided."

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empowered to grant "all such remedies whatsoever as any of the parties may appear to be entitled to in respect of any and every legal or equitable claim properly brought forward by them respectively in such cause or matter." If, therefore, the plaintiff can properly bring the claim before the Court, it can give relief.

The words of Order XX. rules 1 and 2 (1) shew that a plaintiff can properly counter-claim in answer to a counter-claim, if the ground thereof has arisen since the delivery of the statement of defence; therefore, *a fortiori*, matters arising before defence delivered, but after writ, may be ground of counter-claim by the plaintiff; and *Ellis v. Munson* (6) explains the words "ground of defence" as inclusive of counter-claim. Again, the counter-claim in the statement of defence is, according to the authorities, a new action, in which the plaintiff becomes defendant and the defendant plaintiff. It is therefore competent to the plaintiff as defendant to counter-claim in such fresh action—*Stooke v. Taylor* (7) and *Winterfield v. Bradnum* (8).

Denman, in reply.—*Street v. Gover* (9) is a distinct authority that reply does not include counter-claim.

The judgment of the Court was (on Feb. 23) read by

FIELD, J.—It will be observed that, as both the claims in the plaintiff's counter-claim in this case arose before the statement of defence was delivered, they could not be pleaded under Order XX. rule 1 (1), although arising pending the action—that is, after writ issued—because the right thereby given so to plead is limited in express terms to grounds of defence arising after delivery of the statement of defence; so that unless the plaintiff is entitled in some other way to set up these matters in answer to the counter-claim he cannot get the benefit of them in this action, and the defendant will be entitled to recover under his counter-claim by way of cross action

the balance of his outgoing valuation, after deducting the Midsummer rent only and without regard to these claims; so that the plaintiff, in order to recover the September quarter's rent and the tithes he has had to pay, must be driven to a separate action.

It will be observed also that the plaintiff is placed in this position by the defendant having counter-claimed matter subsequent to the commencement of the action, which he claimed the right to do according to the decision of Mr. Justice Fry in *Beddall v. Maitland* (4), in which that learned Judge declined to follow the previous decision to the contrary of the Master of the Rolls in *The Original Hartlepool Colliery Company v. Gibb* (10).

It is not, however, necessary for us to express any opinion as to which of these two conflicting decisions we should be inclined to follow, as the plaintiff has not taken any objection to the defendant's pleadings; and the only question, therefore, for us to decide is, whether the plaintiff is, by the exercise by the defendant of this alleged right, to be defeated in his action by matter of defence arising subsequently to the commencement of it without the opportunity of setting up any defence he may have.

Now, pleas of matters properly pleadable, although arising since the commencement of the suit, were, before the Judicature Acts, admissible if pleaded *plus darrein continuance*, and that right is intended to be preserved by Order XX. rule 1 (1); but the right of a defendant to set up matter in answer, although not admissible under a plea of set-off, was first given to a defendant by the Judicature Act of 1873, which by section 24, sub-section 3 (5) gave power to the Court to grant to any defendant that relief if he shall have properly claimed it by his pleading, and effect has been given to this section by Order XIX. rule 3 (3), by which a defendant may set off or set up by way of counter-claim anything (that is, whether liquidated or unliquidated) which would have furnished him with a cause of action or suit against the plaintiff. But, as was clearly pointed out by counsel for the defendant, a counter-claim by a plaintiff in answer to a defendant's counter-claim is

(10) 46 Law J. Rep. Chanc. 311; Law Rep. 5 Ch. D. 713.

(6) 35 Law Times, 585.

(7) 49 Law J. Rep. Q.B. 857; Law Rep. 5 Q.R. D. 569.

(8) 47 Law J. Rep. Q.B. 270; Law Rep. 3 Q.B. D. 324.

(9) 46 Law J. Rep. Q.B. 582; Law Rep. 2 Q.B. D. 498.

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not mentioned or referred to in terms either in the Judicature Act or in Order XX. rule 1 (1), or any other Order framed under them.

If, indeed, any ground of defence to a set-off or counter-claim has arisen since the statement of defence, that is, as we have hereinbefore observed, provided for by Order XX. rule 1 (1); but the construction which is put by Mr. Justice Fry upon this rule, and in which construction we concur, is that the rule is limited to defence, and does not extend to any relief which may be set up by way of counter-claim.

It may be that any matter rightly pleadable as set off might be considered to come within this rule; but, as we have already pointed out, the matter relied upon by the plaintiff in answer to the counter-claim having occurred since action brought, and before statement of defence delivered, the plaintiff can neither amend his statement of claim nor plead it *plus darrein continuance*, and must submit to a judgment in the action, even if upon the actual facts of the case the defendant may have no right to any sum of money from him, but may, on the contrary, under the new state of things which came into existence on the 29th of September, be actually indebted to him.

On the part of the defendant the contention, however, was carried a step further, for it was urged that not only is there no express mention of a counter-claim by a plaintiff to a defendant's counter-claim in the Acts or Orders, but that a third party brought in by way of counter-claim by the defendant is in the same position as a plaintiff in being obliged to answer the counter-claim, and that in *Street v. Gover* (9) it was held that such a third party could not set up a counter-claim in answer.

Whether in that case somewhat too narrow a construction was not put upon the Judicature Act and its Orders and rules may be open to question, and the late Lord Justice Lush appears to have entertained considerable doubt, but the decision proceeded upon the construction of the 8th rule of Order XXII., in which provision is actually made for the third party's conduct in such a case, but that provision is in language limited to "reply," that being the only word used in the rules.

But in the present case no such fetter ties

our hands, for if there be no rule or Order, either in terms or by necessary implication, prohibiting the bringing forward of the matter alleged by way of counter-claim, and the right to raise it is given to the party pleading by the Judicature Act, it will be impossible for us to hold that the plaintiff is not entitled on setting up such matter to claim relief within section 24, sub-section 3 (5), and if relief can be given upon it, the pleading cannot be held to be embarrassing within the meaning of rule 1 of Order XXVII. (11).

In order to see how this is we must look to the Judicature Acts. Now the language of sub-section 3, section 24 of the Act of 1873 (5) is as large as it possibly can be in giving the defendant a right to counter-claim, and sub-section 7 of the same section most explicitly compels the Court to grant all such remedies as "any" of the parties to a suit may appear to be entitled to in respect of any claim properly brought forward, "so that as far as possible all matters in controversy between the parties may be completely and finally determined, and all multiplicity of legal proceedings concerning any of such matters may be avoided."

Looking to this most beneficial provision, how is it possible to say that a matter upon which, if well pleaded, the plaintiff is clearly entitled to relief as against the defendant's counter-claim is not within the very words, and still more within the spirit of this large enactment, or to hold that such a matter is not properly brought forward at the only stage and in the only manner in which it can be raised? If it had arisen before action the plaintiff might have been properly told to amend his statement of claim. If it had arisen since the statement of defence, and had been a ground of "defence," it might have been pleaded *plus darrein continuance*, but, as the matter stands, he must lose the whole

(11) Order XXVII. rule 1: "The Court or a Judge may at any stage of the proceedings allow either party to alter his statement of claim or defence or reply, or may order to be struck out or amended any matter in such statements respectively which may be scandalous, or which may tend to prejudice, embarrass or delay the fair trial of the action, and all such amendments shall be made as may be necessary for the purpose of determining the real questions or question in controversy between the parties."

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benefit of it in this action if his pleading be struck out. And it is not owing to any fault of his own that he is placed in this position, but in consequence of the defendant having counter-claimed as he has done.

Further, it is not perhaps altogether clear that the right to plead as the plaintiff has done is not within a fair construction of Order XIX. rule 3 (3), by which alone the defendant has acquired the right he has exercised, for by that rule the counter-claim is to have effect as a statement of claim in a cross action (placing, as was held in *Stooks v. Taylor* (7) and *Winterfield v. Bradnum* (8), a defendant in the position of a plaintiff); and, inasmuch as the rule proceeds to say that the Court is to be enabled to pronounce a final judgment in the same action upon the counter-claim, as well as upon the original claim, it would seem somewhat strange justice to hold that the judgment so to be pronounced is to proceed solely upon the allegations in the counter-claim, without taking into account the cross rights of the plaintiff arising out of the very same contract, and at the very same moment of time upon and at which the defendant's claims have had their foundation. There is another way of looking at it pointed out by counsel for the plaintiff. The defendant's counter-claim in the present case, overtopping as it does the amount of the plaintiff's claim, is in substance a cross action in which the defendant is the plaintiff, and there is no great violence in construction in holding that the plaintiff, for the purpose of litigating the counter-claim, is in substance a defendant, and so well within rule 3 justifying a counter-claim.

At all events we have come to the conclusion that the order of Mr. Justice Williams was well made, and must be affirmed with the usual consequent costs.

Appeal dismissed with costs.

Solicitors—Duncan, Warren & Gardner, agents for Hallett, Crery & Furley, Ashford, for plaintiff; A. R. Steele, agent for J. Minter, Folkestone, for defendant.

1882. { *In the matter of an arbitration*
March 14. { *between R. W. PULLEN AND*
 { *THE CORPORATION OF LIVER-*
 { *POOL.*

Lands Clauses Consolidation Act (8 Vict. c. 18), ss. 23 and 31—*Construction—Arbitration—Award—Umpire.*

The three months allowed by the 23rd section of the Lands Clauses Consolidation Act, 1845, for an umpire to make his award, is to be calculated from the date of his appointment, and not from the time when the awarding power of the arbitrators came to an end.

This was a rule calling upon the defendants to shew cause why a writ of *mandamus* should not issue, directing them to issue their warrant under their common seal to the Sheriff of Lancashire, requiring him to summon a jury to enquire of and assess the amount of compensation to be paid by them to Richard W. Pullen, for the purchase by them of his interest in certain tenements and hereditaments, required for the execution of certain works authorised by the Local Government Boards Provisional Order Compensation Act, 1878, and the several Acts of Parliament incorporated therewith.

By the above Act and the Lands Clauses Consolidation Acts, 1845, 1860 and 1869, incorporated therewith, the corporation of Liverpool were empowered to take for certain purposes certain lands and buildings belonging to Mr. Pullen.

On the 22nd of April, 1881, the usual notice to treat was served on Mr. Pullen, on behalf of the corporation.

On the 17th of May, 1881 (no agreement having been come to as to the sum of money to be paid for the purchase of the premises), Mr. Pullen gave notice of his claim, and of his desire to have the question of compensation settled by arbitration. On the 16th of August, 1881, Mr. Pullen appointed Mr. J. G. Martin, of Liverpool, estate agent, as his arbitrator.

On the 29th of August, 1881, the corporation appointed Mr. W. H. Weightman, architect, as their arbitrator, and gave notice thereof to Mr. Pullen. The arbitrators were unable to agree upon an umpire. The statutory twenty-one days

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allowed to the said arbitrators for making their award expired on the 19th of September, 1881, and no award was made by them, nor did they extend their time. The arbitrators failing to agree upon an umpire, application was made by the Corporation of Liverpool to the city police Magistrate for the appointment of an umpire, pursuant to the provisions contained in the Lands Clauses Act, 1845. On the 3rd of October, 1881, the Magistrate made an order, appointing Sir Henry Hunt to be umpire in the arbitration. On the 29th of November, 1881, the umpire sat and heard the matter referred to him, and reserved his decision. On the 20th of December, 1881, the umpire made his award, which was published on the following day.

Under these circumstances Mr. Pullen contended that the umpire's award was invalid, not having been made within the three months limited for the making thereof; accordingly he served a notice on the 20th of January, 1882, requiring the corporation within seven days to issue their warrant to the sheriff directing him to summon a jury (1). The corporation not

having regarded the said notice, Mr. Pullen obtained the above rule *nisi* on the 30th of January, 1882, against which—

Charles Russell, Q.C., and R. S. Wright, shewed cause.—The objection taken to this award is not well-founded. The question here turns on the construction to be placed on sections 23 and 31 of the Lands Clauses Consolidation Act, 1845, and it is contended that the three months given to an umpire within which to make his award began to run from the date of his appointment, the 3rd of October, by the Justices; that being so, the award was made within the prescribed period of three months. The contention on the other side will be that the three months given to the umpire began to run from the 19th of September, which was the time when the awarding power of the arbitrators came to an end, under 8 Vict. c. 18. s. 31, and that consequently the statutory period has been exceeded by one day. It is difficult, however, to understand how the umpire could have "failed" to make his award for three months, seeing that he was not in a position to act until the 3rd of October. The authorities, moreover, are in favour of the corporation. In *Skerratt v. The North Staffordshire Railway Company* (2), Lord Cottenham, L.C., held that the three months began to run from the time when the duty of the umpire devolved upon him, and pointed out the absurd consequences which would result from adopting such a construction as is contended for here. The decision in *Skerratt's Case* (2) was followed and approved of in *The East and West India Docks Company v. Bradshaw* (3), which was decided the same year. Lastly,

their award within twenty-one days after the day on which the last of such arbitrators shall have been appointed, or within such extended time (if any) as shall have been appointed for that purpose by both such arbitrators under their hands, the matters referred to them shall be determined by the umpire to be appointed as aforesaid." By section 39: "In every case in which any such question of disputed compensation shall be required to be determined by the verdict of a jury, the promoters of the undertaking shall issue their warrant to the sheriff, requiring him to summon a jury for that purpose," &c.

(2) 2 Ph. 475; 17 Law J. Rep. Chanc. 161.

(3) 12 Q.B. Rep. 562; 17 Law J. Rep. Q.B. 362.

(1) By the Lands Clauses Consolidation Act, 1845 (8 Vict. c. 18), s. 23, it is provided that "if when the matter shall have been referred to arbitration, the arbitrators or their umpire shall for three months have failed to make their or his award, or if no final award shall be made, the question of such compensation shall be settled by the verdict of a jury as hereinafter provided." Section 25 provides for the appointment of the arbitrator by each party. By section 27, the "arbitrators shall, before they enter upon the matters referred to them, nominate and appoint, by writing under their hands, an umpire to decide on any such matters on which they shall differ, or which shall be referred to him, under the provisions of this or the Special Act." By section 28, if "the said arbitrators refuse, or shall for seven days after request of either party to such arbitration neglect to appoint an umpire, the Board of Trade in any case in which a railway company shall be one party to the arbitration, and two justices in any other case, shall, on the application of either party to such arbitration appoint an umpire, and the decision of such umpire on the matters on which the arbitrators shall differ, or which shall be referred to him, under this or the Special Act, shall be final." Section 31: "If where more than one arbitrator shall have been appointed, and where neither of them shall refuse or neglect to act as aforesaid, such arbitrators shall fail to make

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even if the Court were of opinion that the three months had been exceeded, it has still power to enlarge the time under the Common Law Procedure Act, 1854, s. 15, and to make this award binding.

Kenelm Digby supported the rule.—It is contended that the umpire has for three months “failed” to make his award within the meaning of section 23, and if that be so the applicant has a right to have the amount of compensation payable to him fixed by a jury. The three months began to run from the 19th of September, the day on which the awarding power of the arbitrators ceased to exist; it was not therefore competent for the umpire to make an award on the 20th of December. The appointment of the umpire, though actually made on the 3rd of October, relates back to the time when the arbitrators ceased to have any awarding power. The cases cited are not in point, and leave the question raised here quite untouched. In *Skerratt's Case* (2) it was no doubt held that the time began to run from the period when the duty devolved on the umpire; the question here is, when did that duty devolve? All that *Bradshaw's Case* (3) decided was that the umpire may be appointed more than twenty-one days after the appointment of the last arbitrator. In *Holdsworth v. Wilson* (4), Erle, C.J., in delivering the judgment of the Exchequer Chamber, explains the grounds on which *Bradshaw's Case* (3) had been decided, the soundness of which had been doubted in the Court below. See also *Harding v. Watts* (5).

As regards the question of extension of time by this Court, it is submitted that the Court has no such power in cases under the Lands Clauses Consolidation Act, 1845. In *Rhodes v. The Aire Dale Drainage Commissioners* (6) it was no doubt held that an arbitrator appointed to ascertain the amount of compensation payable under the Lands Clauses Consolidation Act, 1845, had power to state a Special Case under 17 & 18 Vict. c. 125. s. 5, but the decision in that case does not apply to an extension of time.

(4) 4 B. & S. 1; 32 Law J. Rep. Q.B. 289.

(5) 15 East, 556.

(6) 45 Law J. Rep. C.P. 861; Law Rep. 1 Q.P. D. 402.

HUDDLESTON, B.—This is an application for a *mandamus* directed to the sheriff requiring him to summon a jury for the purpose of assessing the amount of compensation to be paid to the claimant, under the provisions of the Lands Clauses Consolidation Acts. The material dates to be borne in mind in determining the question now raised before us are as follows:—The usual notice to treat was given on the 22nd of April, 1881. On the 17th of May, 1881, the claimant signified his desire to have the compensation settled by arbitration, under the provisions of section 23 of the Lands Clauses Consolidation Act. On the 16th of August, 1881, Mr. Martin was appointed as the claimant's arbitrator; and on the 29th of August Mr. Weightman was appointed the arbitrator for the corporation, so that the twenty-one days mentioned in section 31 would begin to run from that day. The arbitrators having made no award, and appointed no umpire, an application was on the 3rd of October made, under the provisions of the 28th section, to the magistrate to appoint an umpire, and, on that day, Sir H. Hunt was appointed umpire. The umpire's award was made on the 20th of December, and published the following day. The question which we have to decide is, whether the three months commenced to run when the duty devolved upon the arbitrators to make an award, or from the time when the umpire was appointed.

The whole question turns on the construction to be placed upon the 23rd and 31st sections of the Act to which I have already referred. The 23rd section provides that, if when a matter has been referred to arbitration, “the arbitrators or their umpire shall for three months have failed to make their or his award, or if no final award shall be made,” then the question of compensation is to be determined by a jury.

The 31st section provides that, when the arbitrators who have been appointed “fail to make their award within twenty-one days” after the appointment of the last of the arbitrators, or “within such extended time as shall have been appointed for that purpose by both arbitrators,” then an umpire is to be appointed as provided by the 23rd section. In the present case

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the twenty-one days from the appointment of the last arbitrator would expire on the 19th of September, 1881, and Mr. Digby has contended that, upon the true construction of these two sections, the appointment of the umpire would relate back to that time, in which case just over three months elapsed before the making of the award. The applicant, therefore, declines to recognise the award, and the present application is to compel the sheriff to take the necessary steps to have the amount of compensation determined by a jury.

But, as I read these sections, the time which the umpire has commences from the date of his appointment, and not from the time when the arbitrators' awarding power comes to an end. The umpire in this case was appointed under the provisions of the 28th section, just as in the case of *Skerratt v. The North Staffordshire Railway Company* (2). In that case Lord Cottenham, dealing with the 23rd section, says, "*Reddendo singula singulis*, according to the ordinary rules of construction we have two parties making an award; provision is made for one and the other, and the arbitrators may have failed, or the umpire may have failed. It applies to both in the abandonment of their duty, and the neglect of doing that which they ought to do within three months; and then the event occurs in which they are to call in the assistance of a jury. How can you possibly construe this to mean that the arbitrators themselves, and they alone, may create the delay and prevent the award being made? How can you construe that as meaning that the umpire shall, within the three months, make his award? I confess I do not see how, by any possible use of the language found in this clause, such a construction can be put upon it. I therefore read it thus: That the arbitrators may have twenty-one days in the first instance; they may enlarge it for themselves to the expiration of the three months; they have no longer time allowed for themselves to do that; but whenever it happens, either at the expiration of twenty-one days or the expiration of the enlarged time, that the duty of the umpire commences, then the umpire has three months to perform his duty."

Now I read the 23rd section in exactly the same way as Lord Cottenham did.

The arbitrators have twenty-one days, or three months, if they choose to enlarge the time, dating from their appointment. So also with regard to the umpire; if the arbitrators fail to appoint an umpire, and the latter is appointed by the Board of Trade or by Justices, then the duty of the umpire commences from the actual date of his appointment. This construction is likewise supported by the judgment of the Court in *Bradshaw's Case* (3): "We find it," says Lord Denman, "decided in *Ex parte Skerratt v. The North Staffordshire Railway Company* (2), that the three months for the umpire commences from the duty devolving upon him. In this decision we fully concur, and as this award of the umpire was made within three months from the duty devolving upon him, and indeed within three months from his appointment, it is not too late." That is a decision binding upon us, and one in which I quite concur; it was, moreover, expressly approved of by Chief Justice Erle in delivering the judgment of himself and five other Judges in *Holdsworth v. Wilson* (4), though the exact point did not arise there. It is, therefore, to my mind, clear that the three months commenced from the time of the duty devolving upon the umpire—namely, the 3rd of October; that being so, the award was made in due time. This rule consequently must be discharged, and with costs.

I am inclined to think that the Court would, if necessary, have had the power—a power which would have been most reasonably exercised in the present case—to extend the umpire's time; but it is not necessary to consider this further, everything, in my judgment, having been duly done by him and in proper time.

BOWEN, J.—I am of the same opinion. The exact point was not raised either in *Skerratt's* (2) or in *Bradshaw's Case* (3), but the judgments are important, and shew that the view which the Judges took of the matter is inconsistent with Mr. Digby's contention. Their view is, in my judgment, the only intelligible one that could be taken. It is difficult to understand how the umpire could be said to have "failed" for three months to make his award, when he has not had the opportunity of doing so. Failure means neglect

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of some opportunity. I therefore come to the conclusion that the three months which the umpire had within which to make his award commenced to run from the 3rd of October, when he was actually appointed, and that the objection taken against this award is not well-founded.

Rule discharged with costs.

Solicitors—Paterson, Snow & Bloxam, agents for Brook & Morris, Warrington, for applicant; F. Venn & Co., agents for J. Rayner, Town Clerk, Liverpool, for the corporation.

1881.	}	MORGAN v. THOMAS.
Dec. 20.		
1882.		
April 1.		

Will—Construction—Devise to one for life, and then to his "Issue and their Heirs."

A testator devised land to his eldest son L. for life, "and after his decease to his lawful issue and their heirs for ever if any"; if L. should die without leaving any children born in wedlock, he gave the land to his son E. and his heirs for ever:—Held, that L. took only an estate for life, and not an estate tail.

This was a demurrer to a statement of defence.

The pleadings were, in substance, as follows:—

Statement of claim.

1. On the 30th of October, 1834, Lewis Thomas, hereinafter called the testator, being then seised in fee-simple of certain lands with a farmhouse and other buildings thereon, situated in the parish of Llanmaes, in the county of Glamorgan, duly made his last will, which, so far as is material, was in the words following:

"I give, devise and bequeath to my eldest son Lewis all my freehold property whatsoever and wheresoever situate during his natural life, and after his decease to his lawful issue and their heirs for ever (if any); if he should die without leaving any children born in wedlock, I give the said freehold property to my son Evan and his heirs for ever—charging the same with the

maintenance of his mother if she should be then living. I give to my beloved wife 7s. a week, to be paid her by my executors hereinafter named during her life. I give to my said son Evan and my two daughters 10l. a piece, to be paid them in twelve months after my decease. I also give to the poor of this parish a Welsh bushel of wheat and the same quantity of barley in a month after my death. I give all the rest, residue and remainder of my personal estate that I may die possessed of, or be in any way entitled to, to my said son Lewis and my other son William, to be equally divided among them, share and share alike; and I nominate and appoint my eldest son Lewis to be sole executor of this my last will and testament. Revoking all former wills by me heretofore made, I ordain this, and no other, to be my last will and testament. In witness, &c."

2. The testator died in November, 1834, seised of the said lands and premises, leaving the said Lewis Thomas, his eldest son, and the said Evan Thomas, him surviving; and Lewis Thomas the son thereupon entered into possession of the said lands and premises under the said will, and continued in possession thereof until his death hereinafter mentioned.

3. Lewis Thomas the son died in or about January, 1881, without having been married.

4. Evan Thomas died in or about October, 1857, intestate, and without having disposed of the said lands and premises, or of his interest therein or in any part thereof, and leaving the plaintiff his only son and heir-at-law. The plaintiff on the 16th of February, 1866, took the name of Lewis Morgan.

5. Upon the death of Lewis Thomas the son, the defendant wrongfully entered into possession, or was possessed of the said lands and premises, and claimed to be entitled thereto and to possession thereof; and the defendant has refused to deliver possession, and claims to continue in possession thereof.

The plaintiff claims—first, possession of the said lands and premises; secondly, mesne profits.

Statement of defence.

1. Lewis Thomas the son, being then under the will in the statement of claim

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stated seised as of fee-tail of the said lands, farmhouse and buildings, by a deed, dated the 11th of July, 1853, and made between himself of the one part and Thomas Powel of the other part, granted, released and confirmed unto Powel and his heirs the said lands and buildings to hold to such uses as he (Lewis Thomas) should by deed appoint and subject thereto to the use of him and his assigns during his life, with remainder to the use of Powel his heirs and assigns during the life of him, Lewis Thomas, in trust for him and his assigns, with remainder to the use of him his heirs and assigns for ever. The said deed was duly enrolled in Chancery, and thereby became a valid disentailing disposition under the Act for the Abolition of Fines and Recoveries.

2. Lewis Thomas the son duly made his will, dated the 23rd of August, 1877, whereby he gave and devised all the real estates of which he should die seised or possessed unto William Watts and David Evans their heirs or assigns, upon trust to permit Catherine Thomas (the defendant) to receive and take the rents and profits during her life, with divers remainders over after her decease. The said devise was never revoked.

3. Upon the death of Lewis Thomas the son, this defendant became entitled under the said devise to, and accordingly entered into, possession of the said lands and premises, and she claims to continue in possession thereof under the said devise.

The plaintiff demurred to the statement of defence, on the ground that under the will set forth in the statement of claim Lewis Thomas therein mentioned took only an estate for life, and not an estate tail in the property in question.

Anstie, for the plaintiff.—“Issue” may be read as a word of purchase, and not of limitation, if that is necessary to effectuating a testator's intention—*Cooper v. Collis* (1). And “issue” being followed by the words “and their heirs,” must here be so read—*Hamilton v. West* (2), cited in *Jarman on Wills* (3), and *Kavanagh v. Morland* (4). The words “his lawful issue and

their heirs for ever,” are here to be read as equivalent to “his children and grand-children existing at his death, taking *per capita* as joint-tenants in fee,” similarly to *Cook v. Cook* (5), or as equivalent to “his children” in like manner, following the use of the word “issue” in *Ryan v. Cowley* (6) and *Carter v. Bentall* (7), which, having regard to the gift over “if he should die without leaving any children born in wedlock,” may be the better construction.

Upjohn (*Wills, Q.C.*, with him), for the defendant.—“Issue” is here a word of limitation, and not of purchase. There is no sufficient reason for treating it as a word of purchase. In *Ryan v. Cowley* (6) the testator interpreted his own language by using the words “if such child or children.” So also in *Carter v. Bentall* (7) and *Farrant v. Nichols* (8). The addition of the words “and their heirs” is insufficient—*Goodright v. Pullym* (9), *Wright v. Pearson* (10), *King v. Burchall* (11), *Denn v. Puckey* (12), *Dodson v. Grew* (13), *Frank v. Stovin* (14) and *Elton v. Eason* (15), where the words “if any” were held to make no difference. The case of *King v. Burchall* (11) is on all fours with this. *Hamilton v. West* (2) differed materially from this case. In *Kavanagh v. Morland* (4) the ancestor was held to take an estate tail and not a mere life estate; and *Montgomery v. Montgomery* (16), which is there referred to by Wood, V.C., as deciding that under a devise to A for life, and then to his issue and their heirs, the issue take as purchasers, is misapprehended, for the devise there contained the words “share and share alike.” There can be no question that the words “if he should die without leaving any children born in wedlock” mean “if he die without ever having had any,” as in *Treharne v. Lay-*

(5) 2 Vern. 545.

(6) 1 Lloyd & G. 7.

(7) 2 Beav. 551.

(8) 9 Beav. 327; 15 Law J. Rep. Chanc. 259.

(9) 2 Str. 729.

(10) Amb. 358.

(11) Ibid. 379.

(12) 5 Term Rep. 299.

(13) 2 Wils. 322.

(14) 3 East, 548.

(15) 19 Ves. 73.

(16) 3 Jo. & Lat. 47.

(1) 4 Term Rep. 294.

(2) 10 Ir. Eq. 75.

(3) 3rd ed. p. 402.

(4) Kay, 16; 23 Law J. Rep. Chanc. 41.

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ton (17) and *White v. Hight* (18). To read "issue" as meaning children and remoter descendants living at the son's death taking *per capita* would be to suppose a strange set of purchasers; and if, to avoid that strangeness, it were read as meaning children, that would be going still further away from the proper meaning of "issue," which is properly a collective word for all descendants down to the remotest.

He referred also to *Perrin v. Blake* (19), *Roddy v. Fitzgerald* (20), *Warman v. Seaman* (21), *Slater v. Dangerfield* (22), *Doe v. Wright* (23), *Bacon v. Cosby* (24), *Parker v. Birks* (25), *Fearn, Cont. Rem.* (26), *Jarman on Wills* (27), and the Act for the Abolition of Fines and Recoveries (28).

Anstie, in reply—*Montgomery v. Montgomery* (16) was not decided on the words "share and share alike." The ground of the decision is indicated by Wood, V.C., in *Woodhouse v. Herrick* (29), who there deals with it more fully than in *Kavanagh v. Morland* (4), and states the decision in the same way. He referred to *Heasman v. Pearce* (30).

Upjohn was heard on the two cases cited in reply.

Cur. adv. vult.

CAYE, J. (on April 1).—In this case the testator made a will in these words:—"I give, devise and bequeath to my eldest son Lewis all my freehold property whatsoever and wheresoever situate during his natural life, and after his decease to his

lawful issue and their heirs for ever, if any; if he should die without leaving any children born in wedlock, I give the said freehold property to my son Evan and his heirs for ever."

The question in dispute is whether the eldest son Lewis took an estate for life or an estate tail. The devise to him during his natural life undoubtedly would give him an estate for life only; and if that devise had been followed simply by the words, "and after his decease to his lawful issue," that would have given him an estate tail. It is, however, contended that the superadded words of limitation, "and their heirs for ever, if any," make the words "his lawful issue" words of purchase, and not of limitation, and that that construction is not affected by the language of the gift over to Evan.

Against this contention, Mr. Upjohn relied on the case of *King v. Burchall* (11), in which it was held that a devise to A for his life and, after the determination of that estate, to the issue male of his body and their heirs, and for want of such issue over, gave A an estate tail; and he also cited the similar cases, *Denn d. Webb v. Puckey* (12) and *Frank v. Stovin* (14).

The subject is discussed in the very important case of *Montgomery v. Montgomery* (16), in which Lord St. Leonards lays it down as clearly settled that a devise to A for life, with remainder to his issue, with superadded words of limitation in a manner inconsistent with a descent from A, will give to the word "issue" the operation of a word of purchase. The cases, he says, are more difficult to manage when there is a devise over for want of issue. To *King v. Burchall* (11), he says he never could reconcile his mind. *Denn v. Puckey* (12) and *Frank v. Stovin* (14) are not dealt with specifically in that judgment; but they seem to have proceeded on the ground that the gift over in default of issue male was only consistent with an estate in tail male in A, and consequently inconsistent with the issue male of A taking an estate in fee. Lord St. Leonards adds that where there are superadded words of limitation, and the issue can take the fee, and there is only a limitation over in a contingent event, the issue will take as purchasers,

(17) 44 Law J. Rep. Q.B. 202; Law Rep. 10 Q.B. 459.

(18) Law Rep. 12 Ch. D. 751.

(19) 4 Burr. 2579; 1 H. Black. 672; 1 Dougl. 843.

(20) 6 H.L. Cas. 823.

(21) Poll. 112.

(22) 15 Mee. & W. 263; 16 Law J. Rep. Exch. 51.

(23) 2 B. & Ald. 713.

(24) 4 De Gex & S. 261; 20 Law J. Rep. Chanc. 213.

(25) 1 Kay & J. 156; 24 Law J. Rep. Chanc. 117.

(26) Pp. 386-395, 526.

(27) Vol. ii. (4th ed.), 360-364, and 418, 419.

(28) 3 & 4 Will. 4. c. 74.

(29) 1 Kay & J. 352; 24 Law J. Rep. Chanc. 649.

(30) 41 Law J. Rep. Chanc. 705; Law Rep. 7 Chanc. 275.

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according to *Lees v. Mosley* (31), following previous authorities.

The present case seems exactly to meet this description. There are superadded words of limitation, and the issue can take the fee, and there is only a limitation over in a contingent event, for I am clearly of opinion that the limitation over to Evan can only take effect in the event of the eldest son Lewis dying without having had children.

This view of the law is confirmed by the language of Lord Hatherley, then Vice-Chancellor, in *Kavanagh v. Morland* (4), where he says that if there be a devise to one for his life and then to his issue, with words of limitation superadded as "to his issue and their heirs," then, according to the decision of Lord St. Leonards in the case of *Montgomery v. Montgomery* (16), the issue are considered to take as purchasers, and the whole estate is given to them under these words of limitation.

In the present case there is a devise to Lewis for his life, and then to his issue and their heirs, and there is no gift over in default of such issue such as in *Denn v. Puckey* (12) and *Frank v. Stovin* (14) was held to shew that the testator contemplated a gift over in the event of an indefinite failure of issue of the body of the first taker, and consequently did not intend that the superadded words of limitation should pass the fee.

Upon the whole, although I am by no means free from doubt in the matter, I believe that I am deciding in accordance with the authorities, and with the intentions of the testator, in holding that the eldest son took an estate for life, followed by a remainder in fee to his issue as purchasers if he had children born in wedlock, and a remainder in fee to his brother Evan if he had no such children.

Judgment for the plaintiff with costs.

Solicitors—Crowder, Anstie & Vizard, agents for Thomas Rees, Cowbridge, Glamorgan-shire, for plaintiff; Wrentmore, agent for James & Co., Merthyr Tydfil, for defendant.

[IN THE COURT OF APPEAL.]

1881.	} YOUNG & CO. v. THE
Nov. 18, 19, 21.	
1882.	
March 18.	MAYOR AND CORPORATION OF THE ROYAL LEAMINGTON SPA.*

Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 174—*Urban Authority—Municipal Corporation—Contract not under Seal—Executed Contract.*

A contract entered into with a municipal corporation acting as an urban authority under the Public Health Act, 1875, is not enforceable against it unless the provisions of section 174 of that Act as to affixing the common seal of the corporation thereto have been complied with, notwithstanding that such contract has been executed, and that the corporation is actually enjoying the benefit of it.

Appeal by the plaintiffs from a judgment of the Queen's Bench Division upon a Special Case, the material facts of which are as follows:—

In November, 1876, one Powis entered into a contract by deed under the common seal of the corporation, who made the contract as an urban sanitary authority under the provisions of the Public Health Act, 1875 (38 & 39 Vict. c. 55), to execute certain works for supplying the town of Leamington with water.

In June, 1878, one Jerram was appointed borough surveyor by writing under the common seal of the corporation, and finding that Powis was not proceeding satisfactorily with the works, reported that fact to the corporation, who referred the matter to their highway committee to report upon; and ultimately Jerram was instructed by the corporation to get the whole of the work included in the contract completed in the best possible manner; and Jerram thereupon took possession of the works, tools, implements and materials belonging to Powis under a clause in the contract giving him power so to do.

The plaintiffs, on the invitation of Jerram, tendered for the completion of the works according to Powis's contract, and finally agreed to carry out and complete all the necessary works, including those

* *Cram* Brett, L.J.; Cotton, L.J.; Lindley, L.J.

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specified in the original contract, and also such additional works as were rendered necessary by the failure of Powis to perform his contract. The plaintiff's tender was not, in fact, placed before nor considered by the corporation.

A memorandum of this agreement was made in writing, and was signed by the plaintiffs and Jerram; but the agreement itself was not under the common seal of the corporation.

The plaintiffs executed the works in accordance with this agreement, and the corporation from time to time made payments to them upon the certificates given by Jerram for all the works completed by them.

It was found as a fact in the case that the employment of the plaintiffs was an employment of them by the corporation through Jerram as their agent, and that the relation of employer and employed never in fact existed between the plaintiffs and Jerram. It was also found that the additional works executed by the plaintiffs were necessary and incidental to the completion of the works left unfinished by Powis; and also that the employment of the plaintiffs to execute the works was within the duties and authorities of Jerram as the engineer of the corporation.

The corporation took possession and obtained the benefit of the works executed by the plaintiffs; but refused to pay a balance of 6,000*l.* odd claimed by the plaintiffs, upon the ground that the employment of the plaintiffs was not an employment under the common seal of the corporation.

The question for the opinion of the Court was whether the absence of the common seal under the circumstances stated was fatal to the plaintiffs' right to recover the amount claimed by them.

The Queen's Bench Division (Williams, J., and Mathew, J.) gave judgment for the defendants on the Special Case.

The plaintiffs appealed.

Benjamin, Q.C. (with him *W. G. Harrison, Q.C.*, and *Edwyn Jones*), for the plaintiffs.—The corporation is bound to pay for the works which have been executed by the plaintiffs, although the contract is not under seal within section 174

of the Public Health Act, 1875 (38 & 39 Vict. c. 55) (1). The defendants are in possession of the works, and are enjoying the benefit of the contract. The fact that the contract was made with a municipal corporation acting as an urban authority does not affect this question at all. In *Nowell v. The Mayor, &c., of Worcester* (2) a similar point was raised, that the defendants had been acting as an urban authority; and the question turned upon the effect of section 12 of the Public Health Act, 1848 (11 & 12 Vict. c. 63), which is substantially equivalent to section 6 of the Act of 1875, so far as this particular question is concerned. There the action was brought to recover certain money for work done by the plaintiffs under a contract made with the defendants under the common seal of the board; and although an attempt was made to restrict the powers contained in that Act, it was held that the defendants were still a municipal corporation. The effect of that decision is that, although the defendants were acting in a double capacity—namely, as a municipal corporation and an urban authority—they were bound as a municipal corporation, as statutory provision was made for payment by a special rate. The fact that a contract is made by a corporation acting as a local board makes no difference—*Andrews v. The Mayor of Ryde* (3). The case of *Nowell v. The Mayor of Worcester* (2) does not conflict with that of *Hunt v.*

(1) By section 51 of 38 & 39 Vict. c. 55: "Any urban authority may provide their district or any part thereof . . . with a supply of water proper and sufficient for public and private purposes; and for those purposes, or any of them, may—(1), construct and maintain waterworks, dig wells, and do any other necessary acts. . . ."

By section 173: "Any local authority may enter into any contract necessary for carrying this Act into execution."

By section 174: "With respect to contracts made by an urban authority under this Act, the following regulations shall be observed—namely (1), every contract made by an urban authority whereof the value or amount exceeds 50*l.*, shall be in writing and sealed with the common seal of such authority."

(2) 9 Exch. Rep. 457; 23 Law J. Rep. Exch. 189.

(3) 43 Law J. Rep. Exch. 174; Law Rep. 9 Exch. 802.

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The Wimbledon Local Board (4), where the board was only a local board, and had no power to contract except in the manner provided by the statute, which was therefore mandatory so far as it enacted that the contract must be under seal. The powers of a corporation with respect to supplying water are defined in sections 51, 55, 56 and 57 of the Public Health Act, 1875, and the incorporated sections of the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17). This is not the case of a corporation receiving a benefit which it is unable to reject; but it is rather one of a corporation established by law, and enabled by statute to create works which bring in revenue; and this contract, even if not under seal, is one by which a productive income-bearing property has passed to the corporation, and that property has been retained by the corporation. Even a *cestui que trust* cannot repudiate a contract made by his trustee and yet retain the benefit thereof; and still less can this corporation maintain that the contract is void and yet retain the benefit of it. If the corporation retains the benefit, it must be that the property in the pipes, &c., has passed to it; and if that be so, then it must be a tortious act on the part of the defendants to retain the property and refuse to pay for it. The corporation is *estopped* from so arguing, for here there is something which cannot be returned—it cannot approbate the contract by keeping that property, and reprobate it by refusing to pay—*Nicholson v. The Bradfield Union* (5). Further, the corporation, by paying money on account on the engineer's certificates, has, in fact, adopted the benefit of the contract. *Sanders v. The St. Neot's Union* (6) contains the whole doctrine on the question of the property passing.

The Ecclesiastical Commissioners v. Merral (7) and *Haigh v. The North Brierley Union* (8) were also cited.

Further, according to the true meaning

(4) 48 Law J. Rep. C.P. 207; Law Rep. 4 C.P. D. 48.

(5) 7 B. & S. 774; 35 Law J. Rep. Q.B. 176; Law Rep. 1 Q.B. 620.

(6) 8 Q.B. Rep. 810; 15 Law J. Rep. M.C. 104.

(7) 38 Law J. Rep. Exch. 93; Law Rep. 4 Exch. 162.

(8) E. R. & E. 873; 28 Law J. Rep. Q.B. 62.

of the rule, this contract is a contract under seal, for it is a part execution of a contract already under seal. It is, in fact, a contract to complete a contract under seal, and is thus but the development of an agreement under seal.

Mellor, Q.C., and *Dugdale*, for the defendants.—Municipal corporations as such have no power to supply water; their power to do so is wholly derived from the Public Health Act, 1875, and the provisions therein contained are for the protection of the rate-payer. It has been decided that the provisions of section 174, sub-section 1 are mandatory—*Hunt v. The Wimbledon Local Board* (4). The case of *Nowell v. The Mayor of Worcester* (2) is not in point, for there the contract was under seal; besides, the provisions of the Act under consideration there were held to be directory only. Also, that case may be considered to be overruled by *Freund v. Dennett* (9).

A municipal corporation is not liable on a contract not under seal even if it be executed—*The Mayor of Ludlow v. Charlton* (10), *Arnold v. The Mayor of Poole* (11), *Paine v. The Strand Union* (12), *Lamprell v. The Billericay Union* (13), *Diggle v. The London and Blackwall Railway Company* (14), *Finlay v. The Bristol and Exeter Railway Company* (15) and *Smart v. The West Ham Union* (16).

The case of *Clarke v. The Cuckfield Union* (17) is not inconsistent with this claim of authority, as there the case came within the exception as to small matters not being within the rule.

Mellor v. Spateman (18), *The Queen v.*

(9) 4 Com. B. Rep. N.S. 576; 27 Law J. Rep. C.P. 314; also 5 Law J. Rep. Chanc. 73.

(10) 6 Mee. & W. 815; 10 Law J. Rep. Exch. 75.

(11) 4 Man. & G. 860; 5 Sc. N.R. 741; 12 Law J. Rep. C.P. 97.

(12) 8 Q.B. Rep. 326; 15 Law J. Rep. M.C. 89.

(13) 3 Exch. Rep. 283; 18 Law J. Rep. Exch. 282.

(14) 5 Exch. Rep. 442; 19 Law J. Rep. Exch. 308.

(15) 7 Exch. Rep. 409; 21 Law J. Rep. Exch. 117.

(16) 10 Exch. Rep. 867; 24 Law J. Rep. Exch. 201, and in error 11 Exch. Rep. 867; 25 Law J. Rep. Exch. 210.

(17) 21 Law J. Rep. Q.B. 849.

(18) 1 Saund. 615, 616, n. (ed. 1871).

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The Mayor of Stamford (19), *Austin v. The Guardians of Bethnal Green* (20), *Crampton v. The Varna Railway Company* (21) and *Hall v. The Mayor of Swansea* (22) were also cited.

Harrison, Q.C., in reply, referred to *Story on Agency*, sections 52 and 53.

Cur. adv. vult.

The following judgments were delivered on the 18th of March, 1882 :—

LINDLEY, L.J.—The facts stated in the Special Case, and which are material for its decision, are as follows :—

1. There was a duly sealed contract between the defendants and Powis for the execution of certain works therein mentioned under the orders of one Jerram, who was the engineer of the defendants, and was duly appointed under their common seal.

2. Powis failed to perform his contract, and under a provision contained in it the defendant's engineer, Jerram, became entitled to employ other persons to finish it, and to charge Powis with the expense.

3. Jerram found that in order to finish the works it was necessary to execute certain additional works not comprised in Powis's contract, as well as to complete the works which were comprised in it.

4. Jerram reported this necessity to the defendants, and they by their council approved of the report; and thereupon Jerram entered into an agreement with the plaintiffs for the execution by them of the work left unfinished by Powis, and of the additional works above referred to.

5. This contract was not sealed by the defendants, but the works thus agreed to be done by the plaintiffs were all done as agreed under the directions of Jerram.

6. The defendants in all these matters acted as an urban authority under the provisions of the Public Health Act, 1875.

The Special Case as amended expressly states this as a fact; but in my opinion it is also a correct statement of the legal

effect of the Municipal Corporations Act (5 & 6 Will. 4. c. 76), s. 92, and of the Public Health Act, when construed together. The Municipal Corporations Act, s. 92, enables corporations to apply their funds for the public benefit of the inhabitants and improvement of the borough; and these words are large enough to include the erection of waterworks. But the Public Health Act, 1875, contains special enactments relating to this very matter, and states how contracts for the erection of waterworks are to be entered into by all urban authorities, whether municipal corporations or not, upon general principles of construction; therefore it appears to me that in order to decide this case all that is necessary is to construe the Public Health Act, and to determine whether it has been complied with or not.

The Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 174, enacts as follows: [his Lordship read the material portions of the section.]

The contract in question was one for considerably more than 2,000*l.*; according to section 174, sub-sections 1 and 4, it ought, therefore, to have been under the common seal of the defendants, and ten days' public notice ought to have been given by the defendants inviting tenders for the execution of the works. Now, although it is stated in the Special Case that Jerram's report which led to the contract was laid before the council of the corporation and was adopted, it is nowhere stated that the contract itself was ever submitted to the council, or that the details of it were ever known to or approved by them, or that any tenders for the execution of the additional works were ever invited, and I infer that in point of fact the council never had the contract submitted to them, and that no tenders ever were invited.

If the contract had been under the seal of the corporation the plaintiffs would not have been prejudiced by the omission on the part of the corporation or its council to invite tenders—*Nowell v. The Mayor of Worcester* (2); but the provision in the statute relating to the seal is one which has been already decided to be imperative and not directory only—*Hunt v. The Wimbledon Board of Works* (4)—and unless, therefore, the contract in question can be

(19) 6 Q.B. Rep. 433.

(20) 43 Law J. Rep. C.P. 100; Law Rep. 9 C.P. 91.

(21) 41 Law J. Rep. Chanc. 817; Law Rep. 7 Chanc. (App.) 562.

(22) 5 Q.B. Rep. 526; 13 Law J. Rep. Q.B. 107.

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regarded as sealed with the common seal of the defendants, the contract is not binding on them.

It was argued that the contract was in substance and in effect under the seal of the defendants, because Jerram was appointed by the defendants under their common seal to perform certain powers and duties, which included the exercise of the rights observed in Powis's contract to the defendants' engineer, and the duty of seeing to the proper execution of the works contracted for by Powis; and because Jerram's report on the additional works was approved by the council. But I am unable to accede to this argument. The answer to it is that this particular contract is not under the common seal of the defendants; and that to hold it to be so because Jerram was appointed under seal, and his report adopted, would be to hold that the council might lawfully delegate an important part of their duties to one of their officers, and so deprive the ratepayers of that protection which the Legislature intended to afford them by requiring the common seal to be affixed to contracts of this description. The object of requiring such contracts to be under the common seal is, I apprehend, to draw the attention of the corporation—that is, of its managing body—to each particular contract, and to ensure if not the examination and discussion, at all events an opportunity for the examination and discussion of the terms and provisions in detail of every contract by which the corporation is to be bound. This object would be entirely defeated if it were to be held that a contract not under seal entered into by an agent appointed under seal was a contract under seal within the true meaning of the statute which governs this case. In this case not only was there no seal in fact, but the omission of the seal was by no means the omission of a mere form. The seal was not affixed because the contract itself was never in fact approved by the council, whose duty it was to consider the contract, and, if approved, to authorise it to be sealed.

In *Story on Agency*, section 53, it is stated that "an agent by an authority under seal might bind the corporation by his agreement not under seal if the agreement

were within the scope of his authority." But this passage cannot apply to cases in which a corporation attempts to delegate to an agent duties which can only be properly performed after deliberation by the corporation itself. In my opinion an authority under seal to Jerram to enter into any contract he might think fit for additional works would be *ultra vires* and invalid, and would not render his contract the contract of the corporation itself even if that contract were sealed by him. To render such a contract binding on the corporation it would, in my opinion, be necessary for the corporation distinctly to ratify it, and in effect make his seal its own.

The last point urged for the plaintiffs was that as the contract has been performed and the defendants have the benefit of the plaintiffs' work, labour and materials, the defendants are, at all events, liable to pay for these at a fair price. In support of this construction cases were cited to shew that corporations are liable at common law, *quasi ex contractu*, to pay for work ordered by their agents and done under their authority. The cases on this subject are very numerous and conflicting, and they require review and authoritative exposition by a Court of Appeal. But in my opinion the question thus raised does not require decision in the present case. We have here to construe and apply an Act of Parliament. The Act draws a line between contracts for more than 50*l.* and contracts for 50*l.* and under. Contracts for not more than 50*l.* need not be sealed, and can be enforced whether executed or not, and without reference to the question whether they could be enforced at common law by reason of their trivial nature. But contracts for more than 50*l.* are positively required to be under seal; and in a case like that before us, if we were to hold the defendants liable to pay for what has been done under the contract, we should in effect be repealing the Act of Parliament and depriving the ratepayers of that protection which Parliament intended to secure for them.

Frend v. Dennett (9) is an authority in support of this view, and was, in my opinion, rightly decided. The additional works there in question had been executed, and

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there was the common count for work and labour and materials as well as a special count on the alleged contract, but the defendant was held not liable either at law or in equity.

It may be said that this is a hard and narrow view of the law, but my answer is that Parliament has thought it expedient to require this view to be taken; and it is not for this or any other Court to decline to give effect to a clearly expressed statute because it may lead to apparent hardship.

For the above reasons I am of opinion that the decision of the Court below was correct, and that this appeal ought to be dismissed with costs.

Lord Justice Cotton requests me to say that he has read this judgment and agrees with it.

BRETT, L.J.—I have come to the same conclusion, after many attempts to come to another, upon the ground that although the defendants were a municipal corporation, yet in this transaction they were acting as a board of health and are bound by the statute, and that we also are bound as to the statute by the case of *Hunt v. The Wimbledon Local Board* (4), in which it was decided that the provisions of section 174 which relate to the seal are mandatory and not directory.

Assuming, therefore, that everything was done according to the statute except affixing the seal, and that the work was done after every enquiry which is directed by the statute had been made, I am of opinion that the mere want of the seal prevents the plaintiffs from recovering in this action.

Further, having read all the cases with regard to the doctrine of work done for and accepted by a municipal corporation, I am bound to say that I have come to the conclusion that even if this corporation were a municipal corporation and not a board of health, the want of seal would have prevented the plaintiffs from recovering in the present case.

Appeal dismissed.

Solicitors—John Mackrell & Co., for plaintiffs;
H. Tyrrell, agent for H. C. Passman, Leamington, for defendants.

1882.
March 20, 21, } COOMBER v. THE JUSTICES OF
24. } BERKS.

Revenue—Property Tax—Assize Courts—Income Tax Acts, schedules A and B—5 & 6 Vict. c. 35.

Property tax, under schedules A and B of the Income Tax Acts, is not payable in respect of a building consisting partly of a central County Police Station, but mainly of Assize Courts with their appurtenances used only by the Judges on Circuit, the Justices in Petty and Quarter Sessions and the County Court Judge, for the purpose of administering justice.

CASE stated by the Commissioners of Income Tax under Part III. of 37 & 38 Vict. c. 16, upon an appeal heard at Reading on the 27th December, 1879, and brought by the Justices of Berkshire, by the clerk of the peace for the county, against an assessment made upon them under schedule A of the Income Tax Assessment in the parish of St. Lawrence, Reading, for the year ending the 5th of April, 1880, whereby they were assessed in respect of certain buildings described as "Assize Courts, &c.," of the alleged annual value of 300*l*.

The following is a copy of the Case:—

1. There is no separation in the assessment and no description of the different buildings included in the assessment under the name "The Assize Courts."

2. The assize courts and the county police station form one block of buildings within the same walls and covered by the same roof. They were erected at the same time, although under different statutory powers.

3. The erection of the assize courts was resolved upon at Easter sessions, 1858. A presentment of three Justices was made on the 5th of April, 1858, and was duly considered at the quarter sessions holden at Midsummer, 1858, pursuant to the directions of the 7 Geo. 4. c. 63. The said presentment shewed that there was a necessity for the erection of a new shire hall, county hall, or other building, for the better or more convenient administration of justice by the Judges of assize at their holding of the assizes for the county

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as well as for the better accommodation of counsel, attorneys, suitors, prosecutors and witnesses attending upon the occasions of the assizes and sessions of the peace. The said presentment was at said Midsummer sessions, 1858, determined to be well founded, and at the same time the present site was approved, being adjoining that land the purchase of which had been already authorised for the erection of constabulary buildings. The erection of the buildings was pursuant to public general statutes and not to any private Act.

4. The cost of building the courts was provided for by money borrowed upon the mortgage of the county rates under 7 Geo. 4. c. 63, s. 11, and the maintenance of the building is provided for out of the county rate. The erection took place, and the maintenance and control of the whole block are regulated (if at all) by public general statutes only.

5. The ground floor of the whole block consists of the following premises, namely—two assize courts, opening out of a large hall and corridor, with retiring rooms for Judges and juries, counsels' robing and consultation rooms, an office for the use of the county treasurer during the sittings of the assizes and quarter sessions. Offices for the clerks of indictments at assizes and for other officers attending upon the Judges, and also a room for the use of the clerk of the peace as hereinafter mentioned during the quarter sessions. There are also on the ground floor offices for the chief constable of the county and the chief superintendent of police and one divisional officer of police.

The first floor consists of rooms for the grand jury, for witnesses in waiting, for committees, and for the living and accommodation of the superintendent of police. A room on this floor, originally designed for the clerk of the peace, is not used by him. Over the jury and counsels' robing rooms, before mentioned, there is a police dormitory with sleeping accommodation for six or seven men.

In the basement, and below what has been described as the ground floor, there are cells for the reception of prisoners detained in custody by the police, or kept, owing to the distance from the gaol, immediately before and after trial, at the

courts. There is a refreshment room for the use of the public at the assizes and sessions, and washing houses and store rooms in connection with the refreshment room, &c. A police guard-room is situated below the jury rooms and counsels' robing and consultation rooms. This is used by the resident constables for purposes of duty and for cooking food of prisoners during their detention.

A married constable as part of his duty is required to reside in some of the rooms below the offices of the assize courts, having his sleeping accommodation on the second floor over the committee or grand jury rooms, with access by means of the staircase leading to those rooms.

Some of the rooms originally designed for the offices of the clerk of the peace during the quarter sessions, are occupied by another married constable who performs the duties of the hall-keeper. The hall-keeper attends to the heating and cleaning of the courts. The clerk of the peace has no use whatever or at any time of any rooms for his private purposes or business.

The one room reserved for him is used by him only as a depository for the statutes and books required in connection with the courts, and for deposited railway plans and other county records in his possession as deputy *custos rotulorum* of the county. The clerk of the peace has no vested interest in this room, and the use he makes of it is official only and was not considered as of any benefit or value to him in adjusting his salary. He does not in fact use the room, except at quarter sessions and when attending committee meetings of Justices.

There is a subterranean passage and several doorways and openings affording complete communication between the various parts of the block, so that although the uses to which the parts are applied are distinct, the structure is one and entire.

Unmarried constables inhabit the dormitory before mentioned subject to written regulations for discipline as to rising, extinguishment of lights, packing up and cleaning, &c.

The dormitory is a long room, divided into cubicles, with sick-room and lavatory attached,

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The constables of the division are bound to live upon the premises, but are liable to be removed for duty to any other place, and they are at all hours liable to be called out on service.

6. The courts are used for holding the assizes and for holding the county quarter sessions and the county divisional petty sessions, and also for the purposes of the county court. The Commissioners of Public Works pay 1*l.* per month for the lighting, warming and cleaning of the courts when used for county court purposes as provided by the statutes.

Rooms in the building are used for meetings of committees of Justices appointed by the Court of quarter sessions, such as the Standing Finance and General Executive Committee, Highways Standing Committee, Executive Committee under Contagious Diseases (Animals) Act.

The police committee, consisting of Justices, meet in that part of the block which is used by the constabulary, namely, in the chief constable's office.

7. The Recorder of Reading is allowed to hold the borough quarter sessions in the court as a matter of courtesy and without charge. The Income Tax Commissioners have occasionally sat in one of the committee rooms, but no payment has been asked for or made.

The entrance hall or corridor is used as a polling station for the county elections, and the grand jury room for casting up votes by the returning officer, without charge.

In the year 1864, the officers of the Berks Militia were allowed, upon special application to the Court of quarter sessions, to use the grand jury room as a mess room during their month's training and to use the basement story as a kitchen. No payment was made therefor.

An amateur musical society has occasionally, but not habitually, used the grand jury room for a short time for practice. No charge has been made or payment received therefor.

The Committee of Management of the Berks Friendly Society have occasionally met in one of the committee rooms, but no payment has been made in respect thereof.

Twice since the erection of the courts, the hall or corridor has been used for

general county meetings called by the high sheriff — namely, to pass votes of congratulation and condolence to Her Majesty on important events. No payment or charge has been made for the building or for admission.

The under-sheriff has occasionally held a writ of enquiry in one of the courts without payment.

On no occasion has any payment or remuneration been received for the use of the building or any part of it, or for admission, and no profit whatever is made out of it.

8. In the year 1861, it was resolved at the quarter sessions:—"That the whole of the building of the assize courts and police station be placed under the charge and supervision of the chief constable, who has undertaken to provide a hall-keeper, with sufficient assistance and proper instructions to attend to the ventilating, lighting and warming apparatus, cleaning, and other necessary duties, and that the county should allow a guinea a week to the credit of the police fund to be applied to the above purposes at the discretion of the chief constable."

This arrangement has been since carried out, and the entire charge of the whole block is vested in the chief constable as such custodian. The uses of the building mentioned in paragraph 7 have been by the allowance of the chief constable.

On the two occasions when the hall was used for county meetings, the chairman of the quarter sessions for the time being gave permission on his own responsibility. Except in the case of the militia, the Justices in quarter sessions have never authorised or sanctioned, or been asked to authorise or sanction, the use of the buildings in the manner specified in paragraph 7.

9. The county police station, as before stated, was erected by the Justices at the same time as and in connection with the assize courts for the county constabulary under 3 & 4 Vict. c. 88, s. 12, on lands purchased by the Justices. The cost being provided by money borrowed on mortgage of the police rates.

At the Michaelmas Sessions, 1858 (that is, between the date of the contract for the purchase and the execution of the convey-

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ance), the Court of quarter sessions resolved "That a portion of the land purchased for a site of the central police station be appropriated for the erection thereon of the new assize courts," and ordered the treasurer to debit the assize Courts' fund with a portion of the purchase money of the premises.

The cost of erecting the police station was provided by money borrowed on the mortgage of the police rates.

The land on which the assize courts and also the central police station are built, was conveyed under 21 & 22 Vict. c. 92, in 1859, by direction of quarter sessions, two Justices having at a previous sessions been authorised to enter into a contract for its purchase unto G. B. Morland (the then clerk of the peace), to have and to hold the same premises unto and to the use of the said G. B. Morland and his successors for ever upon trust, to permit a police station house to be constructed on the premises at the expense of the Justices, and otherwise to permit the premises to be used, appropriated and disposed of as the said Justices of the peace for the said county should from time to time order.

10. The county constabulary was established under the provisions of 2 & 3 Vict. c. 93.

The force and the police station is annually inspected by one of Her Majesty's inspectors, appointed under the Act of 19 & 20 Vict. c. 69; and if his report is satisfactory, a grant is made by the Treasury amounting to one half of the expenses of the pay and clothing of the force in aid of the police rates.

11. The police station is used as the central police station for the county for the temporary confinement of persons taken into custody by the constables.

It is necessary that two superintendents and a certain number of constables should be always on the spot available for duty; and sleeping and living accommodation is provided for them as hereinbefore mentioned. Their residence on the premises is part of their duty.

No rent is paid by them for the accommodation given; some unmarried constables, who are compelled as part of their duty to sleep at the station, are required to contri-

bute one shilling each per week to cover the expense of gas and fuel for their cooking in the guard-room and for washing.

The superintendent and married constables pay for their gas and coals themselves.

No more or better accommodation is provided than is absolutely required for the proper maintenance of the constabulary, and no profit or pecuniary benefit is derived from the use of the building.

12. Water and lighting are paid for by the county.

13. The block of premises are not, nor is any part, assessed to the district, or to the borough rates, or to the poor rates, and no inhabited house duty is charged.

Prior to the assessment now made, the premises were never assessed for income tax, and no person has been previously charged in respect thereof.

14. So far as it is a matter of fact for our determination, we find that neither the Justices of the peace, nor the clerk of the peace, nor the members of the constabulary, derive any benefit whatever from, nor have they any beneficial, nor indeed any occupation of the said premises by reason of their use thereof, and that their use thereof is solely official and for purposes of duty, and that (except the clerk of the peace, as herein appears) they are not the owners and they are not any of them occupiers thereof.

The buildings are not adapted for any purposes but those for which they are used. No rent ever has been received for them or any part of them.

No evidence was given before us or tendered to us as to the alleged annual value of the assessed premises or any part thereof.

So far as we can decide in the absence of evidence on the point we are of opinion that 300*l.* per annum exceeds their annual value, but under the circumstances herein appearing we have not attempted to make any entire or partial assessment, and postpone dealing with the amount of assessment until the determination of this case.

15. It was contended before us, amongst other matters, that the buildings were not assessable, and that the Justices were not assessable under the circumstances, and

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that the assessment could not lawfully be maintained.

We, the Commissioners, are of opinion that under the circumstances before stated,

I. No part of the building was properly assessable to income tax.

II. That even if the buildings were, or any part thereof was properly assessable to income tax, the Justices of the county for the time being were neither owners nor occupiers of the buildings, and were not chargeable with income tax.

III. That no person was chargeable either as owner or occupier of the buildings with income tax.

IV. That there was no evidence before us of beneficial occupation, or that the premises were of the annual value mentioned.

Upon our discharging the assessment, the surveyor of taxes declared his dissatisfaction with our determination as being erroneous in point of law, and within twenty-one days after the said determination required us by notice in writing, addressed to our clerk, to state a case for the opinion of the Exchequer Division of Her Majesty's High Court of Justice.

We, therefore, hereby state the same, raising the following questions for the opinion of the Court:—

I. Whether the buildings are, or any and what part thereof is properly assessable to income tax?

II. If the buildings are (or some part thereof is) properly assessable to income tax, are the Justices of the county for the time being chargeable with income tax in respect of the said buildings under schedule A?

III. If the buildings are (or any part thereof is) properly assessable to income tax, and the Justices are not chargeable with income tax in respect thereof, whether the clerk of the peace, or the inhabitants or ratepayers of the county, or any other person or body of persons is or are chargeable with such income tax?

IV. If part only of the premises is chargeable, what part is chargeable, and who is to be charged, and in what capacity, and under what schedule, and how is the amount to be ascertained?

V. Whether the assessment can in law

be maintained, or whether our decision is under the circumstances lawful?

The Attorney-General (Sir H. James, Q.C.), (The Solicitor-General (Sir F. Herschell, Q.C.) and Dicey with him), for the Crown.—The Act 42 & 43 Vict. c. 21. s. 16 applies the Income Tax Acts previously in force to the year 1879. Under these Acts the land is taxed and not the occupier. No. I. of the rules of schedule A in 5 & 6 Vict. c. 35 applies to "all lands, tenements and hereditaments capable of actual occupation of whatever nature." Section 70 provides that lands are to be assessed whether there is an occupier or not. It is not the occupier who is taxed, but the lands. The occupier only appears as part of the manner of taxation. By No. IX. of the rules of schedule A every person "having the use of the lands" is to be considered the occupier. No. VI. of these rules gives the exceptions in favour of colleges, hospitals, public schools, almshouses and literary institutions. Assize courts would have been included in the exceptions, if so intended. The occupation need not be beneficial; it is only a "use" (as to which see *Bent v. Roberts* (1)). The Justices have the use because the courts are used under the authority of the Justices. The Scotch case of *Clerk v. The Dumfries Commissioners of Supply* (2) gives the construction contended for to this tax, and shews that rating cases are not applicable.

Matthews, Q.C. (H. D. Greene with him), for the defendants.—The contention of the Crown would apply to all public buildings including churches, so that the practice has been wrong from the beginning. But the tax is not charged on land, it is charged in respect of land on the occupier. There is no profitable occupation of this land. The defendants are neither owners nor occupiers of it. They are not a corporation. The owners are the ratepayers, and the Justices have no power over the building, but only the quarter sessions. The buildings are held in trust for the public. They are altogether different from buildings built—*e.g.*, by a philanthropic individual, who made no profit from them,

(1) 47 Law J. Rep. Exch. 112; Law Rep. 3 Ex. D. 61.

(2) 7 Sc. Sess. Cas. (4th series) 1187.

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because in such a case it could scarcely be doubted that the builder would be liable to pay this tax, because the building would be capable of making a profit. There are several statutes which treat the courts as belonging to the inhabitants of the county, as, for example, 7 Geo. 4. c. 63, 10 & 11 Vict. c. 28. s. 1, 13 & 14 Vict. c. 61. s. 24, 19 & 20 Vict. c. 69. s. 22, 21 & 22 Vict. c. 92, 33 & 34 Vict. c. 15. s. 3, 40 & 41 Vict. c. 21. s. 16. Secondly, there is no one assessable to income tax. In *The Queen v. St. Martin, Leicester* (3), it was held that county assize courts being in the occupation of the Crown for public purposes are exempt from poor-rate. In *The Justices of Lancashire v. Stretford* (4) buildings were held not rateable.

He cited *The Justices of Lancashire v. Cheetham* (5), *Worcester v. Droitwich* (6), and *Jones v. The Mersey Docks and Harbour Board* (7). The occupation of these buildings is in the first place of no annual value; and, secondly, the Crown is the occupier.

The Attorney-General in reply.—The public use of a building does not exempt it from taxation. The present case is not distinguishable from the Scotch case. Even if the occupation is in the Crown, as alleged, the owner is still liable, but the Justices are the occupiers and the ratepayers the owners. "Use" does not mean beneficial use. The rating cases are no authority. The test in those cases is beneficial occupation; in these it is capability of value.

GROVE, J.—This case is not free from difficulty, as there are no express terms in the statute meeting the facts, and various portions of the Act have to be taken into account. The opinion at which I have arrived has been impressed upon my mind after a *prima facie* opinion the other way. It is that the respondents are entitled to our judgment. There is, I think, a broad ground supplied by the statute on which to

(3) 8 B. & S. 536; 36 Law J. Rep. M.C. 99; Law Rep. 2 Q.B. 493.

(4) E., B. & E. 225; 27 Law J. Rep. M.C. 209.

(5) 37 Law J. Rep. M.C. 12; Law Rep. 3 Q.B. 14.

(6) 46 Law J. Rep. M.C. 241; Law Rep. 2 Ex. D. 49.

(7) 11 H.L. Cas. 448; 35 Law J. Rep. M.C. 1.

base this result, and there is substantially nothing conflicting with it or inducing a contrary opinion. What is the object of the statute? If the title may be taken into consideration—about which judicial opinion has varied—the object is expressed in the words, "An Act for granting to Her Majesty duties on profits arising from property, professions, trades and offices." The tax or duty is to be on profits arising from property, professions, trades and offices, which is against the view that it is a tax issuing out of land or imposed on the land or property itself. It is a tax on the benefit derived from these things, an annual tax upon the receipts which persons obtain from them. Turning to the schedules, I find schedule A imposes duties "for and in respect of the property in all lands, tenements," &c.—not on the property itself, but in respect of the property. Schedule B is "for and in respect of the occupation of all such lands, tenements," &c. Schedule C is "for and in respect of all profits arising from interest, annuities," &c.; and schedule D, "for and in respect of the annual profits or gains" arising from trades or professions and otherwise. In all these four schedules the contribution is for what a person may annually receive in respect of property as owner and occupier, and in respect of annuities, trades and employments. Schedule A is not, I think, according to the scope of the Act, to be separated in character from the other schedules. In some respects the schedules are differently treated, but they are imposed on what the person may receive.

So far the language is more consistent with the view that the tax is on the person in respect of the land and not on the land. But No. IX. of the sets of rules after section 60 in the Act struck me as being in favour of the contention of the Attorney-General. Its heading is, "Rules for charging the said duties under schedules A and B." The second rule provides that, "every person having the use of any lands or tenements shall be taken and considered for the purposes of this Act as the occupier of such lands or tenements." In view of this provision I was at first inclined to accept the argument that the Justices or the clerk of

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the peace were liable. But on hearing the argument on the other side, and particularly the case of *Beni v. Roberts* (1), I came to the conclusion that the word "use" had not the broad meaning attributed to it by the Attorney-General, but meant a user such as would or might give the person some benefit in the use of the land. The benefit may not be a rent. For example, the owner of a park has its use within the meaning of this rule, instead of money he has the pleasure and advantage. The land has always a capability of producing profit. If the owner does not make a profit of it, he must still pay tax, although he does not get the profit in a pecuniary form. The set of rules No. X. seems to me to support this view. It is described as "Rules for estimating the annual value of properties before described in schedules A and B or either of them." The "annual" value *de anno in annum* is referred to. The rules are not for estimating the actual but the annual value. Then by rule I. of this set the tenant's rates are to be deducted from the rent. Why so, if it is the land which is taxed? Similarly by rule II. the landlord's rates and taxes when paid by the tenant are to be added to the rent. The 3rd and 4th rules, again, dealing with the case of the amount of rent depending on the price of corn or produce, tend to shew that the duty is payable in relation to the annual value. Two of these rules expressly apply to schedule A; the others to schedules A and B.

No. I. of the sets of rules applying to schedule A provides that it shall "extend to all lands, tenements and hereditaments or heritages capable of actual occupation, of whatever nature and for whatever purpose occupied or enjoyed, and of whatever value." The landlord, it may be, does not take rent, but he is not to be exempt for that reason, but to pay on the capability of the land. No. II. provides that the annual value shall be the full amount for one year or the average amount for one year of the profits received. Profits are what are contemplated arising from something that is or may be beneficial. The assessment may be spoken of in reference to the land, but it need not be made on the land. Primarily the occupier has to be looked to

for the taxes, one for himself and the other for the landlord. Nothing in the Act conflicts with this view. The reliance placed on the exceptions or exemptions called "allowances" in No. VI. of the sets of rules struck me in the Attorney-General's argument. Colleges, hospitals, public schools and literary institutions are exempted, but there is not exemption in favour of assize courts. I think the argument from the omission is strong. For the purpose of encouraging art and literature certain property is exempt, although it may pay a rent. But assize courts and police courts in their present state are not capable of paying a rent. They do not fairly come within the words "capable of paying rent." The Justices have no right to let them for a profit. If rooms like assembly rooms were among these buildings, and the case so found as a fact, as in *The Justices of Lancashire v. Cheetham* (5), that portion would pay income tax. The Case virtually finds that there is no beneficial occupation. The Justices would be doing wrong if they applied the building to a private purpose, whether or not they could be interfered with by a Court of law. In the case of *The Justices of Lancashire v. Cheetham* (5) the Justices actually made a profit, and they were held rateable. With regard to the case in the Court of Session, I do not think the distinction between that case and this at all broad. The distinction has been suggested that the commissioners actually bought the property for themselves under the Lands Clauses Act, but I doubt whether there is a substantial distinction. The Mersey Docks Case is mentioned in the Scotch Case, but the point for which that case is valuable is not dealt with. Attention was not called to the *dicta*. Both the Lord Chancellor and Lord Blackburn say that assize courts would not be rateable. In the case of income tax there need only be occupation or capability of occupation, not beneficial occupation, but the public purpose in question is severed from the public purpose in the Mersey Docks Case. The purpose is that of public polity by which the government of the country is carried on. The *dicta* are applicable to this case as to the rating case. The buildings cannot produce any pecuniary benefit, nor are they

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capable of so doing in their present state. If those *dicta* had been before the Scotch Judges the decision might have been different or not so easily arrived at. If there is a conflict between our view and that of the learned Judges of Scotland we must decide independently, as best we can. On a fair reading of the statute, I think the tax is applicable to persons making a profit out of the land, not to the land itself.

HUDDLESTON, B.—I am of the same opinion, for the reasons which have been given by my brother Grove. The question must be looked at under schedule A and schedule B, and I think the courts are not liable to be rated under either. As to schedule A, I think there was no occupation, or rather nothing in the shape of profit or benefit arising from the land. As to schedule B, I think the occupation is not such as to render the Justices liable. Schedule A provides for a charge against hereditaments, warranting the argument that the tax is on the property. The set of rules No. I. for schedule A provides for assessing the property, and the assessment is to "extend to all lands, tenements and hereditaments or heritages capable of actual occupation, of whatever nature and for whatever purpose occupied or enjoyed," except certain properties. What is to be assessed? The annual value. The Act contemplates the assessment of profits accruing to the owner and the occupier, recoverable in the first instance from the occupier. I use the word "profits" advisedly. There is a difference in the words used in the schedules, but the only property to which the Act applies is that which does or may give profit. If it is capable of giving profit it is taxable, but a profit should be intended to be made, and the use should be in the nature of one producing profit. Suppose a large monument is erected on a piece of land. The object is not to make profit. The ground is capable of yielding profit, but it is not so intended. If a person dedicates a park to public use never intending that it shall yield profit, the land is not within the Act. Either there must be profit that could be made, or it must not be intended that no profit should be made. These courts were never intended for profitable use. Almost all the sections refer to profits or gains. Section 52 requires the person chargeable to

give a statement "containing the annual value of all lands in his occupation, and the amounts of the profits or gains arising to such person from all and every the sources chargeable under this Act." One of the sources is the annual value of the land, which he is to state.

The title of the present Act and the prior Act, if we may consider it, I think is conclusive. I doubted whether we had a right to consider the title, and I have taken some trouble to enquire into the law on the subject. Sir Peter Maxwell, in his book on the interpretation of statutes, says: "The title is regarded by the Courts as not forming part of the Act, and therefore it is not taken into consideration in construing any passage of it. If, indeed, it has been looked at sometimes to see what was the object of the Legislature, and has occasionally been referred to by the Judges as bearing on the construction of the Act, this has been excused on the ground that the mind, when labouring to discover the design of the Legislature, naturally seized on everything from which aid can be derived" (p. 34). But Mr. Sedgwick (8) lays down that where words are doubtful the title may be resorted to. He refers to *Stradling v. Morgan* (9) and *The King v. Cartwright* (10). There is authority for saying that the title may be used when there is any ambiguity in the statute. I import from the title that the duties are on "profits"—that is, what the landlord receives. There were no profits in this case, nor was it intended there should be any.

With reference to schedule B, the question arises as to what is the character of the occupation. The building is used for the purposes of public government. The occupier is the person having the use. Who has the use in this case? The Justices have not, except when they happen to be there. The use of the court belongs to the Crown in administering the law. Lord Blackburn, in the *Mersey Docks Case*, points out the position of assize courts, and the other learned Lords agree. In *The Queen v. St. Martin's, Leicester* (3), Chief Justice Cockburn says that the occupiers are the persons adminis-

(8) Interpretation of Statutes, 2nd ed., p. 39.

(9) Flou. 203.

(10) 4 Term Rep. 490.

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tering justice. The decision of the Court of Session is to be treated with respect, but it was held that the Police Commissioners were owners. My opinion is formed not without doubt, but I think the Justices are not taxable.

Judgment for the respondents.

Solicitors—Solicitor of the Inland Revenue, for the Crown; Newman, Stretton, Hilliard & Willins, agents for J. T. Morland, Abingdon, for respondents.

1882. } THE QUEEN v. THE JUDGE OF
Feb. 26. } THE CITY OF LONDON COURT
April 3. } AND COVINGTON.

Admiralty — Jurisdiction — Admiralty Court Act, 1861 (22 & 23 Vict. c. 10), s. 7 — County Courts having Admiralty Jurisdiction—31 & 32 Vict. c. 71.

A County Court having Admiralty jurisdiction can entertain an action of damage in respect of a collision between ships taking place in a dock artificially formed on the land of a dock company, communicating by gates with a river, but not subject to the flow and ebb of the tide, the water within it being maintained at about high-water mark.

Rule to shew cause why a writ of prohibition should not issue to prohibit further proceeding in an action in the City of London Court of Covington v. *The London and St. Katharine Docks Company.*

The action was an Admiralty action of damage brought by the owner of the barges *Gloucester* and *Knat* against the owners of the steam-tug *Louise*, in respect of a collision in the basin of the Royal Albert Dock, belonging to the defendant company.

The dock was made on the company's land, under 38 & 39 Vict. c. cliii., entitled "An Act for authorising the London and St. Katharine Docks Company to construct an Eastern Extension of their Victoria Dock upon lands part of the Victoria Dock Estate, originally acquired by the Victoria (London) Dock Company for

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that purpose, with a new entrance from the river Thames at Galleons Reach." The dock forms an artificial water, communicating with the river Thames by channels over which there are bridges, and which are provided with gates and locks, so that the water in the dock is maintained at about the level of high tide; but the dock is not within the flow and reflow of the tide.

At the trial of the action in the City of London Court the defendants objected to the jurisdiction. The learned Judge decided that he had jurisdiction, but adjourned the case until this rule had been decided.

A. E. Nelson shews cause. — It is admitted that if the Admiralty Court would have had jurisdiction, the Judge of the City of London Court had jurisdiction under 31 & 32 Vict. c. 71. By the Admiralty Court Act, 1861 (22 & 23 Vict. c. 10), s. 7, it is provided that "the High Court of Admiralty shall have jurisdiction over any claim for damage done by any ship." He cited *The Malvina* (1), *The Diana* (2), *Allen v. Garbutt* (3), *The Lemington* (4), and *Purkis v. Flower* (5).

A. Gray (Finlay, Q.C., with him) supported the rule, and argued that some limitation must be put on the general words of section 7 of the Admiralty Court Act, 1861, otherwise consequences not intended by the Legislature would follow. A collision on Ulleswater would be subject to Admiralty jurisdiction, or even between a cart and a ship carried on land. The jurisdiction extended only to the high seas and parts of rivers where great ships go.

Cur. adv. vult.

The judgment of the Court (6), prepared by Field, J., was (on April 3) delivered by

(1) Lush. 493, and on appeal, Brown and Lush. 58; 31 Law J. Rep. P., M. & A. 113.

(2) Lush. 539; 32 Law J. Rep. P., M. & A. 57.

(3) 50 Law J. Rep. Q.B. 141; Law Rep. 6 Q.B. D. 66.

(4) 32 Law Times, 69.

(5) 43 Law J. Rep. Q.B. 33; Law Rep. 9 Q.B. 114.

(6) Field, J.; Huddleston, B.; Bowen, J.

2 E

The Queen v. Judge of City of London Court.

HUDDESTON, B., as follows: This is a rule for a prohibition to the City of London Court to restrain that Court and the plaintiff from proceeding with an action instituted there by Henry Covington against the St. Katharine Docks Company to recover damages sustained by collision in the basin of the Royal Albert Dock of the company.

This basin is a portion of an extension dock made by the company under the powers of the London and St. Katharine Docks Company Act, 1875, and is connected at either end by water-ways and basins with the river Thames, the object being, of course, to afford additional dock accommodation and adequate berths for ships arriving in the port of London, of which those docks are expressly declared to form part. The company have also power by their Act to take and divert water from the Thames into and through the docks, and the powers of the company's harbour master extend for 300 yards in every direction into the Thames from the centre of the outer lock gates.

The ground on which the prohibition was sought was that the City of London Court (which is one of the County Courts to which an Admiralty jurisdiction has been assigned under the 31 & 32 Vict. c. 71) has no jurisdiction to entertain a claim for collision in such a place as this inland basin, it not being any part of the high seas, over which alone, it is said, the Court of Admiralty has jurisdiction.

It was not denied that if the Admiralty Court has jurisdiction the County Court has it also; and the question, therefore, in the present case is limited to the true construction of the Admiralty Court Acts—namely, that of the 3 & 4 Vict. c. 65. s. 6, and of 24 Vict. c. 10. s. 7.

It is undoubted that before the passing of the Act of 3 & 4 Will. 4. the Court of Admiralty had no jurisdiction over any place within the body of a county such as this; but that Act was expressly passed to get rid of that restriction and to extend the jurisdiction of the Court to places within the body of a county; and by section 6 it was accordingly provided that the Court should have jurisdiction to decide all claims for damage received by any ship or sea-going vessel, whether at

the time within the body of a county or upon the high seas. It is unnecessary to consider whether this Act did more than remove that particular restriction, because the extension of the jurisdiction of the Court was carried still further by the 24 Vict. c. 10, by which, among other provisions, it is enacted that the Court of Admiralty shall have jurisdiction over any claim for damage done by any ship, a ship being defined to be a vessel used in navigation not propelled by oars.

Now, the cause of action in the present case falls clearly within the language of the section, and it seems to us that the facts bring it also within its spirit and object.

First, as to language, the legislation is in the most general possible terms—"any damage," without limitation of where done. Then, as to the spirit and object of the Act, the Court of Admiralty had previously clear jurisdiction to entertain a claim for any damage caused by a ship in the Thames, and surely the basin and water-way of a dock are in effect merely a prolongation of the river for the purpose of giving proper accommodation to shipping which must otherwise have had to discharge or load in the river. We can see no reason why, if the harbour master is guilty of any neglect by which damage occurs in the 300 yards of the Thames which is within his limit, he should be liable to an action in the Court of Admiralty; and why, if the same thing occurs inside the outer gates, he shall not. The thing causing the damage is a ship; she is water borne; and all the principles upon which the present case would be decided are identical with those which would govern a case of collision in the Thames.

It was, however, urged that if the words were to be read in their ordinary sense the section would include ships in all inland waters, and even a ship in a graving dock, or while in the builders' yard; and there is always, when the Legislature uses such general language, a difficulty in drawing the precise line at which a particular case shall be ruled within the enactment and another shall be ruled out of it. All we have to do, however, is to decide this present case, and on principle this case seems to come within the Act. Authority also

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supports this contention. The object and effect of the Act have been declared to be to confer upon the Court of Admiralty the utmost jurisdiction in cases of collision. This is the language of Dr. Lushington, and his exposition of the statute was expressly approved of by the Privy Council—*The Malvina* (1). This language was again repeated by Dr. Lushington in the case of *The Diana* (2), in which he held that the Court had jurisdiction under 24 Vict. c. 10, to entertain a claim for a collision which had happened in the Great North of Holland Canal—that is, in foreign inland waters.

In principle this last case appears to us undistinguishable from the present one, and we think, therefore, that the City of London Court has the jurisdiction it claims, and that the rule must be discharged with costs.

Rule discharged.

Solicitors—Lowless & Nelson, for plaintiff, in the City of London Court; W. M. Hacon, for defendants.

1882. }
Feb. 20, 23. } MORTON v. PALMER.

Practice—Plaintiff ordered to pay Costs—Stay of Proceedings.

There is no rule of practice by which a plaintiff ordered to pay costs in the course of an action, but not paying them is liable to have his action stayed until they are paid.

Reversal of an order to stay proceedings made at chambers on the strength of an order of the Court of Appeal, setting aside the verdict for the plaintiff, and granting a new trial, and further directing the plaintiff to pay the costs of the appeal and of the motion below.

Appeal against an order of a Judge at chambers staying the action until the plaintiff should pay the costs directed to be paid by him by an order of the Court of Appeal of the 17th of November, 1881.

The order of the Court of Appeal was as

follows: "It is ordered that the verdict found for the plaintiff on the trial of this cause, and the judgment, if any, entered or signed thereon, be set aside, and a new trial had between the parties, the costs of the first trial to abide the event. And it is further ordered that the plaintiff do pay to the defendant or his solicitor the costs of this appeal and of the application to the Divisional Court, to be taxed by the Master."

This order was made upon an appeal from a Divisional Court refusing a new trial after a verdict for the plaintiff, as reported at p. 7 *Ante*. The costs of the appeal and of the application to the Divisional Court were taxed but not paid by the plaintiff, whereupon the defendant obtained the order now in question.

Finlay, Q.C., for the plaintiff.—The Court of Appeal did not stay the action, and this Court will not now order a stay. This case is not like *Cook v. Hathway* (1), in which the plaintiff was an assignee in bankruptcy, on whom there was no liability to pay the costs which the bankrupt had been ordered to pay. The idea that default in paying costs is a contempt is no longer tenable since the abolition of imprisonment for non-payment of money—see *Jackson v. Mauby* (2).

W. G. Harrison, Q.C., and *McCall*, for the defendant.—The defendant is in contempt for not paying the costs ordered. He is none the less in contempt because he cannot be imprisoned. The Chancery practice on this head is distinct—*Wilson v. Bates* (3), *White v. Bromigs* (4). The same practice now rules in all divisions—*Grant v. Holland* (5). The order to stay was not made in the Court of Appeal for the reasons given in *Goddard v. Thompson* (6), and the right practice is to make this application based on the previous order. The rule is laid down in *Daniell's*

(1) 39 Law J. Rep. Chanc. 99; Law Rep. 8 Eq. 612.

(2) 45 Law J. Rep. Chanc. 53; Law Rep. 1 Ch. D. 86.

(3) 3 Moo. & Cr. 197; 7 Law J. Rep. Chanc. 131.

(4) 26 W.R. 312.

(5) 47 Law J. Rep. C.P. 518; Law Rep. 3 C.P. D. 180.

(6) 47 Law J. Rep. Q.B. 382.

Morton v. Palmer.

Chancery Practice (7), and the forms given in *Daniell's Chancery Forms* (8). If there be any discretion in the matter, the discretion of the Judge at chambers will not be disturbed.

Finlay, Q.C., in reply.

The following judgments were (on Feb. 23) delivered:

MATHEW, J.—This was a motion for a stay of proceedings in the action until payment by the plaintiff of the costs of certain interlocutory proceedings. A Master had made an order for a stay of proceedings, and that order was approved by the Judge on appeal. The order was made for two reasons—first, that the Court will always interpose where an oppressive use is sought to be made of its process; secondly, that according to the practice of Courts of equity, the Court ought to stay the proceedings until the order of the Court of Appeal has been complied with. It seems to me to be questionable whether the order could have been made on either ground, but even if it could, there is the preliminary question whether the Court of Appeal contemplated such a condition when making this order. There is no such condition imposed in terms by the order, and I think there is no doubt that the order was made with reference to common law procedure irrespectively of the equity rule. I think we have no power to insert such a condition in the order which the Court of Appeal did not impose. The appeal must be allowed with costs.

CAVE, J.—In this case the Court of Appeal has ordered the plaintiff to pay the costs of certain interlocutory proceedings in that Court, and the question before us is whether further proceedings in the action by the plaintiff should be stayed until these costs are paid.

It was first contended that the defendant is entitled to such stay as a matter of right, and that we have no discretion to refuse it. I cannot accede to this argument. It is to my mind entirely contrary to justice, that without being at liberty to exercise any discretion whatever, the Court should be compelled to say that a man who may have a just claim should

be prevented from pursuing it further, because he may be unable to pay the costs of some interlocutory proceeding, in which he may have failed, perhaps from no fault of his own. Mr. Harrison says that the right has been exercised and acted on in the Court of Chancery. But on looking at the case he has referred to, I cannot find that any such rule has been laid down or even suggested. It was next contended that in the exercise of our discretion we ought to stay proceedings until these costs have been paid. Now the order of the Court of Appeal simply directs that the plaintiff shall pay these costs, it does not stay further proceedings until these costs are paid, nor does it direct that they shall be defendant's costs in the cause in any event. It simply directs that the plaintiff shall pay them, which of course means that he shall pay them forthwith after taxation. The costs have been taxed and have not been paid, ought we then to stay further proceedings until they are paid? Before the passing of the Judicature Acts, in the Court of Chancery it appears to have been the practice, where a motion had been refused with costs, not to allow the motion to be renewed until those costs had been paid—*Bellchamber v. Giani* (9); *Oldfield v. Cobbett* (10). So in the common law Courts it has been the practice, where a second action has been brought, for the Court to stay proceedings until the costs of the former action were paid, provided both actions were brought against the same parties and for the same cause, or substantially so—see *Hoare v. Dickson* (11), where most of the previous cases on the subject are referred to, and *Cobbett v. Warner* (12). The principle of the practice in each Court was the same—namely, that if a litigant had brought an action or made a motion against another and had failed, he should not bring a fresh action or renew his motion until he had paid the costs of the previous proceeding. This practice, however, is no justification for our making such an order in this case.

(9) 3 Madd. 550.

(10) 12 Beav. 91.

(11) 7 Com. B. Rep. 164; 18 Law J. Rep. C.P. 158.

(12) 8 B. & S. 21; 36 Law J. Rep. Q.B. 94; Law Rep. 2 Q.B. 108.

(7) 5th ed. p. 697.

(8) 3rd ed. p. 957.

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The plaintiff here is not seeking to try over again something in which he has failed before. He succeeded in the former trial, and that verdict having been set aside for misdirection on the terms that the costs of the first trial are to abide the event, he is now desirous of taking his chance of a second trial. It is quite true that he was ordered to pay the costs of the appeal and has not paid them, but for those costs the defendant has the ordinary remedies, and I am of opinion that there is no rule of practice which could justify us in doing what the Court of Appeal has not done, and making his right to go to a second trial conditional on his paying those costs.

Appeal allowed.

Solicitors—Edward Doyle & Sons, for plaintiff;
Indermaur & Clarke, for defendant.

1881. }
Nov. 29. }

In re HORTON.

Solicitor — Practising without duly Stamped Certificate—Solicitor with Country Certificate acting in London—Stamp Act, 1870 (33 & 34 Vict. c. 97), s. 59, and schedule.

A solicitor holding a certificate stamped with the duty charged under the Stamp Act, 1870, if the solicitor "practises or carries on his business" beyond ten miles from the General Post Office in London, which is lower than the duty charged if the solicitor "practises or carries on his business" within those limits, attended a taxation of costs at the central office of the Supreme Court:—Held, that by that single act he had not, contrary to section 59, acted or practised without a duly stamped certificate.

Appeal from an order of Pollock, B., at chambers.

William Horton, a solicitor, having acted as such for J. W. B. Brown, plaintiff in an action in the High Court, and the latter having obtained an order for the taxation of Horton's bill of costs, Huggins

& Mallard, solicitors, carrying on business at Birmingham, were employed by Brown to act for him in reference to the taxation. Mallard attended the taxation before the Master at the Royal Courts of Justice; Horton's bill was reduced by a considerable amount, and the costs of such taxation became payable by Horton. The bill of costs of Huggins & Mallard, in respect of such taxation, was objected to by Horton on the ground that Mallard, holding only a certificate stamped with the duty payable by a country solicitor, had, by attending the taxation at the Royal Courts of Justice, acted or practised without a duly stamped certificate, contrary to the Stamp Act, 1870, s. 59 (1). The objection was set aside by the Master; and Pollock, B., by the order now appealed from, upheld the decision of the Master.

Wood Hill, in support of the appeal.—
Attending the taxation in London was

(1) The Stamp Act, 1870 (33 & 34 Vict. c. 97), s. 59: "1. Every person who . . . (a) directly or indirectly acts or practises in any Court as . . . a "solicitor . . . without having in force . . . a duly stamped certificate, . . . (b) on applying for any such certificate does not truly specify the facts . . . upon which the amount of duty chargeable upon his certificate depends, shall forfeit 50*l.*, and shall be incapable of maintaining any action or suit for the recovery of any fee, reward or disbursement on account of, or in relation to, any act or proceeding done or taken by him in any such capacity. 2. Any person in whose name, either alone or together with any other person, any proceeding is taken in any Court shall be presumptively "deemed to have acted in such proceeding."

The schedule (which by section 6, sub-section 2 is, with everything therein contained, to be read as part of the Act) imposes the following rates of duty: "Certificate to be taken out yearly . . . by every person admitted or enrolled in England or Ireland as "a "solicitor . . . if such person practises or carries on his business—in England within ten miles from the General Post Office in the City of London," 9*l.* if he has been admitted or enrolled, or has carried on business for three years; 4*l.* 10*s.* if for a less period—"in England beyond the above-mentioned limits," 6*l.* or 3*l.*, according to the same periods of standing. [The schedule refers to sections 59–64. Section 62 says the certificates of solicitors are, in England, to be applied for, taken out, issued, dated and stamped in accordance with the provisions of 6 & 7 Vict. c. 78 and 23 & 24 Vict. c. 127.]

In re Horton.

"practising" there within the meaning of the Act (1); and therefore, although it may be at Birmingham that Messrs. Huggins & Mallard "carry on business," there was an acting or practising without a duly stamped certificate, contrary to section 59.

He referred to 23 & 24 Vict. c. 127.

Ringwood, contra, was not called upon.

FIELD, J.—It is not suggested that there was any fraud or impropriety on the part of Mr. Mallard in respect to taking out his certificate, or that his certificate in being taken out as a country certificate was not rightly taken out. But he having been retained by a client to attend a taxation of costs before the Master at the Royal Courts of Justice, and having attended the taxation accordingly, it is said that he has acted or practised without a duly stamped certificate, contrary to 33 & 34 Vict. c. 97. s. 59 (1), a penal enactment. Taking the words "acts or practises" together, and finding in the schedule the phrase "carries on his business" used apparently as equivalent to "practises," I think the Legislature intended not to strike at a single act done in London by a country solicitor, but at the general carrying on of business and practising. I am of opinion that the motion must be dismissed.

CAVE, J.—I am of the same opinion. The question is where Mr. Mallard "practises or carries on business." Mr. Wood Hill contends that if a solicitor does any business at a particular place he "practises" there. But, in my opinion, the language of the schedule, "practises or carries on his business," points to a series of acts, and not to an isolated transaction.

Motion dismissed.

Solicitors—James Neal, for Horton; Indermaur & Co., for Huggins & Mallard.

1881. }
June 28. }

LILLEY v. DOUBLEDAY.

Damages, Measure of—Breach of Contract—Wrongful Act of Bailee—Negligence.

The defendant contracted to warehouse certain goods of the plaintiff for the plaintiff at a particular place; but took them to another place, where they were destroyed by fire. The plaintiff, by reason of the goods not being warehoused where the defendant had contracted to warehouse, lost the benefit of the insurance:—Held, that the defendant was liable to pay the value of the goods.

This was a motion to enter judgment for the plaintiff pursuant to the findings of the jury. The action was brought to recover the value of certain goods which the defendant agreed to warehouse at his depository in the Kingsland Road, but which in violation of his contract he had warehoused elsewhere; and the plaintiff, it was alleged, lost the insurance of them after they were destroyed by fire, because they were insured as being at Kingsland Road.

Murphy, Q.C. (with him *C. E. Jones*), for the plaintiff.—The contract having been to warehouse the goods in Kingsland Road, the defendant, by his breach of that contract, took on himself the risk of the loss of the goods, and is liable for their value—*Davis v. Garrett* (1). Also the defendant may be said to have converted the goods to his own use by not warehousing them in Kingsland Road as he had agreed; and the plaintiff is therefore entitled to recover the value of the said goods.

Addison, Q.C. (with him *Dunlop Hill*).—There was no conversion nor intention to convert, and the defendant is only liable if he failed to use reasonable skill as a warehouseman—*Fouldes v. Willoughby* (2). The damages claimed are too remote—*Hadley v. Baxendale* (3)—not having been contemplated by the parties at the time of contracting. *Hobbs v. The London and*

(1) 6 Bing. 716; 8 Law J. Rep. C.P. 253.

(2) 8 Mee. & W. 540; 1 Dowl. P.C. (N.S.) 86; 10 Law J. Rep. Exch. 364.

(3) 9 Exch. Rep. 341; 28 Law J. Rep. Exch. 179.

Lilley v. Doubleday.

South Western Railway Company (4) is in point. Also *Heald v. Carey* (5), *Glynn v. The East and West India Dock Company* (6), *The British Columbia Saw Mill Company v. Nettleship* (7).

GROVE, J.—I am of opinion that the plaintiff is entitled to judgment. The jury have undoubtedly found that there has been a breach of contract here. The defendant having been entrusted with goods for the particular purpose of keeping them in a specified place took them to another, and must, therefore, be responsible for what happened there.

The only exception to this rule is where the goods must as inevitably have been destroyed at one place as at the other. If a bailee elect to deal with goods entrusted to him in a different way from that authorised by the bailor, he takes upon himself the risks of so doing, unless the risk is independent of his acts and inherent in the property itself. That proposition is fully supported by the case of *Davis v. Garrett* (1). It was argued that that case was decided on the ground that the defendant was a common carrier; but that was not the basis of the judgment of the Chief Justice, for he decided that as the loss happened during the wrongful act of the defendant, and was attributable to his wrongful act, the defendant could not set up in answer to the action the bare possibility of the loss arising apart from his wrongful act, and he brought forward, by way of illustration, the case of a defendant who had by mistake forwarded a parcel by a wrong conveyance, and said if a loss had thereby ensued, the defendant would undoubtedly be liable. I do not decide the question whether there was here a conversion, but base my decision on the fact that the defendant broke his contract by dealing with the subject-matter in a manner different from that in which he had contracted to deal with

The only case that would have made me hesitate is *Hobbs v. The London and South Western Railway Company* (4), on which we are told some doubt has been thrown in a recent case in the Court of Appeal—*M'Mahon v. Field* (8); but the doubt is not strong enough to affect the opinion I have expressed in this case.

LINDLEY, J.—I am of the same opinion. The plaintiff entrusted his goods to the defendant for the purpose of their being warehoused at a specified place, and the defendant warehoused them elsewhere. They were, without negligence on the part of the defendant, destroyed whilst at the other place, and in consequence, in my judgment, the plaintiff is entitled to damages from the defendant. The question remains, what damages? *Hadley v. Baxendale* (3) is not in point, because the question here is, whether the responsibility for the goods lay on the defendant, and if so, the damages must be their value. But it is said that the defendant is only responsible for want of reasonable care; but is that so in a case where in dealing with the goods the defendant departed from his authority? I give no opinion on the question of conversion. What answer has the defendant to the plaintiff who asks for his goods back? Can he refuse either to return the goods or pay their value? I think he cannot. The reasoning in *Davis v. Garrett* (1) is applicable; and *Burrows v. The March Gas and Coke Company* (9) shews that the damage is not too remote.

STEPHEN, J., concurred.

Judgment for the plaintiff.

Solicitors—Phelps, Sidgwick & Biddle, for plaintiff; Marsden & Son, for defendant.

(4) 44 Law J. Rep. Q.B. 49; Law Rep. 10 Q.B. 111.

(5) 11 Com. B. Rep. 977; 21 Law J. Rep. C.P. 97.

(6) 50 Law J. Rep. Q.B. 62; Law Rep. 6 Q.B. D. 475.

(7) 37 Law J. Rep. C.P. 235; Law Rep. 3 C.P. 499.

(8) 50 Law J. Rep. Q.B. 552; Law Rep. 7 Q.B. D. 591.

(9) 41 Law J. Rep. Exch. 46; Law Rep. 5 Exch. 67; on appeal, 7 *ibid.* 96.

1882. } PENWARDEN v. ROBERTS.
March 6, 7. } SOLOMON (claimant).

Bill of Sale—Attestation by Solicitor to the Grantee—41 & 42 Vict. c. 31. s. 10.

The execution of a bill of sale, to which the Bills of Sale Act, 1878, applies, may be attested by the solicitor to the grantee.

Appeal by motion, under 38 & 39 Vict. c. 50. s. 6, from the County Court at Winchester.

Interpleader issue tried in the County Court, to determine whether certain goods in the possession of the defendant, the execution debtor, were the property of the plaintiff, the execution creditor, or of one Solomon, who claimed them under a bill of sale. The County Court Judge barred the claimant, and gave judgment in favour of the execution creditor, on the ground (amongst others) (1), "that the bill of sale was attested by the solicitor to the grantee alone, the grantor not having had independent advice" (2).

A rule nisi having been subsequently obtained to set aside this judgment,

Stephen Lynch shewed cause;

Ringwood appeared in support.

The following authorities were cited:—*Seal v. Claridge* (3), *Vernon v. Cooke* (4), *Hill v. Kirkwood* (5), *Davis v. Goodman* (6).

Cur. adv. vult.

FIELD, J. (Nov. 7) (after stating the facts as above set out).—The claimant is entitled to the benefit of his security unless its validity is rendered void by some statu-

(1) The argument and judgment proceeded on the above ground only.

(2) Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), s. 10: "A bill of sale shall be attested and registered under this Act in the following manner:—The execution of every bill of sale shall be attested by a solicitor of the Supreme Court, and the attestation shall state that before the execution of the bill of sale the effect thereof has been explained to the grantor by the attesting solicitor."

(3) 50 Law J. Rep. Q.B. 316; Law Rep. 7 Q.B. D. 516.

(4) 49 Law J. Rep. Q.B. 767.

(5) 28 W.R. 359.

(6) 49 Law J. Rep. Q.B. 101, 344; Law Rep. 5 C.P. D. 20, 128.

tory defect, and the question for our determination is whether, under the circumstances of this case, the requirements of the Bills of Sale Act, 1878, have been complied with. As an objection to the bill of sale, it is stated that the attestation was not in accordance with the spirit of the Act, because the attesting solicitor was not a solicitor who was independent of both parties. It is true that he was solicitor to the grantee, and that he owed no duty towards the grantor, excepting those which, as a solicitor and a public officer, he would be bound to perform; but we assume that he acted in a proper manner, and we are of opinion that his attestation is sufficient.

There is no authority on the point; the case which comes nearest to this is *Seal v. Claridge* (3), in which Mr. Baron Huddleston ruled that a bill of sale could not be attested by a solicitor who was himself the grantee, and this ruling was upheld by the Court of Appeal. But there is a wide distinction between that case and the present, and it is one which is relied on by Lord Chancellor Selborne in his judgment, where he holds that the Act requires the attesting witness to be some third person. We have come to the same conclusion: we are of opinion that no words in the Act require that the solicitor should be independent of the parties, and think that the attestation by the solicitor to the grantee alone is a sufficient compliance with the Act.

BOWEN, J., concurred.

Rule absolute with costs.

Solicitors—A. S. Jonas, for claimant; Prior, Bigg, Church & Adams, agents for Adams & Co., Winchester, for defendant.

[IN THE COURT OF APPEAL.]

1882. }
 March 15, 16. } GIBBS v. GUILD.*

Statute of Limitations—Fraud—Concealment of Cause of Action—Discovery of Original Fraud—Time from which Statute runs in Case of Fraud—Absence of Reasonable Means of Discovery of Fraud—Judicature Act—Application of Rule of Equity.

Concealed fraud and the absence of reasonable means of discovery of such fraud may be pleaded in reply to a defence of the Statute of Limitations.

Where to a claim for damages for fraudulent representations, whereby the plaintiff was induced to purchase certain shares which were always worthless, the defendant pleaded the Statute of Limitations, and the plaintiff replied that he did not discover, and could not by reasonable diligence have discovered the fraud, or that the defendant was a party to it, and that the defendant had actively concealed the fraud to prevent discovery till within six years before action,—

Held, on demurrer, by LORD COLERIDGE, C.J., and BRETT, L.J. (HOLKER, L.J., dissentiente), a good reply.

Appeal by the defendant from a judgment of Field, J., reported *Ante*, p. 228.

The action was brought against the defendant as promoter of a company, to recover damages for fraudulent representations made by him more than six years before action brought, by reason of which the plaintiff was induced to buy shares in a certain company. The statement of defence alleged that the cause of action did not arise within six years, to which the plaintiff replied that he did not discover the fraud, or that the defendant had been a party to it, and that the plaintiff could not by reasonable diligence have discovered it until within six years before the action. Further, that the defendant actively and deliberately concealed the existence and means of discovering such fraud, in order to prevent and delay the plaintiff from discovering it until within six years.

* *Coram* Lord Coleridge, C.J.; Brett, L.J.; and Holker, L.J.

VOL. 51.—Q.B.

Demurrer thereto (1).

Petheram, Q.C., and *Ram* (with them *Harrison, Q.C.*), for the defendant.—The first question is, whether the replication would have been demurrable before the Judicature Act, and it is submitted that it would. *Clark v. Hougham* (2) was a decision on the question whether there was a sufficient acknowledgment of a debt to take it out of the Statute of Limitations (21 Jac. 1. c. 16. s. 3); and the observations of Best, J., which will be relied on by the plaintiff, are but *obiter dicta*. The remarks of Lord Mansfield in *Bree v. Holbech* (3), which was an action of *assumpsit*, only go to this extent, that there may be cases which fraud will take out of the Statute of Limitations; but the real question there was, whether the fraud was anywhere asserted in the replication, and the Court held that every fact therein alleged might be true without any fault on the part of the defendant. The *dicta* of the Judges in *Clark v. Hougham* (2) and *Bree v. Holbech* (3) are virtually overruled in *The Imperial Gas Company v. The London Gas Company* (4) and *Hunter v. Gibbons* (5). These two cases and the words of the statute itself shew that the Statute of Limitations was an absolute answer to an action for damages prior to the Judicature Act, and the effect of holding the contrary would be to graft an exception upon the Statute of Limitations which was never intended by the Legislature.

Booth v. Lord Warrington (6), which was a suit in equity to recover money paid on a bond which was alleged to have been obtained by fraud, only decides that there might have been an action maintainable at common law, and that a Court of equity would not have been debarred from giving

(1) The defendant further rejoined that the several frauds and concealments alleged did not accrue within six years before action. To this the plaintiff demurred; but the judgment of the Court of Appeal on the demurrer to the replication made it unnecessary to consider this demurrer.

(2) 2 B. & C. 149; 3 Dowl. & Ry. 322.

(3) 2 Dougl. 655.

(4) 10 Exch. Rep. 39; 23 Law J. Rep. Exch. 308.

(5) 1 Hurl. & N. 459; 26 Law J. Rep. Exch. 1.

(6) 4 Bro. P.C. 163.

Gibbs v. Guild, App.

relief, although the cause of action had accrued six years before the action was commenced. *Hovenden v. Lord Annesley* (7) also shews that the Courts of equity have always been considered to be within the spirit and meaning of the Statute of Limitations, and do not merely act by analogy to it, but in obedience to it. See also *Bond v. Hopkins* (8). The principle on which Courts of equity will act has been long established—namely, that where the remedy in equity corresponds with the remedy at law, and the latter is subject to a limit in point of time by the Statute of Limitations, there the Courts of equity will act by analogy to the statute, and impose the same limitation—*Knox v. Gye* (9). The judgment of Lord Westbury shews that where the Courts of law and of equity respectively exercised concurrent jurisdiction, the Courts of equity considered themselves bound by the statute.

In the case of *In re Greaves* (10) Jessel, M.R., said that the Statute of Limitations did not affect Courts of equity, because it only applied to what were commonly called common law actions; but that the statute now applied to any action which is properly described by the statute, whether it is brought in one Court or another, and is consequently binding on the High Court wherever the action is one to recover a debt upon a contract. Where the Courts of law and equity have concurrent jurisdiction, as in the present case, the Courts of equity have always considered themselves bound by the statute.

T. Willes Chitty (with him *R. E. Webster, Q.C., and Evans*), for the plaintiff.—The effect of the Judicature Act, 1873, s. 24, is, that every Division of the High Court is a Court of equity as well as a Court of law. If, therefore, a Court of equity will grant relief in such a case as this, then it follows that this Court also will give relief. In *Booth v. Lord Warrington* (6) the demand was clearly one which could have been made the subject-matter of an

action at law, and there the Court of equity granted relief. It is no objection to equity that the facts of the case would support an action at law, and this is borne out by the remarks of Lord Cottenham in *Blair v. Bromley* (11). This argument is also supported by section 23 of the Judicature Act, 1873. In *Trotter v. McLean* (12) the cause of action was the fraudulent concealment of a trespass, and Fry, J., in delivering judgment, said that the period of limitation imposed by the statute of James ought to apply to proceedings in the Chancery Division in respect of a trespass, unless some equitable ground for repelling the application of the statute existed, and that in the case of fraud the statute would undoubtedly not apply. It is the well-established rule in equity that in cases of fraud the Statute of Limitations begins to run from the discovery of the fraud—*The Ecclesiastical Commissioners of England v. The North Eastern Railway Company* (13); *The South Sea Company v. Wymondsell* (14); *Bond v. Hopkins* (8); *Hovenden v. Lord Annesley* (7) and *Blair v. Bromley* (11). So again, in the case of fraudulent conversion of trust money, lapse of time is no bar to the suit, because in such a case the relief is founded on fraud, and not on constructive trust—*Rolfe v. Gregory* (15). See also *Brown v. Howard* (16). The rule of equity that fraud prevents the operation of the Statute of Limitations is one which has been recognised in an American case—*Sherwood v. Sutton* (17).

Ram replied.

LORD COLERIDGE, C.J.—I am of opinion that the judgment of the Court below is right, and should be affirmed. The point that we have to decide is this: an action is brought, and to my mind it does not signify whether it is brought for the re-

(11) 2 Ph. 354, affirming 5 Hare, 542; 16 Law J. Rep. Chanc. 495.

(12) 49 Law J. Rep. Chanc. 256; Law Rep. 13 Ch. D. 574, 584.

(13) 47 Law J. Rep. Chanc. 20; Law Rep. 4 Ch. D. 845.

(14) 3 P. Wms. 143.

(15) 34 Law J. Rep. Chanc. 274, 275, per Lord Westbury.

(16) 2 Brod. & Bing. 73.

(17) 5 Mason, 143.

(7) 2 Sch. & Lef. 607, 630, 634.

(8) 1 Ibid. 413, 428.

(9) 42 Law J. Rep. Chanc. 234; Law Rep. 5 H.L. Cas. 674-5.

(10) 50 Law J. Rep. Chanc. 817; Law Rep. 18 Ch. D. 551.

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covery of a specific sum of money, or for the recovery of that sum with interest in the shape of damages—the money in the one case having been paid, and the damages in the other case having been occasioned by the fraud of the defendant. The plaintiff claims back a sum of money which the defendant has obtained from him by fraudulent misrepresentation. The defendant says: “Assuming that I did so, I did so more than six years ago; the statute of James says that no action on the case shall be maintained beyond six years from the time when the cause of action arose; the cause of action accrued when you parted with your money to me by my fraud more than six years ago, and the statute is therefore an answer to your claim.” To that the plaintiff replies that the statute would, as a general rule, be an answer, but in this case the defendant had no right to set it up, because he had concealed his fraud from the plaintiff during those years, and had made the statute run in his own favour, and cannot, therefore, in accordance with the principles which the Court has to administer, take advantage of the statute by such an act of injustice; and the question is whether that reply is a good answer.

It is clear if we went upon the principles of strict common law actions and pleadings that there are two decisions directly in favour of the defendant that such a replication under the old rules of pleading would not have been a good answer to the plea—*Hunter v. Gibbons* (5) and *The Imperial Gas Company v. The London Gas Company* (4). It is equally admitted that if this were a pure equity proceeding before the Judicature Act, and had been a suit instituted in a Court of equity to recover back a sum of money which had been obtained from the plaintiff by fraud, and the defendant had pleaded the statute, the replication pleaded in this case would have been held to be a sufficient answer. *Booth v. Lord Warrington* (6) was admitted by Mr. Ram in the course of the argument to be equally in favour of the plaintiff if this were a case of pure equity proceeding, as *Hunter v. Gibbons* (5) and *The Imperial Gas Company v. The London Gas Company* (4) are admitted to be in favour of the defendant if the proceed-

ing were at common law. *Booth v. Lord Warrington* (6), which was decided by the House of Lords after consultation with the Judges, is binding upon this Court, and it is enough to say that Mr. Ram was unable to distinguish that case from the present one, if this case is to be treated as a pure equity proceeding. The report of that case is extremely unsatisfactory, both from its brevity, and from the necessity of having to draw inferences which I do not think fairly are, but which possibly might be, open to dispute. It is not, however, absolutely necessary to rely on that decision, although it has always been treated as a binding decision; its principles have been adopted, and the grounds upon which the Court of equity proceeded in that and similar cases have been expounded from time to time by Judges of the highest authority. Neither is it necessary to discuss the many cases in which the principles laid down, or assumed to have been laid down, in *Booth v. Lord Warrington* (6) have been avowed and acted upon. The case is expressly cited in *The South Sea Company v. Wymondsell* (14), where the facts are more fully stated than in *Brown's Report*. Now Lord King, who had been an eminent common law Judge, decided *The South Sea Company v. Wymondsell* (14) in accordance with and on the authority of *Booth v. Lord Warrington* (6). The principles which have actuated Courts of equity in administering this exception, if it may so be called, in the Statute of Limitations, are discussed at length, together with the authorities in their chronological order, in the elaborate judgments of Lord Redesdale in *Bond v. Hopkins* (8) and *Hovenden v. Lord Annesley* (7). I apprehend that the principle there laid down is this: that the Statute of Limitations does really in a sense bind Courts of equity as much as it does Courts of law, for the reason, stated by Lord Redesdale, that equity follows the law, and that in general what are the legal rights, in the absence of anything to prevent the individual suitor before the Court of equity relying upon them, will be also the equitable rights of suitors, and in ordinary cases the Statute of Limitations applies, as his Lordship is careful to say, *not* by analogy, but by reason of the obedience which

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Courts of equity owe to the enactments of the statute. But it has always been the principle of the Courts of equity, while admitting that there are certain legal rights, to see that the suitors in each particular case shall not be allowed to avail themselves of those legal rights. The Courts of equity do not say that the law does not exist, nor do they presume to interfere with the law, but they say it is unjust in this particular case for the plaintiff or the defendant to insist upon the legal right, which it is admitted does exist, and they therefore restrain the exercise of that right. I do not, therefore, admit that Courts of equity have grafted an exception on the Statute of Limitations by administering it in the way in which they have done. This, however, depends upon the meaning of words; if, by engrafting an exception upon the statute is meant that the Courts of equity prevent a particular person from taking advantage of the statute, then that, no doubt, is true; but if it is meant to be said that the terms of the statute where it applies have been altered, or that the Courts of equity have enlarged or narrowed the language of the statute in cases to which it is applicable, then I demur to the correctness of the expression. The idea I wish to convey is this—I understand that Courts of equity deal with the Statute of Limitations as they deal with every other legal right, whether given by statute or existing at common law, and do not abrogate it, but say that, on principles well understood in these Courts, it is unjust in this particular case to exercise those rights which have been given by law.

The Courts of equity have therefore held that in cases of this kind, where the statute applied, and where the cause of action and the knowledge of the cause of action are contemporaneous, there the statute runs in Courts of equity as it does in Courts of law. Where, however, the cause of action is created, but its existence is concealed from the person who ought to take advantage of it by the fraud of the person who creates it at any rate for more than six years, there the defendant shall not take advantage in his own favour of the wrong which he himself has done, and a fresh equity exists from the moment of

the discovery of the fraud which concealed the cause of action; and from that time, according to Lord Redesdale's judgment, accrues a fresh cause of action, to which the Statute of Limitations will be applied by the Courts of equity.

Upon this demurrer I assume that there was a cause of action, and that it was created more than six years ago, but that the knowledge of the existence of that cause of action was concealed from the plaintiff by the fraud of the defendant for more than six years. If this were a pure equity proceeding it follows from the cases which have been cited and the principles there laid down that the plaintiff would be entitled to succeed on this replication.

The question then arises as to how this proceeding is to be regarded. Is it to be regarded as a common law proceeding, in which case I admit the defendant is entitled to succeed; or is it to be regarded as an equity proceeding, in which case the plaintiff would be entitled to succeed? Strictly speaking, it is neither; but it is an action in the High Court of Justice created by the Judicature Act, 1873, by the operation of which the two systems of common law and equity were in a certain sense both abolished—that is to say, the rights and the principles of both remained, but so far as they were in conflict they were not allowed to exist in conflict with one another, and the High Court of Justice was not only empowered, but was ordered to give relief to suitors in the High Court according to the principles of law and equity concurrently. It is therefore plainly fallacious to treat this case as if it were either an action at law or a suit in equity before the Judicature Act, 1873. We have to consider the operation of that Act upon the two old systems so far as they conflict. The rule now is that each division of the Court is to administer full justice according to so much of the principles of either of the two old conflicting systems as may be necessary in each respective case to give effectual and complete relief to the suitors before the Court. Both the rules of common law and the rules of equity, as modifying those rules of common law, are now to be applied. This is an action to recover back money, or for damages, but it is immaterial which, for

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the reasons already given. To that there is a defence which, prior to the Judicature Act, would have been held to be a satisfactory one; but as we are no longer bound by the rules of strict common law, we have to see what the Courts of equity would have done in a case of this sort. Relying, therefore, on the general expressions of section 23 and section 24, subsection 1, of the Judicature Act, 1873, I think we are bound to give the relief that a suitor would have obtained in equity, and to uphold the validity of this reply. It is true that although *Hunter v. Gibbons* (5) and *The Imperial Gas Company v. The London Gas Company* (4) are directly in point to the contrary, and are binding on Courts of co-ordinate jurisdiction, yet they are not binding on the Court of Appeal. It is not necessary to consider what was the true principle of the old common law pleading in an action in which fraud was a reply to a plea of the Statute of Limitations; but it is sufficient to say that that case has not been concluded in the Court of Appeal, and that there are *dicta* of Judges of very great eminence which make it a matter of argument whether, even if this had to be treated as a pure common law question, this Court might not have arrived at the same result which it now arrives at, upon the joint operation of common law and equity principles under the Judicature Act, 1873.

It is not, however, necessary to decide that question, but I desire to say that the remarks of Lord Mansfield, Mr. Justice Holroyd, Mr. Justice Best, and other great authorities, at all events seem to shew that the matter is by no means one which is incapable of argument in the Court of Appeal.

BRETT, L.J.—I am strongly of opinion that the Judicature Act has not altered the rights or remedies of any parties. That Act merely says that the same rights and remedies are to be administered as were formerly administered; and that all the remedies shall, instead of being administered by two Courts, be now administered by the same Court. It follows equally, therefore, that the Judicature Act does not alter or repeal the effect of any statute which formerly was applicable to a particular case.

The present case must therefore be decided on the ground that this Court will now administer every equity which a Court of equity would administer, so that if equity would have granted relief in this case this Court will now grant the same relief. The next proposition is that the Courts of equity would have relieved the plaintiff. There was some argument that the first proposition which I have enunciated did not now hold, and it was suggested that inasmuch as the names of actions are now altered, there is no longer an action of trespass or an action on the case, and therefore that the Statute of Limitations did no longer apply; but I am of opinion that the Judicature Act did not at all alter or affect the Statute of Limitations, which therefore still applies to the circumstances which constituted the actions named in it; so that if the facts are such as formerly would have supported an action on the case or an action of trespass the Statute of Limitations would still apply to them.

The chief argument here has been on the subsequent proposition—namely, that the Courts of equity would not have granted relief in this case upon the grounds that the facts would have supported a common law action on the case, and that the Statute of Limitations therefore would have applied, because it runs from the accrual of the cause of action; that the alleged fraudulent concealment would have no effect upon the statute; and that to give effect to the alleged fraudulent concealment in the way suggested would be contrary to the very words and intention of the statute.

For the purposes of the present case, all actions may be divided into three kinds—namely, transactions in which, before the Judicature Act, the only remedy would have been by a suit in equity; secondly, transactions in which the remedy was at common law only; and, thirdly, cases in which the two Courts claimed concurrent jurisdiction, so that a person might have claimed a remedy in either Court. Where the transaction was such as came within the meaning of the Statute of Limitations, the Courts of equity recognised the binding authority of the statute, and if there were nothing else but the cause of action which

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had arisen more than six years before the commencement of the suit, the statute was interpreted in precisely the same way by the Courts of equity as by the Courts of common law. But where there was a cause of action which had accrued more than six years before the commencement of the suit, the Courts of equity on doctrines of their own applied a particular kind of equity; the statute was not construed so as to give an equity; but an equity was adopted which was independent of the statute, and which no doubt had an effect on the transaction, notwithstanding the statute—that is to say, the defendant was not allowed to prevent the plaintiff from supporting the right to his remedy on the ground that the statute was a bar, where the existence of the cause of action was fraudulently concealed from him by the defendant until a period beyond the six years.

There is some little confusion in the expressions used in some of the cases, as to fraud being the origin of the cause of action. But that is not the fraud which raised the equity in question. Assuming the cause of action was not the fraud, if the existence of that cause of action was fraudulently concealed from the plaintiff by the defendant, then the equity arose, notwithstanding that the cause of action had arisen more than six years before action. It was not denied that where the only remedy was in equity, the Courts of equity would have adopted that other remedy. To take the case in which the cause of action was one which could only give rise to a remedy in a Court of law, there the Statute of Limitations was pleaded, and it was proposed to answer that plea by a replication that although the cause of action had really accrued more than six years before the commencement of the action, yet the existence of that cause of action had been fraudulently concealed from the plaintiff by the defendant until within six years. It certainly was held—*Hunter v. Gibbons* (5) and *The Imperial Gas Company v. The London Gas Company* (4)—that such a replication could not be supported either as a legal or as an equitable replication. There does not seem to be any decision as to whether a Court of equity, if applied to, would have prevented a defendant

under such circumstances from pleading the Statute of Limitations in a Court of law. All that was decided in the cases in which the equitable replication was not allowed was that in the opinion of the Judges who refused to allow it, a Court of equity would not have granted such an injunction simply and without terms. I venture to doubt whether that view was correct, and whether a Court of equity would not have granted an injunction simply upon such facts being proved before them. I venture still to doubt whether, taking into consideration the doctrine suggested by such authorities as Lord Mansfield, Mr. Justice Bayley, Mr. Justice Holroyd, Mr. Justice Best, Chief Justice Dallas and other great common law Judges, the replication would not be allowed in a Court of Appeal to be a good replication at law. It is unnecessary to decide that point in the present case, and I give no opinion whether such a replication in an action at law would be a good replication, nor whether if the cause of action be one in which there would have been no remedy in equity but only in law, the replication, at all events treated as an equitable replication, would not now be a good one. In the present case the transaction is such that there would, before the Judicature Act, have been a concurrent remedy—that is to say, the plaintiff might have had the same remedy precisely, either in equity or at law.

This action is founded upon an alleged fraud, committed by the defendant, by which money was obtained from the plaintiff, who now seeks to recover it back, together with the general interest which he would have obtained for the use of that money if it had been left in his hands. That such an action would lie at law cannot be doubted. The remedy would have been the recovery of the money, and certainly such interest as the jury might have chosen to give to the plaintiff, for that would have been all that the plaintiff had lost. Now the question whether a suit would have been maintainable for the same cause of action, and whether the remedy in the Court of equity would have been the same, depends upon what was the real decision in *Booth v. Lord Warrington* (6).

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It was argued that that case did not decide that this sum was recoverable in such an action as this.

The suit there was brought in respect of an alleged fraud by which money had been obtained from the plaintiff, and the remedy sought was the recovery back of the money. That such a suit could be maintained in a Court of equity was not questioned either in the Court of Chancery or in the House of Lords. It was assumed that the original cause of action was one which gave rise to the remedy which was sought, and this equity of the concealment of the cause of action by the defendant from the plaintiff fraudulently until within six years before action was given as an answer to the defence of the Statute of Limitations. It was there argued that the statute must bind the Courts of equity, because the transaction was one which would have maintained an action on the case in a Court of law. In other words, assuming that the remedy was concurrent because the statute would have been a bar in the Court of law, it therefore would also be a bar in the Courts of equity. The House of Lords thereupon consulted the Judges, and asked them three separate questions. The first question in dispute was whether, "supposing such a fraud to have been committed as charged by the plaintiff's bill, an action at law might have been maintained and the plaintiff thereby repaired in damages for what he had suffered by reason of the fraud?"

It cannot be doubted that the Judges answered that question in the affirmative. Then it was asked, "Supposing such an action might have been maintained at law, at what time the cause of action accrued?" Now in that case no doubt the original cause of action was the alleged fraud; and then it was asked, When would the cause of action in respect of that alleged fraud accrue? It would seem that there must have been a dispute as to whether it accrued at the time of the fraud, or at the time when the money was paid by reason of the fraud. I should have supposed that the Judges answered that the cause of action was not the fraud, because at common law, at all events, a fraud which produced no result gives no cause of action, it is the result of the fraud which is the cause of action,

and therefore the cause of action would accrue when the money was obtained or paid in consequence of the fraud; but then that was more than six years before the suit, therefore the cause of action arose more than six years before the suit was commenced. Then the question was asked, "Supposing the fraud not to have been discovered till six years after the cause of action accrued, whether a Court of equity be barred from giving relief in such a case on a bill to be commenced after the six years?" The answer, according to the decision of the case, must have been that it did not, and the House of Lords held that it did not. That decision is therefore directly in point to the effect that the Courts of equity would have entertained the present case and would have given a remedy, and that the Courts of equity, although they had concurrent jurisdiction with the Courts of law, would not be prevented by the statute from applying their own equity to a case where the defendant had fraudulently concealed the accruing cause of action.

Now that seems to be the real meaning of the decision in *Booth v. Lord Warrington* (6) as declared by Lord Redesdale in *Hovenden v. Lord Annesley* (7), and it has constantly been cited, and has always been accepted as the true doctrine of the Courts of equity. The case of *Blair v. Bromley* (11) was a suit to recover money obtained by fraud. The Statute of Limitations was set up as an answer, but the equity doctrine was applied, which said that the statute should not be relied upon by the defendant, because the existence of the cause of action had been concealed from the plaintiff by the fraud of the defendant until within six years before the suit. That was decided upon the authority of *Booth v. Lord Warrington* (6) in a Court of equity, and afterwards on appeal to a Lord Chancellor sitting as a Court of co-ordinate jurisdiction with the present Court of Appeal. We are therefore bound by authority to hold that the Courts of equity would have entertained the present case as an equitable suit, and would have given the remedy sought by the plaintiff in this case; and would have applied their own equity doctrine to prevent the defendant from defeating the plaintiff's claim by pleading

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the Statute of Limitations. That doctrine seems also to have been recognised in the case of *The South Sea Company v. Wyndesell* (14). It is true that this case might be treated as an action brought according to the common law doctrine; but it may also be treated as if it were or had been, before the Judicature Act, a suit in equity. Under these circumstances I do not think that we are bound, merely because the action is brought in the Common Law Division, to say it is not a suit in equity; but we must treat it as if it were a suit in equity, and being bound by the equity authorities of a Court of co-ordinate jurisdiction with this, and of a Court superior to this, we must say that under the given circumstances the plaintiff is not deprived of his remedy by reason of the defence, because the reply sets up an equity which would be granted to the plaintiff by a Court of equity. The judgment of Mr. Justice Field was therefore correct.

HOLKER, L.J.—I have the misfortune to differ from my Lords, and for two reasons. First of all, because I must admit that they take what may be considered to be a broader view of this matter than I do, and secondly, because I may be wrong. Having formed an opinion, which I consider a strong one, upon this question, I am bound to give utterance to it.

The question here is, how is the period from which the Statute of Limitations begins to run to be ascertained in a case like the present one? It is said that in dealing with such a case the Statute of Limitations runs from the period mentioned in the statute itself—namely, the accruing of the cause of action; and on the other hand it is contended that the language of the statute is to be disregarded, and that it runs from the time when the fraud has been discovered—at all events in all cases where the fraud has been concealed by the person who originally perpetrated it. In dealing with the question it may be important to ascertain what law was administered by the Courts of equity and law respectively before the passing of the Judicature Act. A great many cases have been cited in order to satisfy the Court what was the law, or how the law

was administered, but there really is not any difference between the view taken on the one side and the other with respect to what the law was. If the cases are examined, it will be found that Courts of common law, when dealing with actions which are within the language and meaning of the Statute of Limitations, acted directly upon the language of this statute, and decided that it should not be a bar until the lapse of six years after the cause of action or suit had arisen; and the common law said that the cause of action in a case like the present was not the discovery of the fraud, but the fraud itself. Although the statute may be a piece of imperfect legislation, we must deal with it as we find it, and the Legislature having said that the action shall be barred after six years from the accruing of the cause of action, we must adopt it, as we cannot legislate for ourselves.

That was the doctrine of the Courts of common law which has been laid down in a great many cases; it is enough for me to mention two of the most recent—*Hunter v. Gibbons* (5) and *The Imperial Gas Company v. The London Gas Company* (4)—in which the law is declared without the slightest hesitation or doubt. These cases were decided by very eminent Judges, and if the common law rule had been different from what it was said to be, I do not think the difference could have escaped them; and I take it to have been clearly decided by those cases and several others that the rule of common law is what I have stated it to be. The rule in equity was different, and with reference to the case of *Booth v. Lord Warrington* (6), which has been relied upon by Lord Justice Brett, and the other cases which support and confirm the doctrine laid down there, I will draw attention to the fact that, whether *Booth v. Lord Warrington* (6) was rightly decided or not, it is very vaguely reported and difficult to understand. I must, however, assume that it was rightly decided, and as it was a decision of the House of Lords it would be binding upon me as a member of this Court; but let me point out that it was an equity decision and not a common law case at all, and that if it enunciated the rule correctly, it enunciated the rule which is adopted in equity and not at common law; but it may be that

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Booth v. Lord Warrington (6) is not such a decision as it is supposed to be. It is somewhat difficult to understand the questions, but it may be that the House of Lords imagined that there was no sufficient remedy at common law, and that the only remedy was in equity, and that there was a remedy in equity which came within the language of the Statute of Limitations. It is enough for me at present to say that *Booth v. Lord Warrington* (6), together with the cases which followed it, was a decision as to the law administered and the rule adopted in the Courts of equity and not in the Courts of common law. Prior to the Judicature Act, the rule at common law was this: the Courts felt themselves bound by the Statute of Limitations, and decided according to the language of the Statute of Limitations, disregarding any equitable considerations which might exist in the case. Equity took a different and, it may be said, far more liberal view of the statute, and in some cases, at all events, the Courts of equity said it would be very unjust to hold that the statute runs from the accruing of the cause of action, and as it would be grossly unjust in many cases that that should be the rule, we will decide that in cases of fraudulent concealment the limitation runs from the time of the discovery of the fraud. That, however, was not the doctrine of the Courts of equity in all the cases, because I think the authorities which have been cited are sufficient to shew that wherever there was a proceeding in the Courts of equity which came within the definition or description of the proceedings mentioned in the Statute of Limitations, there the Courts of equity were just as much bound by the strict and rigorous language of the statute as were the Courts of law. To put it shortly, if there was a proceeding in equity which was similar to a proceeding in an action on the case or an action of trespass, there the Courts of equity considered that the proceeding was one which is described by the Statute of Limitations, and that as regards that proceeding they were bound by the statute just as much as were the Courts of common law. In cases where the rule was different, and where the proceeding in equity was not within the language or

spirit of the Statute of Limitations, the Courts of equity have nevertheless said that there shall be a limitation; and although not bound by the Statute of Limitations, have acted upon the spirit of the statute and by analogy to it, and have said that where a man has been guilty of *laches* for a considerable time he shall be barred of his remedy. But the Courts of equity have refused to extend this rule of acting by analogy to the Statute of Limitations to cases where, by so acting, a grievous injustice would be done. In the case of a proceeding, therefore, not within the statute, where the question has arisen whether the statute shall run from the perpetration, or from the discovery of a fraud, the Courts of equity have said that it shall run from the discovery. There are, therefore, two doctrines which, in a sense, are inconsistent with each other: the doctrine of the common law with reference to ascertaining the period from which the statute shall begin to run, and I will add (though with some hesitation and doubt, because there are some cases which seem rather to militate against that view) the rule of the Courts of equity in cases which are within the Statute of Limitations, and with regard to which the Courts are bound by the statute, which has been and still is that the period of the accruing of the cause of action shall be the period from which the statute runs. But in other cases, where the Courts of equity acting simply and by analogy to the statute do not admit themselves actually bound by it, the rule is different, and the statute runs, not from the perpetration, but from the discovery of the fraud.

Then comes a most important question, whether for the future the rule of law, and also the rule of equity in cases to which the statute applies, is to be abrogated or not; and from that seems to follow distinctly this further question, whether by a decision of this Court the Statute of Limitations is to be repealed or not. Thus, to take a case (and whether it is called an equity suit or a common-law case is immaterial) which is in fact an action for damages or for trespass, or an action on the case—as, for instance, an action to recover back money obtained by fraud—what does this Court do but declare that the rule

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which the Statute of Limitations has established shall be done away with, and that whereas the statute says that in a case of fraud the statute shall begin to run from the arising of the cause of action, which is the fraud itself, it is declared that from henceforth that rule shall not prevail, but that the cause of action and the statute shall begin to run from the discovery of that fraud.

Judgment affirmed.

Solicitors—Miller, Wiggins & Naylor, for plaintiff; Clarke, Rawlins & Clarke, for defendant.

1881. { THE QUEEN (on the prosecution
Dec. 17. { of the East Ham Local
Board) v. BARCLAY AND
ANOTHER.

Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 211—General District Rate—Compulsory Rating of Owners—Powers of Urban Authority—Unoccupied Houses—Reduced Assessment—Discretion of Rating Authority.

[For the report of the above case, see 51 Law J. Rep. M.C. 27.]

[IN THE COURT OF APPEAL.]

1882. { THE QUEEN (on the prosecution
March 15. { of the East Ham Local
Board) v. BARCLAY AND AN-
OTHER, *Justices of Essex.*

Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 211—Assessment of Premises let on Short Tenancies—Assessment of Owner instead of Occupier—Rateable Value where Owner assessed for Tenements whether Occupied or Unoccupied.

[For the report of the above case, see 51 Law J. Rep. M.C. 47.]

[IN THE QUEEN'S BENCH DIVISION AND IN THE COURT OF APPEAL.]

1882. { THOMSON v. THE SOUTH
Feb. 29. { EASTERN RAILWAY COM-
March 25, 29. { PANY. THE SOUTH EAST-
ERN RAILWAY COMPANY
v. THOMSON.*

Practice—Cross Actions—Summons to Stay—Party to be Plaintiff—Burden of Proof—Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 24, sub-s. 7.

When application is made to stay one of two cross actions arising out of the same subject-matter, no inflexible rule exists as to which action ought to be stayed or as to which litigant ought to be allowed to proceed as plaintiff with his action. Generally that plaintiff will be allowed to proceed on whom the burden of proof substantially lies, although the circumstances of each case, such as priority of issue of writ and comparative importance of the claim or cause of action, are matters to be considered in determining the question.

Appeal from the Queen's Bench Division.

On the 28th of November, 1881, J. and G. Thomson issued a writ against the South Eastern Railway Company, and on the 5th of December they delivered a statement of claim in which they claimed a sum of 7,000*l.*, and a further sum of 2,736*l.*, in respect of a contract made between them and the railway company in March, 1880, by which they agreed to build a steamer for the railway company for 35,000*l.*, to be paid by five equal instalments of 7,000*l.*, and in respect of a second contract made in May, 1881, by which they agreed to do certain extra work and to make certain alterations for the sum of 2,736*l.* The statement of claim alleged that they had built and delivered, and that the railway company had accepted the steamer, that the railway company had paid 28,000*l.*, but that they declined to pay the remainder of the sum agreed on.

On the 30th of November, 1881, the South Eastern Railway Company issued a writ against J. and G. Thomson, and on

* *Coram* Field, J., and Huddleston, B., in the Queen's Bench Division; and Brett, L.J., and Holker, L.J., in the Court of Appeal.

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the 29th of December they delivered a statement of claim, by which they claimed to recover from the defendants, in respect of the same contracts as those on which Messrs. Thomson sued them, all the sums of money already paid by the railway company to J. and G. Thomson, and damages for breach of contract with regard to the steamer agreed to be built by Messrs. Thomson for them. They claimed 50,000*l.* damages.

On the 7th of January, 1882, Messrs. Thomson took out a summons to stay the second of the above actions, and to have the two actions consolidated. This summons was adjourned; and then the railway company took out a summons to stay the first action, and to consolidate the two actions. Both these summonses were heard together, and on the 12th of January, 1882, the Master ordered that "all further proceedings in the first above action be stayed and the two actions consolidated, and that the plaintiffs, the South Eastern Railway Company, be at liberty to proceed with the second mentioned action, and that the defendants in such second mentioned action be at liberty to deliver defence and counter-claim."

Messrs. Thomson then took out two summonses, one by way of appeal against this order, and the other against the decision of the Master refusing to make any order on their summons. These summonses were heard by Williams, J., who dismissed the applications, but endorsed one of the two summonses as follows: "Adjourned to abide result of appeal, if any, in the other action; if no appeal, this appeal dismissed."

Messrs. Thomson then moved in the Queen's Bench Division on appeal from the order of Williams, J.

R. E. Webster, Q.C., and *A. O. Nicoll*, for the appellants.

The Attorney-General (Sir H. James, Q.C.), and *Willis, Q.C.* (with them *Bremner*), for the railway company.

FIELD, J. (after stating the facts).—The plaintiffs, Messrs. Thomson, took out a summons, asking that the second action be stayed and that the defendants be directed to bring their action by way

of counter-claim; and the defendants took out a cross summons, asking that the first action be stayed and that the plaintiffs be directed to bring their action by way of counter-claim. The Master and the Judge before whom these summonses were heard decided in favour of the defendants, concluding that the conduct of the suit ought to be given to the party who was the first to threaten the litigation. I am of opinion that this is not the true principle; there is no authority to shew that the party who has first issued his writ may be deprived of the right he has thus acquired—on the contrary, several authorities in the Court of Chancery and Admiralty Court were cited by the counsel for the plaintiffs, in which the principle has been laid down that the first issue of the writ entitles the party issuing it to the conduct of the case. The order of the Judge at chambers cannot be supported on the ground that the defendants were the first to determine to litigate. Under these circumstances I am of opinion that the order cannot be supported, but that the proper order to be drawn up is that the second action be stayed, and that the plaintiffs in that action counter-claim for all their causes of action.

HUDDESTON, B.—I am unable to concur in the reasoning that the party who first determined to litigate, but did not litigate, has the right to the conduct of the action; and I am of opinion, that as the plaintiffs were the first in the field they are entitled to the right they have thus acquired.

If it had been shewn that by any fraud or trickery the plaintiffs in the first action had obtained precedence of the defendants, undoubtedly we should not have allowed them to retain it; but this is not shewn to be the case. The plaintiffs' solicitor adroitly seized the situation, as the defendants were taking steps to obtain it, and he is entitled to retain the position, unless it could be shewn that it was more convenient for the administration of justice that he should be dispossessed. Nothing has been brought forward of sufficient moment to justify us in interfering; the advantage of the first and last word has been obtained by the celerity of the plaintiffs' solicitor, and I see no reason why they should be deprived of it. Under these circumstances, I am clear that

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the causes of complaint should be tried in one action, and that the plaintiffs are entitled to keep the advantage they have obtained. The second action must then be stayed, and raised by way of counter-claim.

The order made was as follows:—"Appeal allowed. Order, that all proceedings in the action of *The South Eastern Railway Company v. Thomson* be stayed, and that the plaintiffs in that action raise their claim by way of counter-claim in the action of *Thomson v. The South Eastern Railway Company*. Thomson's costs in any event. The defendants to have fourteen days to deliver defence."

The railway company appealed.

The *Attorney-General* (Sir H. James, Q.C.), (with him *Bremner*), for the appellants.—The cause of action on which the railway company relies, is that the vessel was never tested to the satisfaction of the company, and therefore that the company was not bound to accept it. Messrs. Thomson claim in their action one instalment of the purchase-money, and a small sum for extras, so that the claim of the railway company is much more important than that of Messrs. Thomson. The writ in the action brought by Messrs. Thomson was issued before that issued by the railway company, but the question of which party ought to have the carriage of the action is not to be settled by any hard and fast rule as to priority of writ. This is an appeal to the discretion of the Court with respect to the exercise of a new power conferred by the Judicature Act, s. 24, sub-s. 7 (1). The question could not arise before that

(1) Judicature Act, 1873, s. 24. sub-s. 7: "The High Court of Justice and the Court of Appeal respectively, in the exercise of the jurisdiction vested in them by this Act, in every cause or matter pending before them respectively, shall have power to grant, and shall grant, either absolutely, or on such reasonable terms and conditions as to them shall seem just, all such remedies whatsoever as any of the parties thereto may appear to be entitled to in respect of any and every legal or equitable claim properly brought by them respectively in such cause or matter, so that, as far as possible, all matters so in controversy between the said parties respectively may be completely and finally determined, and all multiplicity of legal proceedings concerning any of such matters avoided."

Act came into operation, as the matter is one of counter-claim, and not one of set-off.

[BRETT, L.J.—On whom is the substantial burden of proof?]

The pleadings shew that the railway company has the most to establish, and therefore it should be the plaintiff.

Nicoll, for Messrs. Thomson.—It is submitted that Messrs. Thomson ought to be made the plaintiffs, and thus begin and conduct the action; they were the first to take out a summons to stay the other action. Section 24, sub-section 7 (1), of the Judicature Act is intended to prevent multiplicity of actions, and when two actions are consolidated, the plaintiff in the first action should be the plaintiff in the consolidated action.

[BRETT, L.J.—This is not a case of consolidation of two actions, but rather a summons to stay one of two actions.]

The railway company admit by their summons that one of the two actions is unnecessary, and the presumption is that the second rather than the first is the unnecessary action. There is no authority on the point in the common law Courts before the Judicature Act, as counter-claims did not then exist, but the practice in the Courts of Chancery and Admiralty is in point, and favours the argument of Messrs. Thomson.

[BRETT, L.J.—The Court of Admiralty does not stay one action—it directs that all the actions shall be tried together. But I doubt whether any cases in the Courts of Chancery or Admiralty will assist the Court in this case; the analogy is not complete, as it seems to me.]

Zambaco v. Cassavetti (2) shews that where two bills are filed in respect of the same matter, the conduct of the decrees is given to the person who first filed the bill.

[BRETT, L.J.—But is it not rather here necessary to consider on whom does the *onus probandi* lie?]

It is impossible to decide that at this stage, but the presumption is that it is on the plaintiff who first begins an action, so that he has a right to any advantage who is most diligent in the prosecution of his rights. The first of several applicants in

(2) Law Rep. 11 Eq. 439.

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administration or liquidation proceedings has generally the carriage of the proceedings.

[BRETT, L.J.—That is, as between several petitioners or plaintiffs.]

The Attorney-General, in reply.—The question of who is to be plaintiff is more than formal, a plaintiff has rights which a defendant has not, such as the power to take proceedings under Order XIV. This is not merely a consolidation, it is actually stopping one action. The words at the end of sub-section 7 (1) are put in for the purpose of guiding the discretion of the Court in exercising the general power given by the earlier part of the sub-section; it is in derogation of the absolute power there given, and if the parties choose to have two actions, it is not for the Court to put pressure on them which may work hardship. But when, as here, the claim of one plaintiff is much larger than that of the other, and when, further, the burden of proof is also substantially on the same party, then the Court will use the discretion given to it, and will direct that that party shall be the plaintiff.

BRETT, L.J.—This appeal raises a question of very great importance as to the administration of justice under the Judicature Act. I think that it has very properly been the constant effort of the Courts so to construe the Judicature Acts, and the rules of Court made under those Acts, as to make as few absolute unconditional hard and fast rules as possible, and to keep the interpretation of those rules and Acts sufficiently large to enable the Courts to exercise a discretion in each particular case with a view to justice and expediency. Now it seems to me that both the applications made in this case were made, and could only effectually be made, under the Judicature Act, 1873, s. 24. sub-s. 7 (1), so that we must now consider the peculiar jurisdiction therein conferred, and we must decide how to administer that jurisdiction, and how to apply that sub-section. It appears to me that the judgment of Mr. Justice Field reduced the matter to a hard and fast rule, and that he held that in cases in which there were cross actions between two parties the Court would, if it exercised its jurisdiction not of consolidating the

actions, but rather of staying one action and of insisting on all the claims between the two parties being tried in the other action, always allow the first plaintiff to proceed; I say that he held that in such a case the Court was bound to decide that the plaintiff in the action which was allowed to proceed should be the person who first issued a writ; that is, the action which was last begun must be stayed. Mr. Baron Huddleston appears to have enunciated another principle which also contains a hard and fast rule, and to have decided that the rule which Mr. Justice Field laid down must apply, unless it is necessary to make some other order for the purpose of the due administration of justice, or of saving the time of the Court. If this means that the Court must exercise a discretion in each particular case, then I may say that I agree with the learned Judge.

I desire to carry out the rule of conduct to which I have referred as having prevailed in all the Courts, and as having properly prevailed in them; I desire to keep the jurisdiction of the Court as large as possible in order that the Court may be enabled to do what is right and just between the parties in each case; and I am of opinion that there is no hard and fast rule that in cases of cross actions between the same parties that action must be stayed which is last begun. A Judge who has to consider such a case must use his discretion as to the fair mode of doing justice between the parties in each case. If indeed there should be in any case nothing to guide the exercise of his discretion but the fact that one party was the first to issue the writ, then he would properly give that party the benefit and advantage of his diligence. If, for instance, the burden of proof was as much on one litigant as on the other litigant, then the party who first issued the writ would get the advantage and his action would be allowed to proceed; but if, on the contrary, the substantial burden of proof lay on that party who was the second to issue a writ, and who thus became the plaintiff in the second action, it would not be fair and just to stay his action, the second in order of date, so as thus to deprive him of his position as plaintiff, and by making him a defendant give his antagonist power to anticipate him in all mat-

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ters with respect to which the burden of proof might substantially be on him. It seems to me that a Judge must consider what will be in each case the fair mode of trying the matters substantially in dispute when the case comes before a jury. This being so, I am unable to agree with the grounds on which Mr. Justice Field based his judgment, and I must add that I am unable to adopt any of the reasons which have been given by those who have had to adjudicate on this question. I cannot agree with the Master if, as is reported to us, he said that the principle on which the order should be made is that it should be in favour of that party who claimed the largest amount in his action; nor can I agree with the opinion of Mr. Justice Williams, if he said, as we are informed, that the party who first threatened litigation should be allowed to conduct the litigation and be the plaintiff in the action; nor, as I have said, can I wholly concur in the judgment of the Divisional Court.

We must, as it seems to me, consider the particular facts of each case, and in this case I am of opinion that we ought to make the order which Mr. Justice Williams made at chambers, although we do not make it for the same reasons. [His Lordship reviewed the facts of the case in detail, and continued:] There were, therefore, in this case two contracts, and it seems to me that in respect of both contracts the burden of proof is on the railway company, so that on the trial of the cross disputes between these parties the burden of proof is substantially on the railway company; and I am of opinion that, in the circumstances of this case, it would be hard, as the burden is on the railway company, yet to allow Messrs. Thomson to go first, and to be the plaintiffs in the action which is to be permitted to proceed.

It remains to refer to the cases relied on in the Divisional Court. I am of opinion that they are not applicable to the exercise of the jurisdiction conferred by sub-section 7 of section 24 of the Judicature Act, 1873 (1). With regard to the cases of actions for damages for collisions brought in the Court of Admiralty, it may be said that they are no doubt cross actions, but it is also certain that the Court never stops one of those actions. All that the Court

does in such cases is to say that the two actions shall be tried together, and then the first action, or the action first entered for trial, stands first. This was also the case where in a Court of common law two cross actions were, prior to the Judicature Act, taken together by the consent of the parties. The cases of claims for salvage follow the principles acted on in cases in the old Court of Chancery, which is that where there are several plaintiffs, and all the suits are consolidated, then as between the various plaintiffs that one has the carriage of the suit, as it is called, who was the first to sue; but that principle does not apply here, for in this case there are not separate plaintiffs and one defendant, as there may be in a salvage suit in the Court of Admiralty. The doctrine which prevailed in administration suits, or in proceedings for winding up companies in the Court of Chancery and now prevails in the Chancery Division, is the same as that which prevails in salvage suits, and it is settled practice that where several persons sue for the administration of an estate, the Court will not allow all the actions to proceed separately, but directs that they shall be consolidated and tried together. Those cases do not, however, govern this. In the result then, for the reasons I have given, and acting on the principles which I have explained, I am of opinion that we must restore the order of Mr. Justice Williams, and therefore that this appeal must be allowed.

HOLKER, L.J.—The Court is called on to exercise the power conferred by the Judicature Act with the view of preventing multiplicity of actions. I am not certain that I think the proceedings in this case are very important; for I think that the parties to actions often think too much of the question as to which party shall have the first and last word. I think the question before us is a difficult one, for there is not much principle to guide us; but Lord Justice Brett has laid down some principles with which I agree. I do not consider that this case can be decided by any hard and fast rule, for the circumstances of each separate case must be carefully considered. I am unable to feel convinced by the judgments in the Divisional Court, nor is my

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mind satisfied by the reasons given there or at chambers. The Master, as I gather, decided that the party in whose action the most substantial claim was made must prevail; but I cannot think that is just. Mr. Justice Williams held, as I understand, that that party must prevail who first threatens an action; but I am unable to think that that consideration alone should prevail. In the Queen's Bench Division Mr. Justice Field held that the party who first brought his action ought to benefit by his diligence. Now at first that did appear to me a strong argument; but after all, the diligence may be but an accident, or the priority in time may result from the misfortune of the other party, and I am of opinion that no one of these principles standing alone should prevail. It appears to me to be more reasonable to allow the party who has substantially everything to prove to begin; he has really to establish his case, and in the action which proceeds it is just that he and not the other party should be the plaintiff. This appeal, therefore, must succeed.

Appeal allowed.

Solicitors—W. R. Stevens, for the railway company; Clarke, Rawlins & Clarke, for Messrs. Thomson.

1881. { THE QUEEN (on the prosecution
Nov. 22. { of THE GUARDIANS OF THE
 { PRESTWICH UNION) v. THE
 { OVERSEERS OF THE TOWNSHIP
 { OF MANCHESTER.

Poor—Order of Removal—Exemption by Residence—Widow—Residence partly during Life of Husband—9 & 10 Vict. c. 66. s. 1; 11 & 12 Vict. c. 111. s. 1.

[For the report of the above case, see 51 Law J. Rep. M.C. 6.]

[IN THE COURT OF APPEAL.]

1882. }
March 25. } JACKSON v. LITCHFIELD AND
April 3. } SONS.*

Practice—Writ in Name of Firm—Service on Partner, good Service on Firm—Default of Appearance of One of Several Partners—Judgment—Order IX. rule 6—Order XLII. rule 8.

Where one of the partners of a firm has failed to enter an appearance to a writ which has been issued in the name of the firm, and which has been served on one of the partners under Order IX. rule 6, the plaintiff is not entitled to enter judgment against that partner individually, but must proceed with the action, and having obtained judgment against the firm, may then, under Order XLII. rule 8, issue execution against such partner.

Appeal from a decision of the Queen's Bench Division refusing to allow the plaintiff to sign judgment against a member of a partnership for default of appearance.

The action was one of detinue for a brougham, and for damages for wrongfully causing the plaintiff's goods to be seized under a writ of *fiery facias*.

The writ, which was issued against the defendants in the name of their firm, was served personally on one of the partners under Order IX. rule 6. Two of the partners, John and George Litchfield, entered an appearance, and subsequently George Litchfield made an affidavit, under Order XVI. rule 10, disclosing the names of the persons who were partners in the firm, and shewing that James Litchfield, who had not personally entered an appearance, was also a partner. It appeared that James Litchfield had entered an appearance as administrator of Frederick Litchfield, another partner, who had died since the commencement of the action.

The plaintiff applied to a Master for an order for judgment against James Litchfield personally in default of appearance, but this application was refused.

Stephen, J., at chambers and the Divisional Court, affirmed the decision of the Master.

The plaintiff appealed.

* *Coram* Brett, L.J.; and Holker, L.J.

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Mugliston, for the plaintiff, referred to *Ex parte Young* (1), *Pollock v. Campbell* (2), and also to the following rules—Order IX. rule 6; Order XII. rule 12; Order XIII. rules 2, 6, 9; Order XVI. rule 10; Order XLII. rule 8 (3).

Cur. adv. vult.

BRETT, L.J. (April 3).—In this case, which was an action of detinue for a brougham and for damages for a wrongful execution, the writ, which was issued in the name of the firm, had been served, according

(1) 51 Law J. Rep. Chanc. 141; Law Rep. 19 Ch. D. 124.

(2) 45 Law J. Rep. Exch. 199; Law Rep. 1 Ex. D. 50.

(3) Order IX. rule 6: "Where partners are sued in the name of their firm, the writ shall be served either upon any one or more of the partners, or at the principal place, within the jurisdiction, of the business of the partnership upon any person having at the time of service the control or management of the partnership business there; and subject to the rules hereinafter contained such service shall be deemed good service upon the firm."

Order XII. rule 12: "Where partners are sued in the name of their firm, they shall appear individually in their own names. But all subsequent proceedings shall, nevertheless, continue in the name of the firm."

Order XVI. rule 10: "Any two or more persons claiming or being liable as co-partners, may sue or be sued in the names of their respective firms, if any; and any party to an action may in such case apply by summons to a Judge for a statement of the names of the persons who are co-partners in any such firm, to be furnished in such manner, and verified on oath or otherwise, as the Judge may direct."

Order XLII. rule 8: "Where a judgment is against partners in the name of the firm, execution may issue in manner following:—

(a) Against any property of the partners as such;

(b) Against any person who has admitted on the pleadings that he is, or has been adjudged to be, a partner;

(c) Against any person who has been served as a partner with the writ of summons and has failed to appear.

If the party who has obtained judgment claims to be entitled to issue execution against any other person as being a member of the firm, he may apply to the Court or a Judge for leave so to do; and the Court or Judge may give such leave if the liability be not disputed, or if such liability be disputed, may order that the liability of such person be tried and determined in any manner in which any issue or question in an action may be tried and determined."

to the rules of Court, upon one of the partners. An appearance having been entered by one of the partners, or by all of them but one, the usual means were taken, under Order XVI. rule 10, for discovering who were the members of the firm, and it was stated by one of the partners that James Litchfield, who had not entered an appearance, was a member of the firm. An application was then made to enter judgment against him individually, in default of appearance. The Divisional Court, affirming the decision of the Master and Judge at chambers, refused to enter judgment against him individually; and upon consideration, I am of opinion that their decision was right. I think that where a writ has been issued against the firm, judgment must be entered against the firm and not against an individual partner, whether the partner has been personally served or not. It is obvious that a writ against a firm was not known to the common law, but was invented by the Judicature Act. There were no means at common law of suing or of obtaining judgment against a firm in the name of the firm; and formerly all the individual members of the firm were sued, and it was necessary to serve all of them, and judgment was entered against all of them. We must, therefore, see in what way, according to these rules and orders, judgment is to be entered under such circumstances as exist in this case. I wish to state what I consider to be a canon or rule of construction in such a matter, and it seems to me that the following rules are true. In all cases existing at common law which are not provided for by the Judicature Act, the procedure is to be as it was before the Act was passed; and in all cases provided for, the Act is to be followed. But where there is no express provision as to any step in an action, that step must be as near as possible, by analogy, to the common law. Applying that rule here, where the writ has been issued against a firm, the judgment must follow the writ, and must therefore be against the firm. In my opinion, a writ served under rule 6 of Order IX. upon any one or more of the partners, for the purpose of obtaining judgment, is good service on every member of the firm. Then rule 2 of Order XIII.

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makes provision as to the proceedings to be taken by the plaintiff where he desires to proceed after a defendant has failed to appear to a writ. But the whole question here will depend upon rule 8 of Order XLII. [His Lordship read the rule.] Up to that rule there is no provision made as to the way in which judgment is to be entered where the writ is issued against a firm, but that must be determined according to the rules of construction which I have enunciated. The rule at common law is that the judgment must follow or accord with the writ. Under the Judicature Act and its orders the writ may be against the firm. Therefore by analogy the judgment must be against the firm. The course of procedure is to issue a writ against the firm and then to serve it upon one of the members of the firm. The next step is to discover by summons, under Order XVI. rule 10, from the person who is known to be a member of the firm the names of all the persons who are members of such firm; and when they are known, each and all of them ought to appear. If one of the partners does not appear, the proper course is to proceed nevertheless and to obtain judgment against the firm. Until judgment has been obtained against the firm nothing can be done against a partner who has not appeared because of the common law rule that the judgment follows the writ. In the present case the firm has appeared; the case must therefore go to trial, and judgment, which will be judgment against the firm, must be obtained. Then the only means of putting that judgment into execution is that pointed out by Order XLII. rule 8. The reason for this is obvious: that where there is service on one of the partners, execution should not be allowed to issue against another one who has not appeared. The first two clauses of Order XLII. rule 8 are clear. Then the rule says that where a judgment is against partners in the name of the firm execution may issue against any person who has been served as a partner with a writ and has failed to appear. It is not absolutely necessary in the present case to determine whether the service for such purpose must be a per-

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sonal service, though I still incline to think it must be.

Upon the judgment against the firm execution may issue without more against each member of it who has appeared. The subsequent part of rule 8 seems to apply to the case of a partner not discovered at the time or who has not appeared; and in either case the plaintiff, before being entitled to enter judgment and issue execution against that partner, would have to apply to a Court or Judge for leave to do so. It is not, however, necessary to consider what our judgment would be on the final part of that clause. The only question here is whether judgment can be entered; and as the question of issuing execution does not arise, the case of *Ex parte Young* (1) is not applicable. The question there was as to which of two firms these rules applied—to the firm which existed at the time when the writ was issued, or to the firm which existed at the time when the partnership debt was incurred. I was of opinion that these rules applied to the latter firm, and as regards this point I hardly think that the Lord Chancellor differed, although Lord Justice Cotton did, from the view which I took. The only question here being as against whom judgment is to be entered, it seems to me that it must be against the firm, and that execution may then issue against the firm and against every individual member of it, either without or after leave given to do so. The judgment of the Court below was therefore right, and the application for leave to sign judgment must be refused.

HOLKER, L.J., concurred.

Application refused.

Solicitors—John Andrews, for plaintiff; W. F. Morris, for defendants.

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the Statute of Limitations. That doctrine seems also to have been recognised in the case of *The South Sea Company v. Wymondsell* (14). It is true that this case might be treated as an action brought according to the common law doctrine; but it may also be treated as if it were or had been, before the Judicature Act, a suit in equity. Under these circumstances I do not think that we are bound, merely because the action is brought in the Common Law Division, to say it is not a suit in equity; but we must treat it as if it were a suit in equity, and being bound by the equity authorities of a Court of co-ordinate jurisdiction with this, and of a Court superior to this, we must say that under the given circumstances the plaintiff is not deprived of his remedy by reason of the defence, because the reply sets up an equity which would be granted to the plaintiff by a Court of equity. The judgment of Mr. Justice Field was therefore correct.

HOLKER, L.J.—I have the misfortune to differ from my Lords, and for two reasons. First of all, because I must admit that they take what may be considered to be a broader view of this matter than I do, and secondly, because I may be wrong. Having formed an opinion, which I consider a strong one, upon this question, I am bound to give utterance to it.

The question here is, how is the period from which the Statute of Limitations begins to run to be ascertained in a case like the present one? It is said that in dealing with such a case the Statute of Limitations runs from the period mentioned in the statute itself—namely, the accruing of the cause of action; and on the other hand it is contended that the language of the statute is to be disregarded, and that it runs from the time when the fraud has been discovered—at all events in all cases where the fraud has been concealed by the person who originally perpetrated it. In dealing with the question it may be important to ascertain what law was administered by the Courts of equity and law respectively before the passing of the Judicature Act. A great many cases have been cited in order to satisfy the Court what was the law, or how the law

was administered, but there really is not any difference between the view taken on the one side and the other with respect to what the law was. If the cases are examined, it will be found that Courts of common law, when dealing with actions which are within the language and meaning of the Statute of Limitations, acted directly upon the language of this statute, and decided that it should not be a bar until the lapse of six years after the cause of action or suit had arisen; and the common law said that the cause of action in a case like the present was not the discovery of the fraud, but the fraud itself. Although the statute may be a piece of imperfect legislation, we must deal with it as we find it, and the Legislature having said that the action shall be barred after six years from the accruing of the cause of action, we must adopt it, as we cannot legislate for ourselves.

That was the doctrine of the Courts of common law which has been laid down in a great many cases; it is enough for me to mention two of the most recent—*Hunter v. Gibbons* (5) and *The Imperial Gas Company v. The London Gas Company* (4)—in which the law is declared without the slightest hesitation or doubt. These cases were decided by very eminent Judges, and if the common law rule had been different from what it was said to be, I do not think the difference could have escaped them; and I take it to have been clearly decided by those cases and several others that the rule of common law is what I have stated it to be. The rule in equity was different, and with reference to the case of *Booth v. Lord Warrington* (6), which has been relied upon by Lord Justice Brett, and the other cases which support and confirm the doctrine laid down there, I will draw attention to the fact that, whether *Booth v. Lord Warrington* (6) was rightly decided or not, it is very vaguely reported and difficult to understand. I must, however, assume that it was rightly decided, and as it was a decision of the House of Lords it would be binding upon me as a member of this Court; but let me point out that it was an equity decision and not a common law case at all, and that if it enunciated the rule correctly, it enunciated the rule which is adopted in equity and not at common law; but it may be that

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Booth v. Lord Warrington (6) is not such a decision as it is supposed to be. It is somewhat difficult to understand the questions, but it may be that the House of Lords imagined that there was no sufficient remedy at common law, and that the only remedy was in equity, and that there was a remedy in equity which came within the language of the Statute of Limitations. It is enough for me at present to say that *Booth v. Lord Warrington* (6), together with the cases which followed it, was a decision as to the law administered and the rule adopted in the Courts of equity and not in the Courts of common law. Prior to the Judicature Act, the rule at common law was this: the Courts felt themselves bound by the Statute of Limitations, and decided according to the language of the Statute of Limitations, disregarding any equitable considerations which might exist in the case. Equity took a different and, it may be said, far more liberal view of the statute, and in some cases, at all events, the Courts of equity said it would be very unjust to hold that the statute runs from the accruing of the cause of action, and as it would be grossly unjust in many cases that that should be the rule, we will decide that in cases of fraudulent concealment the limitation runs from the time of the discovery of the fraud. That, however, was not the doctrine of the Courts of equity in all the cases, because I think the authorities which have been cited are sufficient to shew that wherever there was a proceeding in the Courts of equity which came within the definition or description of the proceedings mentioned in the Statute of Limitations, there the Courts of equity were just as much bound by the strict and rigorous language of the statute as were the Courts of law. To put it shortly, if there was a proceeding in equity which was similar to a proceeding in an action on the case or an action of trespass, there the Courts of equity considered that the proceeding was one which is described by the Statute of Limitations, and that as regards that proceeding they were bound by the statute just as much as were the Courts of common law. In cases where the rule was different, and where the proceeding in equity was not within the language or

spirit of the Statute of Limitations, the Courts of equity have nevertheless said that there shall be a limitation; and although not bound by the Statute of Limitations, have acted upon the spirit of the statute and by analogy to it, and have said that where a man has been guilty of *laches* for a considerable time he shall be barred of his remedy. But the Courts of equity have refused to extend this rule of acting by analogy to the Statute of Limitations to cases where, by so acting, a grievous injustice would be done. In the case of a proceeding, therefore, not within the statute, where the question has arisen whether the statute shall run from the perpetration, or from the discovery of a fraud, the Courts of equity have said that it shall run from the discovery. There are, therefore, two doctrines which, in a sense, are inconsistent with each other: the doctrine of the common law with reference to ascertaining the period from which the statute shall begin to run, and I will add (though with some hesitation and doubt, because there are some cases which seem rather to militate against that view) the rule of the Courts of equity in cases which are within the Statute of Limitations, and with regard to which the Courts are bound by the statute, which has been and still is that the period of the accruing of the cause of action shall be the period from which the statute runs. But in other cases, where the Courts of equity acting simply and by analogy to the statute do not admit themselves actually bound by it, the rule is different, and the statute runs, not from the perpetration, but from the discovery of the fraud.

Then comes a most important question, whether for the future the rule of law, and also the rule of equity in cases to which the statute applies, is to be abrogated or not; and from that seems to follow distinctly this further question, whether by a decision of this Court the Statute of Limitations is to be repealed or not. Thus, to take a case (and whether it is called an equity suit or a common-law case is immaterial) which is in fact an action for damages or for trespass, or an action on the case—as, for instance, an action to recover back money obtained by fraud—what does this Court do but declare that the rule

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non-fulfilment of that covenant" — and that was all he said.

In support of the second head of damage Mr. Wills called one of the executors and devisees in trust, who stated that the trustees in declining to buy were influenced by the fact that the wall was not built, their opinion being that the land in its then state was somewhat of a speculative bargain, which, as trustees, it was hardly worth their while to undertake, but that if the wall had been built they should have no hesitation about it. This gentleman, and also the plaintiffs' other witnesses, stated that, by the necessary loss of the exercise of this option to have the land back with the wall built upon it they had sustained damage to the amount which would be expended in building the wall. The under-sheriff, in his direction to the jury upon this head, told them that the question "for them was, have the plaintiffs sustained any damage by reason of the wall not being built, so that they have not had the full advantage which they might have of repurchasing the land."

The third head of damage was not disputed by the defendants in principle. As to the extent of it, however, a great body of evidence was gone into on one side and the other, the plaintiffs' witnesses alleging that the damage amounted, according to one witness to 50*l.*, and according to another nearly 100*l.* per acre—that is, 1,000*l.* or 2,000*l.* as the case may be; the defendants' witnesses, on the contrary, alleging that the existence of a blank brick wall seven feet high enclosing twelve acres of land, surrounded by undeveloped building land, would have been the reverse of an advantage, and putting the damages as nominal.

No substantial complaint was made of the direction of the under-sheriff on this head of damage.

Now as the jury were not asked to say on which of the heads of damage claimed they based their verdict of 750*l.*, and as the amount is less by 450*l.* than the cost of the wall (which amount was not in dispute), it is difficult to assign their verdict to that or even the second head on which the same amount was involved without any alternative sum, and the probability

would seem to be that they acted upon the third principle, as to which there is no substantial complaint of misdirection. This, however, is uncertain, as their verdict is reconcilable with their having acted under either of the first two heads, taking upon themselves to reduce the amount. It is, however, unnecessary for the purpose of the present rule to speculate upon this, for upon the assumption that the verdict was based upon the third head, and that alone, we have come to the conclusion that upon a correct view of the evidence the amount is excessive.

Looking at the position of the plot of land in question and the grounds upon which the surveyors for the plaintiffs based their estimate of the injury alleged to have been sustained by the adjoining twenty acres, we cannot come to the conclusion that a loss at all approaching 750*l.* has been sustained. It is not, of course, for us to say what sum would be sufficient, or whether any loss has been sustained beyond the 40*s.* paid into Court; that is the province of the jury to which the case will have to be submitted. But the view we take on this part of the case is not sufficient of itself to make the rule absolute for a new trial, because it may be that the verdict may have been given or is capable of being supported by one or both of the other two principles enunciated, and it is necessary therefore to take them into consideration. But, with regard to the second head of damage contended for, we also consider the damages excessive.

No data whatever were given for assuming the damage to be equal to the cost of the wall, and we know of no authority for saying that evidence of such damage is admissible at all, whilst upon principle it seems to us to be too remote.

The first head of damage, however, was very strongly contended for by Mr. Wills, who cited many authorities in support of it, but we are of opinion that it cannot be supported.

It must be remembered that remedies for a breach of contract such as this are of two kinds.

First, the plaintiffs, if they really wished to have the wall built in accordance with the contract, so that they might have the

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very thing contracted for, and nothing else, might have claimed in the Chancery Division specific performance of the covenant; and in that event, if the Court had come to the conclusion that the damages to be recovered in an action for damages, upon the principles applicable to such actions, would not adequately protect the plaintiffs' rights and interest, it might have ordered the defendants to build the wall, and so no question could have arisen as to the extent or otherwise of any injury sustained by the plaintiffs from the absence of it. But it was also open to the plaintiffs to do what they have done, namely, bring this action for damages, in which event they will be under no obligation whatever to expend the amount recovered in erecting the wall, and most probably would never think for a moment of any such expenditure, which to us, at least, would seem a simple waste of money. The effect, however, of electing to bring the action for damages, is to convert the right to the performance of the contract into a right to have compensation in money, and the rule in such a case, stated in its most general terms, is that the plaintiff is entitled to have his damages assessed at the pecuniary amount of the difference between the state of the plaintiff upon the breach of the contract and what it would have been if the contract had been performed—*per* Baron Parke in *Robinson v. Harman* (2), adopted in *Lock v. Furze* (3). In the present case the only difference between the two states is that twenty acres of the plaintiffs' land are said to be of less value than they would have been if the wall had been built, and for that difference, whatever it may be, the defendants admit that they are liable. But in what way does the cost of the wall or fence become the measure of that difference? If it had been oak paling the damages would have been less, although such a fence is equally effective for the purposes of the contract; if the fence had been limited by the contract to the alternative iron railing, the damage would have been 3,015*l.*, equal

nearly to the fee-simple value of the twenty acres at the price at which the plaintiffs were entitled to buy the twelve acres back. The element of cost to the defendants which may thus vary cannot be the measure of the difference to the plaintiffs, which is one thing—it represents in no sense that difference. Upon principle, therefore, such a basis of assessment seems to us inadmissible, and it must next be seen if it can be supported upon authority.

The case which was most relied upon by Mr. Wills for this purpose was that of *Pell v. Shearman* (4), which at first sight has the air of supporting his contention. In that case the defendants had covenanted that they would, in land to be and which was afterwards demised to them, sink a pit to the lower vein of coal, (supposed to lie under the surface) or to a depth of 130 yards in search of that vein, and if a marketable vein of coal should be reached, would pay to Couch (the plaintiff being his assignee in insolvency) 250*l.* and 2,000*l.*, and the action was brought for a breach of this covenant, the special damage alleged being the loss of the chance of finding the coal, and thus entitling the insolvent to the two sums of 250*l.* and 2,000*l.* There was evidence at the trial that if the pit had been sunk to 130 yards, a marketable vein of coal might have been reached, and that the cost of sinking would be 2,600*l.* The defendants, admitting the breach, submitted that the plaintiff was only entitled to nominal damages; but Mr. Justice Maule directed the jury that as the defendants had failed to perform a work which the plaintiff had a right to have done at their cost, and which might have produced him 2,500*l.*, the jury ought to estimate the damage either with reference to the cost of sinking the pit or give the amount which might become payable. Upon this direction the jury gave a verdict for the plaintiff for 2,500*l.* (probably an error for 2,250*l.*), and leave for that purpose having been reserved at the trial, the defendant moved to enter the verdict for nominal damages or for a new trial, on the ground of misdirection in leaving the cost of the work to the jury, contending that

(2) 1 Exch. Rep. 850; 18 Law J. Rep. Exch. 202.

(3) 19 Com. B. Rep. N.S. 96; 34 Law J. Rep. C.P. 201.

(4) 10 Exch. Rep. 766.

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the Judge ought simply to have left it to the jury to estimate the value of the contingency. Upon the argument of the rule the plaintiff's counsel urged that the defendants were bound either to do the work or pay as damages what it would cost, upon which Baron Parke is reported to have said: "In this case there is difficulty in making the cost of sinking the pit the measure of damage, because the plaintiff cannot go upon the land and make the pit. If he had been the owner of the soil the criterion of damage would have been the expense of putting him in the same situation as if the defendants had performed their contract; and then he would only have had to spend the money in sinking the pit." The defendants, on the other hand, claimed that only nominal damages could be recovered. All the members of the Court, however, were of opinion that the plaintiff was entitled to more than nominal damages, but they thought that the branch of the learned Judge's direction to the jury which left to them the loss of the chance of finding marketable coal was correct, and so the verdict might be and was supported.

Baron Parke again pointed out that the expense was a wrong criterion of damage, but also again putting his opinion, not upon any general footing, but upon the limited ground that the plaintiff had no right to go upon the defendant's land so as to be able to perform the covenant.

Now in fact the very same element exists in the present case, so that as far as the *dictum* of Baron Parke in that case went, it is an authority against the present plaintiffs. But Mr. Wills sought to avoid the distinction taken by Baron Parke by saying that the plaintiffs were willing to waive the ground of it, and, as it were, to throw in the land by simply taking the cost of the wall as damages as if erected on their land, but we do not see how such a suggestion can alter the principle of damage. His principal contention upon this case, however, was that Baron Parke, by putting his view upon the limited ground, must be considered as having entertained the opinion that but for that the cost of sinking the pit might have been the measure of damage, and that he

seems, indeed, if correctly reported, to have expressed such an opinion. But however this may be, the reason of the decision in *Pell v. Shearman* (4) rested upon the other of the alternatives left to the jury; and the case therefore is not a binding authority upon the question now before us, although of course the opinion of Baron Parke is entitled to be considered by us, as it has been, with very great respect.

Besides this authority Mr. Wills relied, and very properly, upon the expressed opinion of the late Lord Chief Baron in the case now before us, and, of course, if that eminent Judge had given the judgment of the Court upon that point we should have been bound by it, but as Baron Huddleston expressly declined to express any opinion upon it, and the judgment of the Court was limited to the answer to the other question in the case, all that the Lord Chief Baron said does not amount to an authority binding upon and cannot be acted upon by us if it be, as, with great respect, it appears to us to be, opposed to principle and other authority.

No doubt there are also cases in which in actions upon covenants against incumbrances or to pay off specific incumbrances, it has been held that the damages are the diminution in value of the estate by reason of the existence of the incumbrances, and if the contract is to pay off a specific incumbrance the owner may recover the whole amount, although no claim has been made or damage proved—*Lethbridge v. Mytton* (5), *Carr v. Roberts* (6), *Loosemore v. Radford* (7) and *Hodgson v. Wood* (8); but in those cases there is a specific covenant to pay a specific pecuniary compensation. The right is to have that pecuniary amount, and there can be no question, therefore, but that the pecuniary compensation is the very thing to be recovered.

On the other hand, there are authorities tending to negative Mr. Wills's proposition.

(5) 2 B. & Ad. 772.

(6) 5 B. & Ad. 78; 2 Law J. Rep. K.B. 183.

(7) 9 Mee. & W. 657; 11 Law J. Rep. Exch. 284.

(8) 2 Hurl. & C. 649; 33 Law J. Rep. Exch. 76.

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In *Jones v. Gooday* (9), the plaintiff sued in trespass for taking away his soil, and Chief Justice Tindal having directed the jury to give such damages as they thought the plaintiff had sustained by that act, the plaintiff moved for a new trial, contending that the direction ought to have been that the plaintiff was entitled to such a sum as would restore the land to the condition in which it was before the commission of the trespass; but the Court refused the rule, Lord Abinger saying, "All that he is entitled to is compensation for the damages he has actually sustained," and Baron Alderson saying, "The plaintiff is entitled, by way of compensation, to what the land was worth to him. If the principle for which Mr. Kelly contends were to be adopted, it would follow that a party who has let the sea in upon the land of another, the land itself being worth only 20*l.*, would have to pay by way of damages the expense of excluding it again by extensive engineering operations. The same argument, I remember," he adds, "was urged in an action brought against the Regent's Canal Company; it was contended that they were bound to replace the soil they had taken away or to pay such a sum in damages as would enable the plaintiff to do so. The jury, however, did not adopt that view of the case, and the Court refused to disturb their verdict."

So also in *Oldershaw v. Holt* (10), the defendant had agreed to build houses on the plaintiff's land to be demised to the defendant, and broke his contract, and the plaintiff afterwards recovered the land in ejectment, and had agreed to let the land to another upon more favourable terms. The defendant having, in an action brought against him for the breach of this covenant, paid 40*s.* into Court, Lord Denman directed the jury to calculate what damage the plaintiff had sustained, and they found a verdict for the defendant, and the jury having found upon a matter of calculation that no damage had been sustained, the Court refused a new trial. No one suggested there that the plaintiff was entitled

to the cost of building the house upon the land. Under these circumstances we have come to the conclusion that the direction of the under-sheriff upon this head of damages cannot be supported, and the rule therefore must on all grounds be absolute for a new enquiry.

Rule absolute.

Solicitors — P. B. Matthews, for plaintiffs; Smith, Fawdon & Low, agents for Grueber, Blackheath, for defendants.

1882. { BURGOYNE AND OTHERS (*peti-*
March 28. { *tioners*) v. COLLINS AND
OTHERS (*respondents*).

Municipal Election — Nomination of Councillor — Burgess subscribing more Nomination Papers than there are Vacancies — 38 & 39 Vict. c. 40 (Municipal Elections Act, 1875), s. 1. sub-s. 2.

At an election of town councillors, a burgess, after he had subscribed as many nomination papers as there were vacancies, and the same (otherwise duly subscribed) had been delivered to the town clerk, subscribed another nomination paper. Upon objection to all those nomination papers on the ground that his subscriptions thereto were void under the Municipal Elections Act, 1875, s. 1. sub-s. 2 (which enacts that a burgess may subscribe as many nomination papers as there are vacancies, but no more), the mayor allowed the objection against all: — Held, upon petition questioning the return of candidates returned as the only candidates duly nominated, that only the last of the nomination papers considered invalid was invalid.

This was a Case stated (under 35 & 36 Vict. c. 60. s. 15. sub-s. 6) as to an election holden on the 1st of November, 1881, of councillors of the borough of Clifton Dartmouth Hardness.

Four councillors were to be elected, and the nomination for such election was fixed for the 22nd of October, 1881. The four petitioners were qualified to be

(9) 8 Mee. & W. 146; 10 Law J. Rep. Exch. 275.

(10) 12 A. & E. 590; 10 Law J. Rep. Q.B. 221.

Burgoyne v. Collins.

elected, and were nominated as candidates by nomination papers duly signed and duly delivered to the town clerk about 4.15 p.m. of the said 22nd of October. One Robert Peek was one of the assenting burgesses in each case. After the said nomination papers had been so delivered, Peek, without the knowledge or assent of any of the petitioners, signed as assenting burgess the nomination paper of one Hughes, and such nomination paper was delivered to the town clerk before 5 p.m. of the said 22nd of October. The four respondents and one Collier were also nominated.

The deputy-mayor attended on the 24th of October at the town hall to hear objections to the nomination papers; and thereupon one of the respondents objected to the nomination papers of the petitioners and Hughes, as void by reason that Peek had subscribed the nomination papers of five candidates, there being only four vacancies. The deputy-mayor in each case allowed the objection. Collier withdrew from his candidature; the town clerk published the names of the respondents and Collier as the only persons duly nominated, and that Collier had withdrawn; and the mayor on the 1st of November declared the respondents duly elected.

The petitioners petitioned against the election and return, and by order of Bowen, J., this Case was stated. The Court was to have power to draw inferences of fact. If the nomination papers of the petitioners or any of them were valid, the election of the respondents was not a legal election. The question for the opinion of the Court was, whether the respondents or any of them were duly elected.

J. D. Fitzgerald, for the petitioners.—The nomination papers of the petitioners were not invalid as decided by the deputy-mayor. The subscribing by one of the assenting burgesses of five nomination papers, there being only four vacancies to be filled, invalidated, under 38 & 39 Vict. c. 40. s. 1. sub-s. 2 (1), his subscription of

(1) 38 & 39 Vict. c. 40 (Municipal Elections Act, 1875), s. 1: "The following provisions shall . . . apply to nominations at all municipal elections of councillors, auditors and assessors. . . . 2. At any such election every

the fifth nomination paper, but not his subscription of the four nomination papers of the petitioners. The case is within the principle of *The Queen v. Harrauld* (2). The decision of the deputy-mayor against the nomination papers of the petitioners is not conclusive, even if he had power, notwithstanding *Howes v. Turner* (3), to entertain the objection made to their validity; for, by express provision of 38 & 39 Vict. c. 40. s. 1. sub-s. 3, the decision of the mayor on an objection to a nomination paper, if allowing the objection, is subject to reversal on petition questioning the election or return, though final if disallowing the objection.

He was stopped by the Court.

The respondents did not appear.

MATHEW, J.—I think the two points necessary to be made out on behalf of the petitioners have been made out—namely, first, that the nomination papers of the petitioners were not invalid as considered by the deputy-mayor; and secondly, that the decision of the deputy-mayor against their validity is open to review. The election of the respondents must be declared void.

CAVE, J., concurred.

Judgment for the petitioners.

Solicitors—J. E. Fox & Co., agents for R. W. Prideaux, Dartmouth, for petitioners.

candidate shall be nominated in writing; the writing shall be subscribed by two enrolled burgesses . . . as proposer and seconder, and by eight other enrolled burgesses . . . as assenting to the nomination. Each candidate shall be nominated by a separate nomination paper, but the same burgesses, or any of them, may subscribe as many nomination papers as there are vacancies to be filled, but no more. . . ."

(2) 42 Law J. Rep. Q.B. 211; Law Rep. 8 Q.B. 418.

(3) 45 Law J. Rep. C.P. 550; Law Rep. 1 C.P. D. 670.

1882. }
April 28. }

In re CHAPMAN.

Practice—Costs—Taxation between Solicitor and Client—Employment of Counsel at Chambers—Rules of Court, 1875—Costs, rule 14.

Rule 14 of Special Allowances (Costs), 1875, by which no costs of counsel attending Judges' chambers shall in any case be allowed on taxation unless the Judge certifies the case to be a proper one for counsel to attend, applies to taxation of costs between solicitor and client, as well as between party and party.

Appeal from chambers.

On taxation of a bill of costs delivered by a solicitor to a client the Master disallowed the fees paid to counsel for attendance at Judges' chambers. The client had authorised the attendance, but the Judge had not certified for counsel, and the Master therefore considered he was prevented by rule 14 of Special Allowances (Costs) 1875 (1) from allowing the costs so incurred. On appeal Mathew, J., at chambers, affirmed the decision of the Master.

R. B. Muir contended that the Master was unfettered by rule 14, inasmuch as that rule and the other rules of Special Allowances only applied as between party and party, and that as the client had authorised the attendance the costs should have been allowed.

H. Kisch, in support of the Master's decision, contended that rule 14 applied not only as between party and party, but also as between solicitor and client; and that the Master had therefore no power to allow the costs.

GROVE, J.—This case has presented more difficulty than at first sight appeared. The wording of the rule is clear and free from ambiguity, but my first impression was somewhat shaken by the contention of Mr. Muir that these rules have re-

ference to certain allowances which apply only as between party and party, and also that where the solicitor has full authority from his client to employ counsel at chambers, and the Master considers it a proper case for the attendance, it would be unreasonable that the Master should be debarred from allowing the costs so incurred. I have, however, come to the conclusion that the decision of the Judge was right, and that this appeal must be dismissed.

In addition to the almost conclusive argument that the rule is not by its language expressly limited to costs as between party and party, I find that the rule of Hilary Term, 1853 (2), on which it was evidently framed, contains the words "as between party and party," limiting the application of the rule to that case, and we must accept it as a matter of fact that the framers of rule 14 had before them the rule of Hilary Term, 1853. If that is so, the words "as between party and party" have been intentionally omitted, and the rule is intended to have a universal application, and to apply to all cases of attendance by counsel at Judges' chambers. It might well have been considered that the attendance by counsel might become matter of abuse, occasioning delay and unnecessary increase of costs, and that as between counsel and client some check should be placed to prevent the solicitor from saddling his client with expenses which ought not to be incurred. In order, therefore, to prevent the solicitor from unduly and unnecessarily employing counsel, the Legislature has by this rule intended to enact, and have enacted, that the solicitor is not to have the compulsory power of making his client pay for these costs unless the Judge certifies that it is a proper case for the employment of counsel. There is nothing repugnant in the interpretation we place upon the rule; and it is one which I think will work well and afford only a proper protection for clients.

In the second place, I do not find that

(1) Rules of the Supreme Court (Costs) 1875, rule 14: As to counsel attending at Judges' chambers, no costs thereof shall in any case be allowed, unless the Judge certifies it to be a proper case for counsel to attend.

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(2) Rules, Hilary Term, 1853, rule 6: The costs of attendance by counsel or special pleader before a Judge at chambers, shall in no case be allowed as between party and party, unless the Judge shall certify for such allowance.

In re Chapman.

these rules are, as was contended, confined exclusively to costs as between party and party. Rule 21 is evidently not so limited, for it shews that the costs of counsel attending chambers may be obtained when appearing for a third party. On the other hand, rule 26, which does apply exclusively to party and party, is different to the others, the words "between party and party" are not used, but it evidently contemplates a taxation between party and party. I am of opinion, therefore, that on the fair construction of this rule the decision of the learned Judge was right.

LOPES, J.—The point in this case which raises a question with regard to the costs of counsel at chambers is one of considerable importance. In taxing a bill of costs between solicitor and client, the Master disallowed the costs of counsel's attendance at Judges' chambers, and the question involved in this appeal from his decision is whether rule 14 includes and applies to the taxation of costs as between solicitor and client, or whether it only relates to taxation as between party and party. In my opinion the rule applies, not only as between party and party, but as between solicitor and client.

In the first place, the language of the rule is amply sufficient to cover both cases; it says that no costs shall "in any case" be allowed unless the Judge certifies the case to be a proper one for counsel to attend. It was, however, contended that the whole body of these rules relating to special allowances relate only to costs as between party and party; and, consequently, we are asked, in fact, to read it thus: "in any case between party and party, &c." But there appears to me strong reasons for the opposite contention, and I only refer to rule 21—and there are probably others—to shew that this is not the case. In the second place, there are strong reasons arising from the language of the old rule in Hilary Term, 1853; for it is plain, as pointed out by my brother Grove, that those who framed the present rule must have had the old rule before them, and intentionally omitted the words "as between party and party." It was contended that hardship would be occasioned by construing the rule in this way, but I do not agree with that contention,

because, *ex concessis*, the Master has no discretion in the case as between party and party, and why should he have any discretion in a case between solicitor and client? If imperative in the one case, why should it not be imperative in the other? It appears to me that the costs of employment of counsel at chambers ought only to be allowed when the Judge who has heard the case certifies it to be a proper one for counsel to attend, and that the true way to interpret the rule is to hold that it applies to taxation between party and party as well as between solicitor and client.

Appeal dismissed.

Solicitors—The appellant in person; Kisch, Son & Hanbury, for respondent.

[IN THE COURT OF APPEAL.]

1882.
March 28, 30. } HARRIS v. TRUMAN,
April 3. } HANBURY AND COMPANY.*

Principal and Agent—Property held by Agent charged with a Trust—Estoppel—Bankruptcy of Agent—Goods in Order and Disposition of Bankrupt.

The defendants employed one F. to buy barley, and to malt it for them only. F., for the purpose of purchasing such barley, was empowered to draw upon a certain fund paid into a bank in the name of the defendants. F. bought barley upon credit, and at the same time fraudulently drew out money from the fund so supplied by the defendants, representing by his conduct that the money so drawn out was used for the purpose of paying for barley approved of by the defendants. F. was paid by a commission, which included all the expenses of purchasing and malting the barley, the cost of insurance, the necessary licences and the duties on the malt due to the Excise, the defendants being his sureties to the Excise for the payment of such duties. F. also bought malt which he represented to have been made from barley

* *Coram* Lord Coleridge, C.J.; Brett, L.J.; and Holker, L.J.

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bought with the defendants' money. The defendants, F. having become bankrupt, seized all the barley and malt upon his premises, the value of which was less than the moneys which he had drawn out. In an action brought by the trustee in bankruptcy of F. to recover the value of the barley and malt so seized,—Held, that the relation created by the course of business between the defendants and F. was that of principal and agent; that the barley and malt which were seized by the defendants were charged in trust with the amount of the price which was, or ought to have been, and which F. represented by his conduct to have been, paid for them with the defendants' money; and that, as F. (who never had been reputed owner) was estopped from saying that he was not trustee of the barley and malt for the defendants, the trustee in his bankruptcy was also estopped from disputing the equitable right of the defendants; and that the defendants were entitled to judgment.

Appeal from a judgment of the Queen's Bench Division (1) in favour of the defendants. The case is reported 50 Law J. Rep. Q.B. 633.

The action was brought by the trustee in bankruptcy of one Fairman, to recover the value of certain barley and malt which the defendants had seized upon the bankrupt's premises. The facts will be found fully stated in the judgments.

Sir H. Giffard, Q.C., and *Harrison, Q.C.* (with them *J. F. Moulton*), for the plaintiff, referred to the following authorities:—*In re Hullett's Estate* (2), *Pennell v. Deffell* (3) and *Clayton's Case* (4).

The Solicitor General (Sir F. Herschell, Q.C.) and *K. E. Digby (Benjamin, Q.C.)*, with them, for the defendants, were not called upon.

Cur. adv. vult.

The following judgments were delivered on April 3:—

LORD COLERIDGE, C.J.—This case raises

(1) Field, J.; Manisty, J.; and Bowen, J.

(2) 49 Law J. Rep. Chanc. 415; Law Rep. 13 Ch. D. 696, 708.

(3) 2 De Gex, M. & G. 372; 23 Law J. Rep. Chanc. 115.

(4) 1 Mer. 572.

a question of very considerable importance between the trustee in bankruptcy of a person who has been called, under protest on the part of the plaintiff, the "malting agent" of the defendants, and the defendants themselves. I gather from the judgment of Mr. Justice Manisty that the trustee substantially represents the body of dealers as distinct from the original sellers, the farmers, who have been paid in full, under protest, by the defendants. The primary question is, whether, under the circumstances, the trustee in the bankruptcy of Fairman is entitled as against the defendants to maintain that the property in a large quantity of barley and malt held by the bankrupt in maltings—some of which were his own property, and some of which were leased by him—was in Fairman. Then there is the subordinate question whether, assuming that the property was not in the defendants, yet, as between them and Fairman, and therefore as between them and Fairman's trustee, Fairman had so conducted himself that there was a trust attached, on well-known equity principles, to all this property in favour of the defendants; and whether, even if it could not be made out in fact what were the particular quantities of malt and barley upon which this trust had unquestionably attached by construction of law, nevertheless, by the dealings between Fairman and the defendants, his trustee is not estopped from denying that the property was so affected by the trust.

With respect to the first part of the case it may be said to have been concluded in the Court below by the findings of the jury, who found that it was the intention of the parties—so far as it could be collected from the course of business between them, and in the absence of any evidence of a contract—that the property, substantially, should not pass in the barley to the defendants at all, nor in the malt until the period of manufacture, when duty became payable upon it, and was paid to the Government.

If this Court were bound by the findings of the jury, and the assent of the Court below to those findings, it would be necessary to consider at greater length than I propose to do the grounds upon which the Court below, in fact, determined

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this case. So far as I have examined and considered the cases and the arguments that support the opinion of the Court below I entirely agree with them; but sitting in this Court, under the Judicature Act, I conceive I have a right, if I am in possession of all the facts of the case, to ascertain the true legal rights of the parties, and to do what I think is justice. Now I am of opinion that the findings of the jury in respect of this property, so far as it was the proceeds of money belonging to the defendants, cannot be sustained, and that the true view of the case is that this is a question of principal and agent. Fairman was the defendants' agent from the beginning to the end of these transactions. So far, therefore, as any of the property in dispute here consists of the proceeds of sales in which Fairman can be said to have acted as the defendants' agent, the property passed to them; and there is an end to the matter, because, as between the trustee of an agent and the principal, the trustee can be in no better position than the agent. If, therefore, it did not lie in the mouth of the agent to say, and he could not have said, that this barley and malt belonged to him, neither can the trustee do so.

Next, as to the course of dealing between Fairman and the defendants, I do not think I can state it better than in the language of Mr. Justice Field, who, it was admitted on the argument before us, has accurately stated the facts which were proved before him. The passage upon which the main part of my judgment in this case depends is as follows:—"From the evidence in answer to this case, given by the defendants, it appeared that the great London and Burton brewers do not either make for themselves, or buy ready made, all the malt which they require for the purposes of their business, but that they make arrangements with persons who occupy maltings, and take out licences as maltsters, and are known as 'malting maltsters,' who buy barley, malt it, and deliver the malt to the brewer as required, the latter paying the agent a commission upon the quantity steeped or malted, and which commission covers the buying and the malting, but not the cost of the barley. The capital required for this latter purpose

is so large that the brewer invariably finds it, but the arrangements between the maltster and the various brewers differ materially in many respects. In the case of some brewers, the mode of transacting business was such as to render it reasonably clear that the 'malting agent' passed the property in the barley bought by him to the brewers immediately on their making the specific payments which they did for the specific quantities of barley bought by the agent and invoiced to them. In the present case that system was not pursued; and, as there was never any specific agreement, either verbal or in writing, between the bankrupt and the defendants, it became necessary to resort to the course of business understood to be and actually adopted between the parties, in order to ascertain whether the property in the barley or malt in question had ever, and, if so, when, passed to the defendants. This course of business was as follows: The bankrupt hired or owned the necessary malting premises; he took out the necessary licences, employed the necessary people and paid their wages, superintended the malting, went to market and bought the barley, and delivered the malt, when made, into the defendants' sacks; and for all this his remuneration was an agreed commission upon the quantity of barley bought and steeped. He also insured the barley and malt against loss by fire. At one time he had effected the insurance with and paid the premiums to any office he pleased; but in latter years the defendants, who stand to their own fire losses, required all their agents, and amongst others the bankrupt, to insure with them, they deducting the amount of the annual premiums from the amount due to him for his commission. The purchases of barley were very large; and, in order to provide the necessary funds for this purpose, the defendants opened accounts with three banks, at each of which they always kept a balance, and which balances always exceeded the aggregate amount of the supposed cost of the barley supposed to have been bought by the bankrupt. These accounts were opened in the names of and fed by the defendants; they were intended to be operated upon solely for the business of purchasing barley by them, and were

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drawn upon by the bankrupt. The malting season extends from the beginning of October to April, and at the end of each season balances amounting to 1,500*l.* together were left at the defendants' bankers as a starting-point for the next season's operations. Each week during the season the bankrupt was understood to attend the markets and buy barley according to his own judgment and in his own name, he being admittedly, as between himself and the seller, the principal. The course of business in these markets is to buy by sample; the bulk is deliverable at variable periods, and, if the bulk corresponds, the payment is then due in cash."

Then having said that this was not always observed, and that the bankrupt in fraud did not always comply with the course of business which it was understood existed between them, his Lordship goes on to say this:—"Every week the bankrupt forwarded to the defendants a written statement of the parcels of barley he professed to have bought, and the names of the alleged sellers, and at the bottom were written the sums which the bankrupt requested the defendants to pay in to the credit of the defendants' provincial banking accounts; but these sums were not intended to represent, and did not represent, any payment for any specific barley, but were paid in in order to keep the accounts, upon which the bankrupt had the power of drawing, full."

Then follows a longer statement, which it is not necessary to read, of the transactions and mode of dealing between the defendants and Fairman in respect of these accounts and balances.

The effect of this is that the bankrupt was to do these things for the defendants only; that all the barley which Fairman bought, was bought with money supplied by the defendants; that the barley so bought was to be turned into malt for the defendants, and for them only; and it was uncontradicted (and I think that is the only fact not mentioned in the passages I have read from the judgment of Mr. Justice Field) that as far as the defendants knew, or as far as any arrangement or course of business between them and Fairman was concerned, no barley or malt, except that which had been bought by Fairman with

money supplied by the defendants, and for them only, ought ever to have been at any of Fairman's maltings. It is plain, therefore, that the simple relation of principal and agent existed as between the defendants and Fairman, and that it never could have lain in his mouth to say that he was not their agent, employed by them to buy with their money barley, subject to their approval; and it appeared from the evidence that any barley which they disapproved of, never could in practice come upon Fairman's maltings. Then it seems to me, with all respect, that the thing in substance, and disregarding the particular forms, comes to this—that substantially Fairman was their agent, and that he never had any property in the barley, for it was bought with the defendants' money, to be turned into malt for their purposes, and was to be kept in places which were, in substance, paid for by them, because that fact was taken into consideration in the very large commission, which is mentioned in one of the judgments as being as much as 10,000*l.* a year, which Fairman sometimes received from the defendants. The incident about insurance is the only one which, at first sight, may have a bearing the other way. It was said that, inasmuch as the defendants insisted that Fairman should insure his barley with them, that was an admission on their part that the barley on which they took a profit by such insurance was not their barley, but belonged to Fairman. Strictly and technically looked at, I do not deny that that argument is capable of arising; but when looked at in substance a still stronger argument in favour of the view I am about to present seems to arise from the very same circumstances.

If, in truth, the barley belonged to Fairman, it was a harsh and tyrannical step on the part of the defendants to compel him to insure what belonged to him, and was absolutely his property, and that they, his masters, should make a profit out of an insurance on their servant's property.

If, however, the barley truly was, as I am of opinion it was, the property of the defendants, it becomes a very reasonable stipulation in a contract between them as principal and agent, that Fairman should insure, and so secure their property.

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The defendants at first, when they were not their own insurers, took care that the insurances were effected in solvent offices, but when they became their own insurers, it was said they took for the amount of the premiums they would otherwise have had to pay, a certain sum, which was deducted out of Fairman's commission.

But Fairman would have had to pay that sum out of his own commission if he had insured elsewhere, so that the defendants when they stood to their own losses and became their own insurers, only deducted a certain per-centage from his commission. The very fact and form of this transaction—that the barley was to be insured with them, and that they were to stand to their own losses—is very strong. Nothing could be stronger in point of substance than that they agree with Fairman that any loss upon the barley was to be borne by them and not by Fairman.

I am therefore of opinion upon the first part of the case—agreeing entirely in the view taken by the Court below, but differing with them as to the reasons on which they arrived at that view—that the relation of principal and agent existed between the parties; that the barley and malt were always the property of the defendants; and that upon this ground the judgment ought to be entered for the defendants.

I by no means say that the Court below was wrong in feeling bound by the findings of the jury upon questions put to them, and upon the answers to them with which Mr. Justice Field was not dissatisfied; but it makes no difference in the result whether I think the Court below was right or wrong in accepting the findings of the jury; because, even if such findings were wrong, the ordinary doctrine of principal and agent applies, and the defendants are entitled to succeed.

Then, if the findings of the jury were right, I entirely concur with the conclusion at which Mr. Justice Field arrived, assuming the correctness of the findings of the jury in answer to those questions.

Now the judgment of the Court below is based upon two propositions: first, that when such a relation as exists here is created between two parties, and large amounts are entrusted to a man to buy

goods, and to carry on a large business for another person who so supplies the money, there the old established doctrine of equity will affect the trust, and the proceeds of that money, as between the two parties, will be affected by a trust in the hands of the party who has purchased the goods, so that he will be the trustee for the person who has placed him in the position to buy, and for whom he has, in truth, bought the goods.

Of course, this supposes that the relation of principal and agent does not exist in the ordinary sense of the word; but it supposes a case in which a relation of confidence is created between two persons—a case in which one person trusts another to do a certain thing with his money. That other person receives the money on the faith that he will do it, and leads the person who has given the money to understand that he has done it; and as between those two persons he is considered in equity to have done it; and is therefore bound to hold what he does get for the benefit of the person giving the money. I think that is quite right.

Secondly, I say this, which I also think is right. It may be—although there is no distinct evidence of this—that a person placed in a fiduciary relation with another may have dealings of his own as well as fiduciary dealings, and he may in fact mix up dealings of his own with dealings in which he has acted as trustee; but equity says that where as between that person and the *cestui que trust* a fiduciary relation is created in respect of an appreciable portion of a fund which has been misapplied, so that the trustee cannot shew what portion of the proceeds of the total fund is, and what portion may not be fiduciary, there equity charges the whole fund with the trust, and leaves it to the trustee to shew what portion of that fund is not affected by the trust. That is said to be the general rule, and would certainly be so where by a long course of dealing and representations a person has so conducted himself towards his employer that the employer has understood and continues to deal upon the footing that the terms of the trust are being properly fulfilled. If, therefore, a question arises between the *cestui que trust* and the trustee, the trustee would be es-

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topped from saying that another state of things existed. That, I apprehend, is the principle upon which the Court below supported the judgment of Mr. Justice Field, and held that the defendants were entitled to succeed upon the ground, not that the property passed to them through their agent, but that as between Fairman and themselves, he had so conducted himself that whatever barley was bought with their money was affected by this trust; and that if there was any of this barley which was not bought with their money, yet he had so conducted himself that it did not lie in his mouth to say that it was not bought with their money, and was not affected by the trust which, if it had been so bought, would have been applied to it by equity. Therefore, as Fairman would have been estopped from setting up facts, if they existed, denying this fiduciary relation, I am of opinion that his trustee in bankruptcy cannot be in any better position, and cannot disavow the obligation, or set up the facts, if they exist, against the obligation. Upon those grounds, therefore, which have been stated by the Court below, and also if the findings of the jury are to be accepted, I think that this judgment is right and ought to be affirmed.

BRETT, L.J.—In this case one Fairman, being a debtor, absconded in order to avoid his liabilities to his creditors, and thereby committed an act of bankruptcy. After that act of bankruptcy the defendants seized a quantity of barley and malt which was on certain buildings called “maltings” which belonged to Fairman. The plaintiff is the trustee in bankruptcy of Fairman, and brings this action, alleging that all or a greater part of the goods so seized were both in law and equity the property of the bankrupt, and that the defendants had no interest in them; and by way of alternative the plaintiff says that the goods so seized, or the greater part of them, were in the order and disposition of the bankrupt, even if they were the property of the defendant, and that he, the trustee, is entitled to recover them as against the defendants. It was suggested that the defendants were entitled to do as they did on the ground that the property in all the goods seized, both barley and malt, was in

them in point of law, and not in the bankrupt at all; that if the property in all the goods seized was not in the defendants, then either the bankrupt was a bare trustee of the malt and barley for the defendants, or the barley and malt were at least in equity charged with the whole sum which had in fact been paid for them by the defendants. Further, that in any one of these views, the defendants were entitled to seize these goods as against the trustee.

On the part of the defendants it was alleged that even if these goods were the property of the defendants, either in law or equity, they were not in the order and disposition of the bankrupt at the time of the bankruptcy, because he was not, from the very nature of the business, the reputed owner of them. I am of opinion that in any view of the case, it is impossible for the trustee to claim any part of the barley or malt. The difficulty to my mind in this case in arriving at the legal view of the transaction, is one which has arisen because the defendants did not wish to deal directly with the excise. If this barley belonged to the defendants, and if Fairman was only their servant, it might have well been said that they were the persons who ought to have taken out the necessary licences, and who ought in the first instance to have been directly under the authority of the excise.

The great difficulty, therefore, in arriving at a legal solution of this case, arises from the fact that the brewers, who do not wish to enter directly into relations with the excise, employ certain persons, who are called “malting agents,” and who appear to the world as the owners of the barley, and as the persons who malt it, and who directly in the first instance take out and pay for the licence to the excise.

The facts here are not in dispute, and I agree with Lord Coleridge that, if it were necessary to set aside this verdict, we have abundantly before us all the facts with regard to this business, so as to enable this Court to exercise the power given by the Judicature Act, and, if necessary, to set aside this verdict and to see what the judgment ought to be.

The facts with regard to this business are as follows: there is a contract between the brewers and such a person as Fairman,

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who is called a "malting agent," under which the agent is to have possession of a building called a "malting." The agent is to go into the market, and in his own name and on his own credit—for he has no authority to pledge the credit of the defendants—to make contracts for the purchase of barley. In order to enable him to do so, a fund is opened at the bankers in the name of the brewers. Originally the bankrupt Fairman was to pay for any barley which was to be eventually malted, by drawing for the amount upon the account which stood at the bankers in the name of the defendants. Fairman was, therefore, a person supplied with funds by the defendants, and if he was their agent to buy barley, he was not by the nature of his employment such an agent as had authority to pledge the credit of his principals. Such authority must be either express, or implied from the course of business between the parties. If Fairman was put in funds by the defendants, then it is admitted and found by the jury that he had no authority to pledge their credit, because there was an express stipulation that he was to pay in cash for all barley which was to be malted by him. Upon any view of the case the defendants could not have been liable to the sellers of the barley. The barley, therefore, was to be bought by Fairman according to the course of business; and when he had made a contract with the sellers for the purchase of any barley, a sample was sent for approval to the defendants; so that it seems to me that no barley could properly, as between Fairman and the defendants, be taken to the "maltings" except that which had been approved of by the defendants. Originally, after the barley had been approved by the defendants, a statement was sent to them shewing as near as possible what money would be required for payment of it, and then Fairman drew upon the fund which had been opened at the bank in their name, and they then filled up the account so as to be ready for future operations. The mode of payment was afterwards somewhat altered, and instead of the actual price of the barley being paid into the account, sums were from time to time paid in, so as to keep the account in such a condition that Fairman

could draw upon it for the price of the barley. All the barley which came into the maltings under these circumstances ought, if Fairman had acted honestly in accordance with the arrangements between him and the defendants, to have been malted for them.

The malt was to go to the defendants, who were not to pay for the malting, and the refuse, as I understand it, also belonged to them, so that Fairman, if he had sold it, would have had to account to the defendants for the price. Every part of the barley was therefore accounted for to the defendants.

Now Fairman, as it is stated, dishonestly as against the defendants, bought barley, and drew upon the account at the bankers for the price of it, and in many instances did not pay for the barley at all. In other instances he sold either the barley or the malt to persons other than the defendants, and kept the price, and that was a fraud as against the defendants. Now it follows from this state of facts that all the barley which went to the maltings was, or ought to have been, paid for with the defendants' money, and that from the moment when that money was or ought to have been paid, not only the malt made from the barley, but the refuse produced from it also belonged to them. It is absurd upon this course of business to suggest that Fairman, even according to the contract between him and the defendants, could have bought the barley at one price and then have charged a larger price to the defendants; he could not treat the barley as his own, but was bound to give the full benefit of it to them for the price which he paid for it.

It was stated that Fairman was paid a large commission, which was to include a commission for buying and the expenses of malting the barley. Fairman could not do anything which an owner could do with the barley; it was paid for with the defendants' money, and the defendants paid him a commission for actually buying and doing everything to it before it came into their hands. Moreover, the duty on the malt, although it was in one sense paid by Fairman, was really and truly paid by the defendants, because they became sureties to the excise for the payment of the duty

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by him, and did, in fact, pay it with their own money. The duty, manipulation, cost of carriage, and work done by Fairman, and everything which the owners would have had to pay, were paid by the defendants; and they paid Fairman everything which, if he had been their agent with regard to the barley, would have been paid by them to an agent.

It is true, as regards the insurance, that Fairman for a time insured the barley, but it is equally true as a fact that the cost of insurance was considered in fixing the amount of the commission, and that it was intended to cover the insurance. Therefore the defendants really paid for the insurance; and although it is said that they afterwards insisted that Fairman should insure with them, that is a mere phrase, and the real truth is that the barley was not insured at all. It is absurd to say that if the barley had been destroyed by fire or otherwise the defendants would have had to pay the value of it to Fairman; if that were so, Fairman would have been already paid the price of the barley with the defendants' money, and by insuring him they would have had to pay him the price over again. The real meaning of what the defendants did was to insist as a matter of right that Fairman should no longer insure the barley, and they became their own insurers. The matter comes to this—that the costs of insurance had been included in the commission to Fairman, but when the defendants no longer insisted that he should insure, that sum was deducted from the commission. The defendants therefore paid the cost of insurance. Every expense, from the time the sample of barley was accepted, was paid by the defendants, and nothing was paid by Fairman.

Under these circumstances, and in respect of certain answers given by Mr. Pryor, the jury were asked the following question: "Was it the intention of the bankrupt and the defendants that the property in the barley bought by the bankrupt should become vested in the defendants at some one of different times, among others on approval of the samples?" The jury answered "no"; that is, that such was not the intention of the parties.

I agree that under ordinary circumstances the intention of the parties must

be considered, but I doubt whether the mere intention of the parties in the present case was sufficient to determine in whom the legal property in the barley vested.

I am much inclined to think that, although the jury did find that the parties in fact intended that the property should not pass, nevertheless it did pass. It is not actually necessary to set aside the finding of the jury on this point, which I believe was a finding to this effect: That it was the wish and desire of the parties that the property should not pass, but nevertheless that the one should have everything that would have gone to him if it had passed, and that the other should have nothing at all. Still, if the finding of the jury is to stand, and it is to be said that the property in the barley did pass to the defendants, it certainly could only mean that it was their property in point of law. It is therefore necessary to consider the equities.

Now it has suggested itself to my mind that in equity Fairman would be a bare trustee of the barley from the time of its approval if the business had been carried on honestly, and that the defendants were, in equity, the owners of that barley; but, on the other side, it was urged that a man cannot be a bare trustee in the absence of a contract between him and the *cestui que trust* that he shall be so. I do not think that can be a true proposition. The equity arises from the existence of certain facts and relations between the parties, and where the facts are such as I have stated them to be in this case, I think a Court of equity would hold that Fairman was, in equity, the bare trustee of this barley for the defendants.

Even if that be not so, I have not the slightest doubt that the Court of equity would say that, under the circumstances, if this business had been honestly carried out as it was intended to have been carried out, this barley was charged with the price actually paid for it by the defendants. It was urged that the barley had not been paid for by the defendants, because they only advanced money to Fairman for the purpose of carrying on the business; but that proposition, when examined into, is absurd as a matter of business, and amounts to this—that the defendants were advanced

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ing enormous sums to Fairman to enable him to carry on business without any security whatever.

If this business had been carried on honestly as between Fairman and the defendants, it is impossible to say otherwise than that the defendants really paid for the barley, and that equity would, from the moment that Fairman had drawn upon the account at the bank, have charged the barley with the price so paid by the defendants. Therefore, even though the legal property in the barley was in Fairman, he was either a bare trustee, or there was an equitable charge, at all events to the full amount in value, on this barley in favour of the defendants.

It was then urged by the trustee in bankruptcy that the barley dishonestly bought by Fairman was not bought for the defendants at all; but was bought with the intention of selling it again. Now, nothing could be more dishonest than that; for Fairman either bought and paid for the barley with the defendants' money, intending to sell again, or else he bought it never intending to pay for it at all, but at the same time drawing against it on the defendants' money. In either case this was a gross fraud; and if Fairman had been plaintiff in this action it is impossible, after he had represented to the defendants by the accounts that all the barley at the malting was barley bought by him, and approved by the defendants, and to be paid for by them, and after he had drawn upon the defendants' account for the price, that he would not be estopped from saying that he had been defrauding the defendants. If that be so, the trustee in bankruptcy who is suing upon the relation between Fairman and the defendants would also be estopped from relying on the fraud of the bankrupt. The trustee of a bankrupt has no better title than the bankrupt would have had if he had sued the defendants. I therefore think that, so far, the trustee is not entitled to recover against the defendants.

It was next said that the goods were in the order and disposition of the bankrupt. There is no finding of the jury on this point, but it was admitted by Sir Hardinge Giffard that he fully intended that the Judges of the Divisional Court should

have power to draw inferences of fact. The Court did draw the inference that from the notoriety of the mode in which the business of a malting agent is carried on, no creditor dealing in such matters could have failed to know that the malting agent is not the real legal or equitable owner of the barley and malt; but that in truth and in fact the brewers pay for the barley and malt. The question of reputed ownership therefore does not arise, and the goods cannot be said to be in the order and disposition of the bankrupt at the time of the bankruptcy within the meaning of the Bankruptcy Act.

I agree entirely with regard to the finding which the Court below undoubtedly had power to entertain, and will only add this: That if it were necessary to find as a fact that there was an understanding between Fairman and the defendants that he should be—although the apparent owner—really an agent or trustee, I consider that the Court had power also to draw inferences with regard to that fact.

I am therefore of opinion that in any view of this case the defendants are entitled to judgment, and that the judgment of the Court below ought to be affirmed.

HOLKER, L.J.—Some difficulty and complication has arisen in this case from the peculiar manner in which the finding of the jury has been dealt with by the Court below.

The action was brought to try the question whether the property in a large quantity of barley and malt was in the trustee of Fairman or in the defendants; and there was also a second question, whether these goods were, within the meaning of the Bankruptcy Act, in the order and disposition of the trustee as the representative of the bankrupt, by the consent of the true owner. With respect to the latter contention I will not say that it was practically given up, but Sir Hardinge Giffard, who represented the plaintiff at the trial, consented to leave that question to the Judges when the matter came on to be argued, who took a view against the plaintiff, and that disposes of that question.

Then as to the first finding of the jury. It may be presumptuous for me to ques-

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tion the accuracy of that finding, but I cannot help thinking that under the circumstances it was a wrong finding, and that they ought not to have found that the property in the barley was in the bankrupt, because all the facts that were laid before them seem to point to an opposite conclusion. The jury were also asked when the property passed to the defendants if it was in them. According to the finding of the jury the property in the barley did not pass to the defendants, either when it was purchased, or when it was approved, or when it was delivered, but when the duties were paid. It is difficult to say why the property in the goods should only have passed to the defendants when the duty was paid, and not before. There are, however, these salient facts: Fairman, who ultimately absconded, taking with him a large quantity of the property belonging to the defendants, was the servant of the defendants, for he helped them in their business. It was his business to buy barley, to be approved of by the defendants before it was sent to the maltings. It was then his business to malt that barley. The peculiar way in which the insurance was effected seems to be more in favour of the view that the barley belonged to the defendants than to Fairman. He therefore did everything which it was necessary to do to this barley, and was paid for his work from beginning to end by a commission. It was admitted that he could not sell it, either for himself or for other people; that he could not charge a half-penny of profit to his employers for it; and yet it is said that the property in the barley is in him. That appears to be a very strange view. It seems to me that the more reasonable conclusion on the part of the jury to have arrived at was to say that Fairman acted in the matter entirely as the defendants' agent; and that the whole of the money paid, or which ought to have been paid for it, was or ought to have been the defendants' money; and that under the circumstances the barley and malt were the property of the defendants. If that had been the finding of the jury no difficulty would have arisen, but the jury found otherwise. Now if the Court below had come to the conclusion that the finding was to be taken

literally, and to be treated as though it meant all that it said, and nothing but what it said, the result would have been a verdict or judgment which would have worked considerable injustice. The Court, however, did not take that view, but said that the verdict was to be interpreted by the light of the admitted facts of the case. Although the jury have found that the property in the barley and malt was in the bankrupt, and therefore in his trustee, nevertheless this Court may take into consideration the admitted fact that the barley was purchased by Fairman with the defendants' money; and that it was then worked up by him into malt, and that he was paid for so doing by a commission, and that he was not at liberty to deal with it as his own, but was obliged to treat it as the property of the defendants. I think, therefore, that under the circumstances he in fact held it subject to a trust for the defendants, not in the ordinary and strict sense of the term, but charged with the price which had been paid for it by the defendants.

It was then said that a large quantity of barley and malt might have been bought, not with the defendants' money at all, but with money belonging to Fairman or to some one else, so that it could not be said that the barley or malt was impressed with a trust at all. But Fairman is estopped from saying that. The doctrine of estoppel is one which ought not to be extended, but if ever there was an estoppel, this is one: because Fairman represented to the defendants that he was purchasing barley for them, and the money was got from them for that express purpose. The Court will not therefore allow him, after he had represented to the defendants that he had bought the barley and malt, to say now that he has not done so. For these reasons I think that it was competent for the Court below by the light of the admitted facts so to treat the verdict of the jury, and that the judgment ought to stand.

Judgment affirmed.

Solicitors—W. P. Slater, for plaintiff; Clapham and Fitch, for defendants.

[IN THE COURT OF APPEAL.]

1882. }
 March 22, 23. }
 April 3. } ORMEROD v. THE TODMOR-
 DEN JOINT STOCK MILL
 COMPANY (LIM.).*

Practice—Reference of Matters requiring Prolonged Examination of Documents or Scientific or Local Investigation—Discretion of Judge to refer—Jurisdiction of Court of Appeal to review Discretion—Judicature Act, 1873, s. 57.

The Court of Appeal has jurisdiction to review the discretion exercised by a Judge under the provisions of section 57 of the Judicature Act, 1873, which empower him to refer any question or issue of fact which may arise "in any cause or matter requiring any prolonged examination of documents or accounts, or any scientific or local investigation," which cannot in the opinion of such Judge conveniently be made before a jury. But as a general rule the Court will only interfere where it clearly appears that such discretion has been improperly exercised. So held, per BRETT, L.J., and HOLKER, L.J.; LORD COLERIDGE, C.J., dissentiente.

Appeal by the defendants from an order of Pollock, B., made at the trial, which was as follows:—

"It is ordered by the Court, that this being a cause or matter requiring prolonged examination of documents, and also scientific and local investigation, which cannot in the opinion of the Judge be conveniently made before a jury or conducted by the Court through its ordinary officers, and the defendants not consenting thereto, the questions and issues of fact raised by the pleadings in this action be tried by an official referee, and that this action be adjourned for further consideration."

The action was brought to recover damages for abstracting and heating water of the river Burnley, on which are situated the mills of the plaintiff and the defendants.

The case came on for trial at Manchester, in July, 1880, before Lindley, J., and it was then adjourned in order that a Special Case might be stated; but it was found impossible to do so, as there were facts in

* *Coram* Lord Coleridge, C.J.; Brett, L.J.; and Holker, L.J.

dispute, and an order was made at chambers that the case should be sent down again for trial. The plaintiff then gave notice of trial before the Judge, and the defendants gave notice of trial before a Judge and special jury. A view was had by the jury, and the case came on for trial before Pollock, B., who, at the conclusion of the opening address of counsel for the plaintiff, intimated his opinion that the case could not be tried by a jury. The counsel for the defendants objected to the case being referred, and stated the question of fact which he wished to raise, and the nature of the evidence which he proposed to adduce. Pollock, B., made the order.

The defendants appealed.

Russell, Q.C., and R. Henn Collins, for the defendants.—The learned Judge had no power to make the order; there was a plain question of fact for the jury, whether the plaintiff had suffered any appreciable injury from the action of the defendants. The only documents to be examined were documents of title, and a consideration of these could have been separated from the question of fact. The order, in fact, sets aside a previous order of a Judge of co-ordinate jurisdiction, and sends the trial of the case to a less convenient tribunal than that chosen by the defendants. The discretion exercised by a Judge under sections 56 and 57 of the Judicature Act, 1873 (1), must be a judicial discretion

(1) Judicature Act, 1873, s. 56: "Subject to any rules of Court, and to such right as may now exist to have particular cases submitted to the verdict of a jury, any question arising in any cause or matter (other than a criminal proceeding by the Crown) before the High Court of Justice or before the Court of Appeal, may be referred by the Court or by any Divisional Court or Judge before whom such cause or matter may be pending, for enquiry and report to any official or special referee, and the report of any such referee may be adopted wholly or partially by the Court, and may (if so adopted) be enforced as a judgment by the Court. . . ."

Section 57: "In any cause or matter (other than a criminal proceeding by the Crown) before the said High Court, in which all parties interested who are under no disability consent thereto, and also without such consent in any such cause or matter requiring any prolonged examination of documents or accounts, or any scientific or local investigation which cannot, in the opinion of the Court or a Judge, con-

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exercised on well recognised principles, and it is a discretion which the Court will review—*Hoch v. Boor* (2). Where an order to refer is made without consent of the parties, only such questions can be referred as are brought within the terms of section 57. It is not every question which requires scientific or local investigation or examination of documents or accounts which can be referred to an official referee—*Longman v. East* (3), *per Brett, L.J.* Under section 57 the official referee can only try issues of fact arising on any question of account. The issues under this section are to be tried and not reported upon as required by section 56; questions of rights of ownership are questions which would have to be considered on further consideration. The documents here are only documents of title, and an investigation of them would not assist the jury in coming to a conclusion on the questions of fact raised. If the question to be decided do not involve, in the words of the section, “a prolonged examination of documents, or a scientific or local investigation,” then the case shall be tried before a jury. *Leigh v. Brooks* (4) was also referred to.

Gully, Q.C., and *Aspland* (with them *Crompton, Q.C.*), for the plaintiffs.—The Judge had jurisdiction to make the order, and his discretion was properly and justifiably exercised. The question of title was not a simple question of law; it involved the identification of plots of lands referred to in the documents; certain acts of ownership exercised over certain water goits which were described in the deeds were relied on by the plaintiffs. Where a Judge has jurisdiction to refer a matter, the

veniently be made before a jury, or conducted by the Court through its other ordinary officers, the Court or a Judge may at any time, on such terms as may be thought proper, order any question or issue of fact on any question of account arising therein to be tried . . . by an official referee . . . all such trials before referees shall be conducted in such manner as may be prescribed by Rules of Court, and subject thereto in such manner as the Court or Judge ordering the same shall direct.”

(2) 49 Law J. Rep. Q.B. 665.

(3) 47 Law J. Rep. C.P. 211; Law Rep. 3 C.P. D. 142, 154.

(4) 46 Law J. Rep. Chanc. 344; Law Rep. 5 Ch. D. 592.

Court can only interfere with and overrule the discretion where it has been improperly exercised. In a matter within the jurisdiction of a judge to refer, and therefore fit for the exercise of a judicial discretion, the Court will require a very clear case of manifest error before interfering with his exercise of that discretion—*Hoch v. Boor* (2) *per Thesiger, L.J.* The manifest error must be some such error as this—that the Judge came to the conclusion that there was a question, when in fact there was none at all. It cannot be disputed here that Pollock, B., had jurisdiction to make the order; and if that be so, there is no authority to the effect that his discretion can be reviewed.

Collins replied.

Cur. adv. vult.

The following judgments were now (on April 3) delivered:—

LORD COLERIDGE, C.J.—This is a case in which I feel great repugnance to be compelled to give a judgment, and as to which I much regret that it has ever arrived at the stage in which we find it. Any judgment I pronounce will be hard upon one or other of the parties; but the case must be decided one way or the other, and it raises, no doubt, a question of great practical importance which at some time or other will have to be settled.

The two parties are millowners, and the action is brought to recover damages for the alleged abstraction of water by the defendants from the Burnley river, and returning it appreciably and injuriously lessened in quantity, and so heated as to be unfit for the purposes for which the water of the stream had been used and rightfully used by the plaintiffs. The pleadings raise questions of law and questions of fact, and the case was set down for trial at Manchester, in August, 1880, before the then Mr. Justice Lindley. At his suggestion it was agreed that a Special Case should be stated, so that the points of law might be settled before the trial, if after such settlement trial were necessary of the issues of fact. But the Special Case could not be agreed upon—neither learned counsel, I am obliged to say, could have seriously expected that his opponent would agree to his statement—Mr. Justice Lind-

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ley, who had meanwhile become Lord Justice, could not give the time necessary to settle the disputes—I must say the unreasonable disputes—which arose upon the Special Case, and he sent it down again for trial, observing more than once that if he had been aware of the nature of the case he should not have attempted to get it turned into a special case, but should have tried it out himself.

The case came on again at the Manchester assizes in January, 1882, before Baron Pollock. It was set down as a special jury case, and eleven of the jurors impannelled to try it had had a view, to which the consent of both parties was necessary, as the *locus in quo* was beyond the boundary of Lancashire.

At the end of the opening speech of the plaintiff's counsel, certainly not in any way at his invitation, and against the strenuous resistance of the defendants' counsel, Baron Pollock referred the case for report to an official referee by an order under and following the language of the 57th section of the Judicature Act, 1873. Against that order the defendants have appealed.

It is, I am aware, a difficult and ungracious task to review the discretion of a Judge, and to comment unfavourably upon its exercise in a particular case. It may be that we have not all the facts before us which influenced his mind, or, if we have, that they are presented to us in a different light and in different relations. His judgment has to be exercised at the moment and with little argument, ours after lengthened argument and time taken for consideration. This is all true, and always to be remembered; yet at last this Court must pronounce the judgment which on reflection it thinks right, and after much reflection I am obliged to say that his is an order which it is impossible not to regret should ever have been made. Both parties were anxious to try the case; both parties assured the Judge that in their judgment the case could have been disposed of in a very reasonable time. There certainly was an issue of fact—namely, whether water had or had not been unduly abstracted and injuriously overheated by the defendants, which if decided in their favour put an end to the action, and which was peculiarly fit for the consideration of

a Manchester special jury; both parties had incurred large and abortive expense already; no attempt was made by the learned Judge to try the issue of fact, nor to ascertain experimentally whether the statements of counsel that it was a cause readily admitting of trial were well justified or no. It is an example of forming and adhering to an opinion against pointed remonstrance and in the absence of practical evidence, and I feel the force of the observation of Mr. Russell, that if such orders were often made few trials of any importance could ever proceed before a jury, and the business of the Queen's Bench Division would be reduced to cases of inferior importance, and in which the stake was insignificant.

But although I certainly should not have made the order myself, I must decline to interfere with it when made, on two grounds—first, I think that Baron Pollock had jurisdiction to make the order, and that we ought not to interfere with his discretion; secondly, that I am by no means satisfied that we have jurisdiction to review this particular kind of order—and if it were necessary, and I think it is not, to decide the case on this ground, I am prepared, as at present advised, to hold that we have not. I will deal with these two reasons in their order.

First, I observe that the learned Baron's order follows carefully the words of the section in the statute. [His Lordship read section 57 and the order in question.] Was there, then, jurisdiction to make this order? I think there was. This is a question which I am clearly of opinion is open upon appeal. The statute lays down that the cause or matter as to which the opinion of the Judge is to be formed, must be one which requires in fact a prolonged examination of documents or accounts, or a scientific or local investigation. It is this examination or investigation on which the Judge is to form his opinion, and the existence of the necessity for such examination or investigation in fact is a condition precedent to the Judge having the right to form such opinion. However inconvenient he may think the trial before a jury on other grounds, he cannot, at least under this section, interfere. If there were no documents or accounts, no

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scientific or local investigation, the Judge would have no right to make such an order as has been made here, however expedient it might be on other grounds to make it, and if he did it could undoubtedly be rescinded on appeal. Here, however, it appears to me the condition precedent existed and the jurisdiction attached. The cause did require a prolonged examination of documents, so prolonged that Lord Justice Lindley, on that ground only, had tried to have a special case stated. If those documents were to be examined and the title argued out at the trial, it is, I think, clear that the examination must have been, in the fair meaning of the word, "prolonged." It matters not for this question of jurisdiction that the more convenient and least expensive course may have been to try the questions of fact by the jury, and hear the point of law argued afterwards, if argument turned out to be necessary. It matters not that the scientific character of the so-called scientific investigation may be more than doubtful; so that on this point I agree with the opinion pretty plainly intimated by Lord Justice Lindley. The conditions precedent are stated disjunctively in the section; if any one exists the jurisdiction attaches; and I think that, as I have explained, one did exist, and that therefore the jurisdiction attached. I have said already that I should not have so exercised it in the same circumstances; but assuming that I have the power to interfere, I think it the least among many evils not to do so. There have been already two abortive trials; the case is now, at last, in train of settlement by some tribunal, not perhaps the best for the purpose, but one which will at any rate dispose of it, and it seems better to leave it where it is than to force it to a third beginning, perhaps to be again abortive. In the only two reported cases which I have been able to find in which the discretion of a Judge as to the mode of trial has been questioned, the Court of Appeal has used the strongest language as to this discretion. In *Swindell v. The Birmingham Syndicate* (5), Lord Justice James says, "It is essentially a matter of discretion, and this Court will not interfere with

the Vice-Chancellor's discretion." "The Court," says Lord Justice Mellish, "has a discretion whether there shall be a trial by jury." In that case there were charges of fraud, and the plaintiffs claimed a jury. Vice-Chancellor Hall refused it; and the Court of Appeal upheld him, holding that it was within the 26th rule of Order XXXVI., where the words are, "if it shall appear desirable"; and they upheld him simply apparently on the ground that it was for him to decide, and that "if it appears desirable" to him there was an end of the matter. In *Ruston v. Tobin* (6), where also there was a question of fraud, and a jury was claimed under the 3rd rule of Order XXXVI., Vice-Chancellor Malins refused it, and the Court of Appeal again upheld him. Lord Justice James's judgment is every word of it important—"I am of the same opinion, and I repeat what I have often said before, that these appeals from the discretion of a Judge as to the mode in which a case before him can most conveniently be tried ought not to be brought. When a Judge has a discretion as to the mode of trial, his exercise of that discretion is not to be interfered with. If he were to say that he exercised it in a particular way, because he held a certain opinion on a matter of law, and the Court of Appeal considered that he was wrong in his opinion on that matter of law, it would interfere; but I think there is hardly any other case in which it would do so." The Master of the Rolls is not quite so strong, but he is emphatic too. Again, under the 6th section of the Common Law Procedure Act, 1854 (7), power of compulsory reference is given to the Judge "at his discretion," and if it shall appear to him that the matter cannot conveniently be tried before him. Hundreds of orders must have been made under the authority of this section between 1854 and 1873. During those nineteen years I was in fair practice at the bar, and I never heard of any attempt being made in any single case to rescind such an order. The section, it may be said, points in its language to orders made at Nisi Prius, which, under the old practice, it was diffi-

(5) 45 Law J. Rep. Chanc. 756; Law Rep. 3 Ch. D. 127.

(6) 47 Law J. Rep. Chanc. 218; Law Rep. 7 Ch. D. 473.

(7) 17 & 18 Vict. c. 125.

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cult or impossible to review. This is true; but as the words of the section are very like the words of the section under which Baron Pollock acted, they afford a very fair argument that the words of the latter section import that the discretion is not to be reviewed, as it was not to be and could not be reviewed under a section both in object and phraseology so very much the same. On the first ground, therefore, assuming that we have jurisdiction to interfere, I think it is a jurisdiction which we ought not to exercise.

But there are considerations more properly belonging to the second ground, and shewing that we have not the right to interfere, which are cogent also to shew that if we have the right it is one which should not be exercised. As a general rule I do not for a moment question the power of this Court to review the orders of Judges. The 19th section of the Judicature Act, 1873, gives no doubt in general terms to this Court jurisdiction and power to hear and determine appeals from any order of any Judge, subject to the provisions of this Act. But if, according to the fair interpretation of the Act itself, certain orders are not intended to be subject to appeal, why then the 19th section will not subject them. Now, I distinguish between the rules (which have the force of law) on which the two cases to which I have referred have been decided, and the sections of the Act now under consideration on the one hand, and the sections which were under consideration in the other three cases to which reference has been made on the other. The cases of *Golding v. The Wharton Salt Works Company* (8), *Watson v. Rodwell* (9) and *Davy v. Garrett* (10)—cases on which reliance has been placed as shewing that we possess that jurisdiction—were all cases concerned with the allowance or reformation of certain pleadings. The points raised were points which, to use the language of Lord Justice James in *Golding v. The Wharton Salt Works Company* (8), “depend on the discretion of the Judge”; very different, as I think,

from matters the determination of which has been committed to his discretion by the very words of the statute itself. There are certain general rules laid down as to the character of pleadings, and the Judges have to enforce obedience to these rules. In so doing, from the very nature of the case and the infinite variety of circumstances, the application of these rules must be infinitely varied. In such matters much must depend on the discretion of the Judge; and the Court of Appeal, while quite properly asserting its right to see the general rules obeyed, and overruling quite properly, if requisite, as in *Davy v. Garrett* (10), the discretion of the Judge, has intimated repeatedly that it would do so only in strong cases, and always with reluctance. But in such a case it seems to me no question could reasonably be made that the statute intended the Court should, if necessary, enforce the due execution of its own provisions, and therefore unquestionably, if necessary, overrule, as it did in the last cited case, the discretion of the Judge. The language of the Judges in these pleading cases is very different indeed from the language used when the question is as to the mode of trial, where words importing absolute discretion are used by the statute. This Court has reviewed discretion in matters of pleading. Mr. Collins told us he had been unable to find any case in which this Court had ever, in fact, reviewed discretion as to mode of trial. But, further, the consequences of holding that we can review this order are startling indeed. I have said that I do not approve of this order; but an order of this kind, which every reasonable man would heartily approve, might by a rich suitor who sought delay be appealed through this Court to the House of Lords. Again, if a Judge were applied to for such an order as this, and from mistake or perversity were to decline, this Court, if the contention before us is correct, could interpose, take the case half tried out of his hands, and then on further appeal have perhaps its own order reversed and the half tried case sent back again by the House of Lords to be tried, I suppose, by the same Judge and the same jury, if they are to be found, after an interval of months, perhaps of years.

Yet, when the suspended trial is re-

(8) Law Rep. 1 Q.B. D. 374.

(9) 45 Law J. Rep. Chanc. 744; Law Rep. 3 Ch. D. 380.

(10) 47 Law J. Rep. Chanc. 218; Law Rep. 7 Ch. D. 473.

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newed, if indeed renewed it can be, the rest of it (for it is to be remembered the interference may take place at any stage of the trial) may be had under absolutely different conditions. Witnesses may die, counsel may change, facts may alter, circumstances may vary; what was (I will assume) wrong discretion in 1881, may become, to the satisfaction of every one, right discretion in 1883, and so the suspended trial is ordered to be recommenced, to be again referred with entire approbation. Anything more cumbrous and inconvenient I can hardly imagine, few things more mischievous; and I certainly do not think the statute meant anything of the kind. I think it meant what it has said—that if certain conditions precedent exist, the Judge has power to act upon his opinion, and that, having acted on his opinion, there can in the nature of the case be no appeal, because, being in fact of that opinion, he has by the statute power to act upon it. The statute seems to me, for convenience and for the conduct of business, to trust the Judges, to assume that they will act with conscientiousness and in good faith. It is not suggested here that there was want of either, but if there were, in any supposable case, it is, I think, the least of two evils, and better on the whole that now and then a wrong order should be made than to do violence, as I think we should, to the language and intention of the statute by allowing an appeal in a matter utterly unsuitable to it, and committed by Parliament itself to the conscience of the Judges.

I do not say that if the opinion was not *bona fide*, if (let the supposition be permitted) a Judge were to come into Court and say he was of opinion that no case in the list could be conveniently tried because he wanted to be elsewhere, that in such a case there would be no appeal. I think there clearly would; but in a case of *bona fides* and conscientious opinion I am, as at present advised, of opinion that the discretion of the Judge in this particular case and under this particular section was not intended to be, and cannot be, reviewed.

BRETT, L.J.—I have never been more disturbed than at having to come to the conclusion to which I honestly feel

I must come in this case; and I am the more distressed because I find that Lord Coleridge is of a different opinion to that which I feel obliged to hold. If I could honestly say that I agreed with his Lordship that this Court had no jurisdiction in such a matter, I should be happy to do so, and still more so if I could say that I think the Court in this particular case is not bound to differ from the learned Judge who made the order.

This case came on for trial at Manchester, an order having previously been made that it should be tried there, and also by a special jury. An order also had been made by consent of both parties that the jury should have a view, and the jury had had a view; eleven of the jurymen who had had a view were present, ready to try the case; the parties and their witnesses were also there; but the learned Judge, for reasons which he gave at the trial, but which are not absolutely the same as those set out in the order appealed against, declined, against the desire of both parties, to allow the case to be tried before a jury, and referred it, as he was obliged to do if he referred it without the consent of the parties, to an official referee.

Now the reason given by the learned Judge at the trial was substantially this—that he had made up his mind, unless this Court should say that such a rule of conduct was wrong, that whenever there were a considerable number of documents to be examined for any purpose, he should insist upon referring the cause. That is not the same reason as the one given in the order itself, which is drawn up in the terms of section 57 of the Judicature Act, 1873. The rule laid down by the learned Judge would obviously lead him to the same conclusion if the documents to be referred to raised a question of law as to the title; so that he would refer the cause under such circumstances, although there might be no need of any scientific inquiry or local investigation, or although the issues of fact might perfectly well be tried before a jury. The first question to be considered is whether, assuming the conditions in section 57 to have existed, this Court has jurisdiction to review the discretion of a Judge exercised in such a case. I am of opinion that this Court has that juris-

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diction. It has been laid down by this Court in several cases that, upon a true construction of the sections of the Judicature Act, there is an appeal to this Court from every order of a Judge or of a Divisional Court, unless that jurisdiction has been taken away expressly by the Judicature Act, or some other statute which has not been repealed, or by necessary implication. Now there is no express enactment in either the Judicature Act or any other statute that there shall be no appeal against such a matter of discretion as this. The question, therefore, as to the jurisdiction of this Court must depend upon whether such an appeal is taken away by implication. The general right of appeal to this Court is given by section 19 of the Judicature Act, 1873, which provides as follows: "The said Court of Appeal shall have jurisdiction and power to hear and determine appeals from any judgment or order, save as hereinafter mentioned, of Her Majesty's High Court of Justice, or of any Judges or Judge thereof, subject to the provisions of this Act, and to such rules and orders of Court for regulating the terms and conditions on which such appeals shall be allowed, as may be made pursuant to this Act." Now, with deference to Lord Coleridge, my view of the section (and it is one which this Court has hitherto acted upon) is that the words "subject to the provisions of this Act" must be read with the words which are coupled to them by the conjunctive "and," namely, "such rules and orders of the Court" as may be made, and apply only to the mode of procedure on appeal, and that the jurisdiction of this Court is only limited by the words "save as hereinafter mentioned." It is true that in some cases this Court has gone beyond those words and held that if the Judicature Act has not in terms repealed Acts which say positively that there shall be no appeal, those statutes, if unrepealed, remain in force. But if there are no such statutes, then the jurisdiction of the Court to entertain an appeal from any judgment or order is limited only by the words "save as hereinafter mentioned."

We must therefore see whether section 57 of the Judicature Act, 1873, contains any stipulations which take away

the jurisdiction given under the general words "from any judgment or order." Section 57 sets out first of all the conditions which permit the Judge or a Court to have any opinion on this matter, and I agree that neither Court nor Judge has jurisdiction to form any opinion so as to act upon it, unless the cause does, within the meaning of this section, require a prolonged examination of documents or accounts, or any scientific or local investigation; and further, if any Judge or Divisional Court were to form an opinion, and act upon it, as to the mode of trial, assuming that one of those conditions existed when in fact it did not, I agree with Lord Coleridge that this Court, whatever may be the view as to its power to review the discretion, would have jurisdiction to say whether the conditions precedent existed or not. There is, to my mind, some difficulty as to the meaning of the words "a matter requiring any prolonged examination of documents." The only power given to the Court or a Judge under this section is to order that the issues of fact shall be referred. The Court cannot refer issues of law, and I am inclined to think that the prolonged investigation of documents within the meaning of the section must be a prolonged examination of such documents as it is necessary to inquire into and decide upon in order to enable the Judge to leave the questions of fact to the jury. If the examination of the documents or a construction of the documents is not at all required in order to enable the trial of the issues of fact, but only to enable the Judge to determine a question of legal right, I doubt much whether the examination of such documents is an examination within the meaning of this section.

It is doubtful whether the conditions precedent have been complied with in this case, and it seems to me impossible to say that the official referee will ever look at any one of these documents, for the issues of fact are wholly independent of them. The documents raise a question of law, which must be decided by a Court or a Judge alone, and without the assistance of the jury. Then there is another matter: it was stated in the order that this case required a scientific investigation. In a

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certain sense I think that it did—that is, there was a question as to what amount of heat in the water when it arrived at the plaintiff's mill would interfere with the operations of his machinery; and it was admitted that each party had some two or three scientific witnesses to inform the jury upon that fact. Moreover, a scientific man might be able to assist the jury in coming to a conclusion on that question. It seems to me, therefore, that there was just a sufficiency of scientific investigation in this matter to give Baron Pollock jurisdiction to make the order. The question must therefore be as to the exercise of that jurisdiction, and whether this Court has jurisdiction to review the discretion exercised by the Judge. It is said that we have no such jurisdiction where the conditions precedent exist and where the cause is one "which cannot, in the opinion of the Court or a Judge, conveniently be made before a jury," because the opinion of the Judge is a fact; and it was said that if the Judge was of that opinion the Court cannot say that he has not that opinion, and therefore, from the nature of the thing, there is no appeal. I cannot give that force to the phrase—the words "in the opinion of the Court or Judge" mean "according to the judgment of the Court or Judge," and as that is an opinion on law, it cannot be denied that an appeal lies from it. An order made as to the mode of trial, first by a Judge at chambers, and then by a Divisional Court, must be made upon affidavits, so that, if there is an appeal, this Court would have precisely the same materials before it as the Judge at chambers and the Divisional Court had. In all other cases in which a Judge at chambers and a Divisional Court make orders upon affidavits as to any part of the procedure, there is an appeal to this Court; and it is suggested that there is no appeal in the present case, only because the words "in the opinion of" are used in the section, but those words only mean what I have already stated.

If there is an appeal from the Divisional Court making such an order as this, it follows, *ex necessitate rei*, that there is an appeal from the order of a Judge made at the trial, because the only power which the Judge at the trial has to make such an

order is derived from the section, which says that it may be made by the Court or a Judge "at any time." Section 57, therefore, does not by necessary implication take away the right to appeal against such an order, and the case comes within the general words of section 19. It has frequently been decided that this Court has jurisdiction to review the discretion exercised by the High Court; and in *Ruston v. Tobin* (6) the Master of the Rolls, in delivering judgment, says, "I am of opinion that, as was said in *Swindell v. The Birmingham Syndicate* (5), the Court of Appeal ought not, as a general rule, to interfere with the discretion of a Judge as to the way in which a case before him shall be tried. There may be a case so strong as to induce it to interfere, but it must be a very strong case."

In the opinion of the Master of the Rolls, therefore, the Court had jurisdiction, which ought not to be exercised except with extreme delicacy. That I also understand to be what Lord Justice James means when he says that an appeal ought not to be brought; and if, after having heard the judgment of the Master of the Rolls, he had meant to say that the Court had no jurisdiction, he would have expressed his opinion to that effect. There are also many other cases in which this Court has held that it has this jurisdiction, but it is not necessary to discuss them.

Certain consequences which might arise if this Court were to allow this appeal have been pointed out by Lord Coleridge, but I think that they are hypothetical consequences which will never arise if this Court will act upon the rules which have been laid down.

Then I come to that which to my mind is more distressing than the question of jurisdiction, and I cannot honestly say otherwise than that I think it perfectly clear that the discretion of Baron Pollock was wrongly exercised in this case. I admit that there was, in the sense of giving jurisdiction, a question of scientific investigation to be gone into in this case. If we have power to review the discretion, it seems to me that the intention of the Legislature is to place the discretion in this Court, on an appeal, in the place of the discretion of the Judge who has not in

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the opinion of this Court exercised his discretion properly. This Court has laid down for its own guidance the rule—which I think is the right one—that it will not exercise its own discretion merely on a difference of opinion, nor unless it thinks the case is perfectly clear. The question whether the water which went out of the defendants' mill would arrive at the plaintiff's mill with such a heat or in such quantity as to interfere with him is one which, although it may be a question of science, can be decided with the greatest ease by any juror who is acquainted with machinery; and I do not think there can be a tribunal more fit to decide in a moderate time such questions than a Manchester special jury. I cannot, therefore, honestly say that I think the discretion of the learned Judge here was properly exercised. The case seems to me to be one wholly unfit to be tried by an official referee either at Manchester or in London. In my opinion it is perfectly clear that the learned Judge made an erroneous estimate of the mode in which this case ought to be tried. It is therefore the duty of the Court to overrule the discretion exercised by the learned Judge, and to say that the order was entirely wrong.

HOLKER, L.J.—The first question is, whether an appeal is given by the Judicature Act or any other Acts against an order of a Judge altering the mode of trial, and also whether an appeal is given against the refusal of a Judge to make such an order. At first I was strongly of opinion that there was no appeal for some of the cogent reasons pointed out by Lord Coleridge as to the manifest inconveniences which would arise if such a right was given. It seems a contradiction in terms to say there is an appeal from a discretion; and at first it was my impression that it was not the intention of the Legislature to give such an appeal. Great difficulties might arise from the fact of a Judge refusing to make an order referring a matter to an official referee, if an application could afterwards be made to this Court to reverse that refusal and to make the order. But I think the remedy would be found in the proper exercise of the discretion by the

Court of Appeal. Upon reference to the sections of the Judicature Act and to the orders I have come to the conclusion that there is an appeal from the exercise of discretion of a Judge who either makes, or refuses to make, an order altering the mode of trial, and that the Legislature intended that the Court of Appeal should exercise its discretion in lieu of that of a Judge who, in making the order, has not properly exercised his discretion. There is hardly any limitation to the general power of appeal given by section 19 of the Act of 1873, but there is not a universal appeal given against the exercise of discretion, for upon reference to the subsequent sections and rules of Court it will be found that there are cases in which an appeal is excluded; so that the Legislature, if it had so intended, would have used language to exclude an appeal in cases like this.

Thus, an instance will be found in section 49, in which the Legislature has distinctly intended there shall be no appeal, except by leave of the Court or Judge making the order, where the order is made by consent, or relates to costs which by law are left to the discretion of the Court. Then again may be found in section 50 another instance of an exceptional case, in which it was the intention of the Legislature that there should be no appeal. Now looking at those two sections alone I should have come to the conclusion that it was the intention of the Legislature, if there should be such an appeal, to substitute one tribunal to exercise a discretion instead of another tribunal where there was reason to believe that the other tribunal had in the exercise of that discretion made a mistake, or had acted on a wrong principle. Besides the Judicature Act and orders, there are several cases on the subject, not all of them cases in which there is an appeal from the exercise of a discretion to alter the mode of trial, but cases where there was an appeal from the exercise of a discretion given by the Act of Parliament to deal with pleadings and other discretions—*Golding v. The Wharton Salt Works Company* (8), *Watson v. Rodwell* (9), *Davy v. Garrett* (10) and *Ruston v. Tobin* (6). A perusal of these cases shews that an appeal is given by the Legislature against the exercise of a discretion; but that it

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should be allowed only in "a very strong case," to use the words of the Master of the Rolls in *Ruston v. Tobin* (6). The view of Lord Justice James, as expressed in *Golding v. The Wharton Salt Works Company* (8), also is that an appeal has been given, but that it should be rarely allowed. Now that decision, if it be correct—and it has been followed in other cases—disposes of the question whether an appeal has been given by the Legislature. On the authority of these cases, therefore, I hold that such an appeal has been given.

The next question is, whether Baron Pollock had discretion to make this order. The learned Judge thought the case was one which he could refer, and he said that he had jurisdiction to refer it because there was or might be involved in the inquiry a local and scientific investigation, and also because, in the words of section 57, "a prolonged examination of documents and accounts" would be necessary. Now I cannot say that there would be no necessity for any local investigation. As regards the examination of documents I do not see how a prolonged examination could have been necessary, except for the purpose of making out a title, and that certainly was not a question for the jury to try. Next, as to the scientific investigation, it would be difficult to imagine any case in which no scientific evidence would be necessary; but it would not require much science to ascertain whether a substantial quantity of water had been abstracted from the stream. The same remarks apply as to the question of the amount of extra heat which would interfere prejudicially with condensing operations. All these matters might possibly have been investigated, but it is obvious that very little scientific investigation or examination of documents would be required.

The case, if it did so at all, came but slightly within the section, and very little time would have been occupied in making the necessary investigations.

Assuming, therefore, that the right to appeal does exist, was this order properly made? According to the opinion of Lord Justice James an appeal from the discretion of the Court below or a Judge

ought to be allowed only in a very strong case, that is to say, only where injustice would otherwise be done. In my opinion the facts shew that injustice was done in this case; for Baron Pollock, at the sacrifice of a very considerable expense to the parties, substituted a tribunal by no means so well suited for the purposes of the trial as the one chosen by the parties.

For these reasons I have come to the conclusion that this order was wrong, and ought to be set aside.

Appeal allowed.

Solicitors—Torr & Co., agents for A. G. and T. W. Eastwood, Todmorden, for plaintiff; Pritchard, Englefield & Co., agents for Grundy, Kershaw & Co., Manchester, for defendants.

1881.	{	THE HIGHWAY BOARD OF THE HIGHWAY DISTRICT OF THE STOCKPORT AND HYDE DIVISION OF THE HUNDRED OF MACOLESFIELD v. GRANT.
Dec. 20.		
1882.		
April 1.		

Easement—Highway—Right to Support—Wall Adjoining and Supporting a Highway—Liability to Repair—Servitude oneris ferendi.

Where a servitude of support to a highway by a wall has been acquired, the owner of the highway, and not the owner of the wall, in the absence of express stipulation to that effect in the instrument (if any) creating the easement, is bound to repair the wall when out of repair and insufficient to support and maintain the highway.

Semble, such stipulation covenant or obligation cannot be inferred merely from the fact that the wall has been on several occasions repaired by the owner of the wall or his predecessors in title.

This was a Case argued on further consideration.

The plaintiffs in their statement of claim alleged that they were, "before and at the time of the grievances thereafter mentioned, possessed of and had vested in

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them and had the care and maintenance of a certain highway within their district," and "were entitled to have the said highway supported by a certain wall of the defendant next adjoining one side of the said highway, and as between themselves and the defendant to have the said wall kept by the defendant in such a state of repair as to enable it to support the said highway"; that the defendant "did not keep the said wall in such a state of repair as aforesaid, but wrongfully and negligently permitted the same to become and be out of such state of repair; and thereby the said highway, for want of such repair and support as aforesaid, had sunk, subsided and given way;" and that "by reason of the premises the plaintiffs suffered damage and incurred expense in reinstating the said highway and wall."

The defendant denied the plaintiffs' possession of the highway and right to the support of the same by the wall, and his own liability to keep the same in repair. He admitted that the wall had fallen out of repair, but denied that the subsidence was due to such want of repair, and alleged that it was due to the plaintiffs' own neglect in not draining the highway and the land underneath it. He also denied that the wall was the property of him or his predecessors in title, or was erected by him or them; and alleged that it was erected at the time when the highway was first made by the persons in whom the highway then vested, who then and thenceforth became responsible for the repair and maintenance of the said wall.

In the alternative the defendant said the highway was dedicated to the public by his predecessors in title, subject to any inconvenience which might arise from the then or subsequent condition of the said wall.

Russell, Q.C. (with him *Leresche*), for the plaintiffs.—The question is whether there was a servitude created for the benefit of the plaintiffs against the defendant as owner of the wall, and if there was, whose duty was it to keep the wall in repair. The alleged servitude is a right to support acquired by prescription. The defendant could not have taken the wall down, which

shews there was a servitude; but this leaves untouched the question whether it was an active servitude. The easement imposed upon the owner of the wall the burthen of supporting the highway, and the same evidence shews a servitude to keep and maintain it in repair.

[*LOPES, J.*—Is that so?—it amounts to this, that a man is to mend a wall and keep it maintained for ever without any benefit.]

The owner of the wall has always repaired it.

[*LOPES, J.*—I never heard of a servitude which had an obligation to repair.]

That is so with this particular kind of easement, an easement bearing the weight—*Gale on Easement*, 4th ed. p. 20. In the old books it is laid down that this easement carries an obligation to repair. It is an obligation peculiar to this servitude—*Sanders' Justinian*, p. 120, Cujacius, vol. vii. p. 406.

The King v. Llandillo (1) and *Angus v. Dalton* (2) also were cited.

Gully, Q.C., for the defendant.—It was only in the case of houses that such a servitude even in the civil law ever existed, and this the English law disregards—*Pomfret v. Ricroft* (3).

[*LOPES, J.*—The way it is put is this: you are constantly repairing the wall, and that is some evidence of an obligation to repair in the original grant.]

How can any repairing my own wall or house give a right to my neighbour to compel me to do so? There is nothing extraordinary in doing repairs on my own wall.

He also cited *Gale on Easements*, 5th ed. p. 392, and *Colebeck v. The Girdlers' Company* (4).

LOPES, J. (on April 1).—This is an action brought by the plaintiffs against the defendant, to recover the money they (the plaintiffs) have spent in repairing a wall supporting their highway, which they say belongs to the defendant, and which he is

(1) 2 Durn. & E. 232.

(2) 50 Law J. Rep. Q.B. 689; Law Rep. 6 App. Cas. 740.

(3) 1 Wms. Saund. 55, p. 321.

(4) 45 Law J. Rep. Q.B. 225; Law Rep. 2 Q.B. D. 284.

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bound to repair. The wall appears to have been built by a predecessor in title of the defendant and belongs to the defendant. The wall has for a long time supported the highway, and whatsoever may have been the purpose for which the wall was originally built, the plaintiffs have now acquired a right to its support for their highway.

It is urged, however, that the plaintiffs have not only acquired a servitude of support as against the servient tenement of the defendant, but that the defendant, as owner of the servient tenement, is bound to repair it at his own expense when out of repair and insufficient to support and maintain the highway. As a general rule easements impose no personal obligation upon the owner of the servient tenement to do anything, the burden of repair falls upon the owner of the dominant tenement. There is abundance of authority for this, and it is in accordance with the principle of the civil law which imposed the burthen of repair in cases of easements upon the owner of the dominant, and not upon the owner of the servient tenement.

A question has arisen whether in certain cases the owner of the servient tenement is not bound to make the necessary reparations—*e.g.* in the cases of servitudes *oneris ferendi*.

This question has always arisen in the case of town property, and has never arisen in a case like the present. I do not think, therefore, these cases have any application to the present case. But it appears, even in the case of such easements in town property, that the additional obligation to repair could only be imposed by an express stipulation to that effect in the instrument creating the easement, or at all events there must have been a prescriptive right to the repair as well as to the support.

It is urged by the plaintiffs that the wall has been on several occasions repaired by the defendant and his predecessors in title, and that I ought to infer from that a covenant or obligation to repair. It would require strong evidence to justify such an inference in support of an exceptional abnormal easement such as that claimed. I cannot draw it. I think any repairs done by the defendant or his predecessors in title

were done for their own convenience, and not in consequence of any obligation. I therefore give

Judgment for defendant.

Solicitors—Andrew, Wood & Glasier, agents for James Smith, Stockport, for plaintiffs; Hughes & Son, agents for G. Lingard Vaughan, Stockport, for defendant.

1882. }
Feb. 6. }

HELT v. LAWES.

Pleading—Libel—General Denial that "Defendant falsely and maliciously published of and concerning the Plaintiff"—Order XIX. rules 17, 18 and 19.

In an action for libel the defendant may not deny generally in his statement of defence that the "defendant wrote or published the same falsely or maliciously, as alleged," but must set out the facts upon which he relies, either to shew justification or privilege.

This was an action for libel of the plaintiff in his profession and calling by the defendant; and in paragraph 3 of the statement of claim it was alleged that "the defendant falsely and maliciously wrote and published of and concerning the plaintiff, and of and concerning him in his said art and profession, the words following—" It then set out a long paragraph in a weekly periodical. In paragraph 4 it was alleged that "the defendant falsely and maliciously wrote and published of and concerning the plaintiff, and of and concerning him in his said profession and art, the words following," and a letter containing the before-mentioned paragraph as an inclosure and referring thereto, was set out. The defendant, in paragraph 2 of his defence, pleaded a denial "that he wrote or published the said words set out in paragraph 3 of the statement of claim, or that he wrote or published the same falsely or maliciously, as alleged." And in paragraph 3 an admission that he sent the letter set out in paragraph 4 of the statement of claim, and containing the paragraph therein

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referred to; but a denial "that he wrote or published the same falsely or maliciously, as alleged."

The plaintiff obtained an order of Kay, J., reversing the order of Master Butler, and striking out so much of paragraphs 2 and 3 of the statement of defence respectively as consisted of the words, "denies that he wrote or published the same falsely or maliciously, as alleged."

The plaintiff appealed.

R. E. Webster, Q.C. (L. Coward with him), for the defendant.—If his plea ran, "the defendant denies that he wrote and published the libel falsely," the plaintiff would only be entitled to particulars. The defendant is entitled to traverse the allegation of malice.

Sir H. Giffard, Q.C. (with him Pollard).—This is an attempt to shift the *onus probandi*, and by traversing the falsehood and malice, put the plaintiff to the proof of the same; but, in reality, the *onus* of proving truth or rebutting the inference of malice lies on the defendant.

[FIELD, J.—Under the word "malicious" a defendant might set up many things at the trial not before known to the plaintiff.]

He might set up a series of circumstances to shew privilege, as to which the plaintiff, having had no notice, can produce no evidence in contradiction.

Webster, in reply.—Even if the word "maliciously" be unnecessary, since libel implies malice, it is therefore immaterial, and the traverse can do no harm.

[FIELD, J.—The question seems to be whether the words "falsely and maliciously" are a material part of the claim.]

The test of that is, would the plaintiff strike them out of his statement of claim? If not, they are material, and the defendant is bound to traverse the allegation, or else it will be taken to be admitted.

FIELD, J.—I feel unable to interfere with the discretion exercised by my brother Kay. Were we to restore the part of the defence struck out by his order, the plaintiff would have great difficulty in finding out what defence the defendant really intended to set up at the trial. The object of the Judicature Act is, that

parties by their pleadings should give notice to the other side of the facts on which they intend to rely when the case comes on for trial before a jury. In this case the plaintiff complains of two libels, and in his statement of claim sets out the exact words, written and published, as he alleges, by the defendant. In alleging the publication of those libels by the defendant, and the meaning of the same by innuendo, the plaintiff certainly uses the words "falsely and maliciously." Now Order XIX. rule 17 (1) means, without doubt, that every material "allegation of fact . . . if not denied specifically or by necessary implication, or stated to be not admitted . . . shall be taken to be admitted." The question in this case is whether the allegation that the defendant wrote and published the alleged libels "falsely and maliciously," is a material allegation which the defendant must deny, or which in default of such denial will be taken to be admitted.

First, as regards the word "maliciously." If the words set out in a statement of claim in an action for libel do not import malice, the pleading is demurrable; but if the words import injurious matter, malice is implied, and therefore the word "malicious" is immaterial. The defendant in his plea, if unamended, says, I did not do it "maliciously." But there is a way to traverse the allegation that it was done maliciously, namely, by setting out the circumstances that may rebut the implication of malice. The only object of alleging that the defendant published ma-

(1) Order XIX. rule 17: "Every allegation of fact in any pleading in an action, not being a petition or summons, if not denied specifically, or by necessary implication, or stated to be not admitted in the pleading of the opposite fact, shall be taken to be admitted, except as against an infant, lunatic or person of unsound mind, not so found by inquisition."

Rule 18: "Each party in any pleading, not being a petition or summons, must allege all such facts not appearing in the previous pleadings as he means to rely on, and must raise all such grounds of defence or reply, as the case may be, as if not raised on the pleadings would be likely to take the opposite party by surprise, or would raise new issues of fact not arising out of the pleadings—for instance fraud, or that any claim has been barred by the Statute of Limitations or has been released."

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liciously, is that if the defendant at the trial wants to set up privilege or truth, he should be precluded from doing so if he has not pleaded it. I am, therefore, quite satisfied that the allegation as to the publication being malicious is not material. As to the allegation that it was published "falsely," a libel *prima facie* imports a wrong, which it could not do if the alleged libellous matter were true, and therefore the *onus* of proving the truth thereof is cast on the defendant. There is therefore no good done by a traverse of the allegation that the defendant published "falsely"; but it is, on the other hand, mischievous, as under it a defendant might set up a defence of truth as a justification, and Order XIX. rule 18 (1) shews that a plaintiff is entitled to know if such a defence is contemplated. I think the order of Mr. Justice Kay should stand, and that the defendant should have leave to amend by pleading affirmative matter.

HUDDESTON, B.—I am of the same opinion, but should not have come to the conclusion at which I have arrived if, thereby, any harm were involved to the defendant. The allegation is that the defendant published "falsely and maliciously." The defendant in his statement of defence traverses the falsehood of the statement alleged to have been made by him, and thereby takes the *onus* of justifying, but this he would have without such traverse. As regards the traverse of the malice, if the words be libellous, malice is inferred, and can only be rebutted by shewing privilege or justification. For these defences the plaintiff should be prepared at the trial by having had notice by the defendant's plea that he intends to set them up, but a mere denial of the falsity and malice does not give such notice to the plaintiff.

Appeal dismissed with costs.

Solicitors—C. O. Humphreys & Sons, for plaintiff; Lewis & Lewis, for defendant.

1882. } RICHARDS, TWEEDY AND CO.
May 6. } v. HOUGH.

Evidence—Deposition under a Commission—Irregularity in Taking—Foreigner—Objection to Oath—Affirmation by person not qualified to affirm—Time for taking Objection.

A commission was issued abroad for the purpose of taking the evidence of a witness touching certain matters relating to an action brought by the plaintiffs against the defendant. The witness objected to be sworn and was allowed by the commissioner to affirm. His evidence was then taken. The deposition was regular upon the face of it, and was returned by the commissioner in the following terms: "Affirmed before me, the witness objecting to an oath." The plaintiffs were represented at the commission, but took no objection at the time to the evidence being given upon affirmation; subsequently, however, they applied at chambers to have the deposition taken off the file on affidavit shewing that the witness was not a person who was entitled to affirm:—Held, that the objection should have been taken at the time, and ought not now to be entertained, there being nothing on the face of the deposition itself to shew that it was not properly taken.

This was a motion on behalf of the plaintiffs to rescind an order of Denman, J., at chambers, who refused to take off the file a deposition of a foreigner, taken abroad under a commission, in an action brought by the plaintiffs, as charterers of a ship, against the defendant, as the owner, for not taking on board a cargo.

The facts were shortly as follows: A commission had been issued to Russia for the purpose of taking the evidence of Captain Marstow, who was in the Russian navy. The witness, when before the commissioner, objected to be sworn, and his evidence was taken upon affirmation, the commissioner returning it in the following terms: "Affirmed before me, the witness objecting to an oath." There were conflicting affidavits as to the grounds on which the refusal to take the oath was based, from which it appeared that the witness had not objected to be sworn on

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religious grounds. According to one statement the reason given by the witness was that he was not certain of the facts to which he was asked to depose; according to another statement the reason was that it was contrary to the regulations of the Russian naval service that an officer should be sworn as a witness. It was admitted that no objection had been taken at the time to the evidence being given, although the plaintiff was represented by a merchant who had raised a number of other objections.

English Harrison, for the plaintiffs.—This evidence ought not to have been taken at all. The witness gave no valid reason for objecting to take the oath, and there is no statute which enables him to affirm. The 20th section of the Common Law Procedure Act, 1854, which enables witnesses required, or desired to make a deposition, to make a "solemn affirmation or declaration," only applies to cases where the witness "shall refuse or be unwilling from alleged conscientious motives to be sworn," and, in order to enable him to do so, he is "solemnly, sincerely, and truly bound to affirm and declare that the taking of any oath is, according to his religious belief, unlawful." Moreover, the commissioner must first have satisfied himself "of the sincerity of such objection." Again, the Evidence Further Amendment Act, 1869 (32 & 33 Vict. c. 68), as explained by 33 & 34 Vict. c. 49, has no application to a case like the present—first, because section 4 of the former Act only enables a "promise and declaration" to be made in certain cases, whereas this witness's evidence purports to have been taken upon "affirmation"; and, secondly, because such a "declaration" could only be made "if the presiding Judge is satisfied that the taking of an oath would have no binding effect on his conscience," whereas the contrary was the fact here. It is immaterial whether the witness's objection to take the oath was due to a non-recollection of the facts as to which he was about to be examined, or to the fact that the taking of an oath was contrary to the regulations; in neither case could an affirmation or declaration be substituted. *Grill v. The General Iron*

Screw Collier Company (1) is an authority to shew that an objection of this kind is properly taken at chambers.

The Solicitor-General (Sir F. Herschell) and *Douglas Walker*, for the defendant.—The commissioner had the power under 1 Will. 4. c. 22. s. 7, to take his deposition upon affirmation, and the deposition is regular on the face of it; the maxim *Omnia presumuntur rite esse acta* therefore applies, particularly where the objection does not appear on the face of the deposition. It would, under such circumstances, be a dangerous precedent for the Court to enquire into and decide upon conflicting affidavits the question whether this deposition was properly taken. Moreover, *Birch v. Somerville* (2) is an authority to shew that it is now too late to raise such a point.

English Harrison, in reply.—*Birch's Case* is distinguishable; there the objection was not taken until after verdict, and the Court having ascertained that the losing party had from the first been aware of their regularity refused to grant a new trial.

GROVE, J.—I am of opinion that this appeal should be dismissed. From the first I formed a strong opinion that this Court would require a very peculiar case indeed to be made out before it would consent, upon some extraneous matter appearing on affidavits, to set aside a deposition which was perfectly regular upon the face of it. I do not mean to say that such a course could not be adopted in any case, such as where, for instance, it was made to appear that there had been some gross corruption or that a bribe had been given to the commissioner; for it may well be that the Court would set aside evidence so taken if satisfied that the charges were substantiated. But an objection such as this ought to be taken at the time, and not afterwards, when the objecting party has discovered that the evidence is unfavourable to himself. If objections of this kind could be raised afterwards it would go a long way towards destroying the value of evidence taken upon commission, and

(1) 35 Law J. Rep. C.P. 331; Law Rep. 1 C.P. 600.

(2) 2 Ir. Law Rep. N.S. 243.

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we should perpetually be having a budget of applications with affidavits containing some objection to such evidence. I think the general rule is that any objection of this sort should be taken at the time, which admittedly was not done here. The case cited by the Solicitor-General shews that the Court will not be willing to assist unless this be done. It is not at all improbable but that, if it had been objected before the commissioner that the witness had stated no grounds entitling him to give his evidence upon affirmation, the matter might have been remedied, and the consent of the proper authorities given to the taking of the oath. If we were to allow this evidence to be taken off the file, a party might purposely not object at the time, with the object of using the deposition if favourable, and only objecting to it afterwards if it should prove unfavourable. It would be introducing a very dangerous precedent were we to accede to this application when the proceedings are perfectly regular in form, and there is nothing on the face of the deposition to lead us to the conclusion that the witness was improperly allowed to affirm.

LOPES, J.—I agree. There is no suggestion of any dishonesty on the part of the witness, and the real ground for wishing to get rid of the deposition is that it was unfavourable to the plaintiffs. The proceedings are regular in point of form, and no objection was taken to the witness giving his evidence upon affirmation, though an advocate was present on behalf of the plaintiffs and took a number of other objections to portions of the evidence. It is much too late now, in my judgment, for the plaintiffs to seek to get rid of this deposition; and if an objection of this kind were upheld under such circumstances, then great injustice would result. I think, therefore, that this appeal should be dismissed with costs.

Appeal dismissed.

Solicitors—Lindsay, Mason & Greenfield, for plaintiffs; Lyne & Holman, for defendant.

1882. }
Jan. 11. } TUCK AND OTHERS v. CANTON.

Copyright—Reproduction of Picture in Chromo—Licence to Reproduce Imitation of Picture—Assignee of Copyright—25 & 26 Vict. c. 68—Registration of Licence.

The assignees, duly registered, of the copyright in a picture sold to the plaintiff the sole right to reproduce it in chromo for two years. This agreement of sale was not registered. While it was in force the defendant published the same subject by chromo-lithography, independently, not directly copying plaintiff's chromo-lithograph. The plaintiff's chromo-lithograph plate was not engraved with the name of the proprietor or date of publication, as required by the Act 15 & 16 Vict. c. 12. s. 14.

It was objected that plaintiff could not recover damages from the defendant for piracy of his copyright, because, first, the plaintiff's chromo was not duly engraved; and secondly, there was no registration of the assignment to the plaintiff within 25 & 26 Vict. c. 68.

But, held by MATHEW, J., on the first point, that the copyright in the original picture had been violated by the production of the defendant's chromo-lithograph, which was not simply an imitation of the plaintiff's chromo-lithograph; and, on the second point, that the plaintiff was not an assignee of the copyright within the meaning of the Act, but a licensee to reproduce an imitation of the picture, as to whose licence no registration is required.

This was an action in which the plaintiff Tuck sought to recover damages, and the plaintiffs Gow and Butterfield damages and penalties, from the defendant for piracy of plaintiffs' copyright in a picture called "Remembered." An injunction was also claimed.

At the trial before Mathew, J., and a special jury, at the Guildhall, it was proved that the painter of the picture assigned the copyright of it and of another, called "Forgotten," to Brooks, who assigned it to the plaintiffs Gow and Butterfield, and both these assignments were duly registered.

Tuck v. Canton.

By an agreement dated the 30th of July, 1879, Gow and Butterfield, the then owners of the copyright, accepted an order of the plaintiff Tuck for 3,000 pairs chromos, subjects, "Forgotten" and "Remembered," for 500*l*. The agreement then proceeded: "The sole right to reproduce these subjects in chromos or in any other form of colour printing to be vested in you for the term of two years from date of first delivery; while in case of an order for reprinting 2,000 pairs, at the price of 3*s*. per pair, this right to be vested in you absolutely." There was no registration of the licence to the plaintiff Tuck.

A sketch of the original picture, "Remembered," was published in the *Graphic* newspaper, and called "The Force of Old Associations," and the artist sold the drawing he made from it to defendant, without notice that it was not original. Defendant had this printed in colours to illustrate some almanacs which he published, but soon discontinued the publication, as it did not pay, and destroyed the stones.

The jury found that Tuck had sustained by the infringement of the copyright damages to the amount of 15*l*., beyond the 10*l*. which had been paid into Court in the alternative, but that Gow and Butterfield had sustained no damage.

The defendant submitted that, notwithstanding the verdict, plaintiffs were not entitled to recover, and this question was reserved for further consideration till the 11th of January, when

T. R. Kemp, Q.C., and *R. A. McCall*, argued for the defendant.—Tuck being an assignee of the copyright has no title under 8 Geo. 2. c. 13, 7 Geo. 3. c. 38, 17 Geo. 3. c. 57, and 15 Vict. c. 12. s. 14. The plate is not truly engraved with the name of the proprietor and the date of the publication, and each print does not bear the engraved name and date. Tuck is not the proprietor—*Brooks v. Cocks* (1), *Rock v. Lazarus* (2) and *Lucas v. Cook* (3). Again, Tuck cannot recover under 25 & 26

- (1) 3 Ad. & E. 138.
 (2) 42 Law J. Rep. Chanc. 105; Law Rep. 15 Eq. 104.
 (3) Law Rep. 13 Ch. D. 876.

Vict. c. 68. s. 4. He is either a proprietor or assignee, and he is not registered. The rights under the statute are vested in the "proprietors," who are not entitled to sue till after registration—sections 3, 4, 5, 8 and 11. If the plaintiff Tuck has not complied with the statutory conditions he cannot succeed in this action—*Reade v. Conquest* (4), *Gaubold v. Wallace* (5), *Duperz v. Dicks* (6) and *Strahan v. Graham* (7). A licensee is the same as an assignee.

J. C. F. S. Day and *H. F. Dickens*, for the plaintiffs.—The distinction is that Tuck is merely a licensee from the registered proprietor, and so not affected by defendant's arguments upon the Acts, which refer to proprietors and assignees. He is entitled to maintain the action as licensee—*Sweet v. Cater* (8), *Wood v. Boosey* (9), *Read v. Bentley* (10) and *Bogue v. Houlston* (11).

Tuck has an equitable interest in the copyright of the picture, and if this is injured by piracy he can maintain an action for damages.

MATHEW, J.—I think that the plaintiff Tuck is entitled to judgment. With reference to the first point made by Mr. Kemp, that the plaintiff is suing here for an imitation of a chromo-lithograph, and the chromo-lithograph does not contain upon it the statement of the date of the publication as required by the Act of Parliament, I think it is a sufficient answer that the plaintiff's cause of action here appears to me to be that the copyright in the original picture has been violated by the production of the chromo-lithograph, which was produced by Canton.

Unquestionably, under the agreement between Gow and Butterfield and Tuck, Tuck acquired the right to imitate the picture by the production of the chromo-lithograph mentioned in the document of

- (4) 9 Com. B. Rep. N.S. 755; 30 Law J. Rep. C.P. 209.
 (5) 25 W.R. 604.
 (6) W.N., 1879, p. 145.
 (7) 15 W.R. 487.
 (8) 11 Sim. 572.
 (9) 35 Law J. Rep. Q.B. 103; Law Rep. 2 Q.B. 340.
 (10) 27 Law J. Rep. Chanc. 254.
 (11) 21 Law J. Rep. Chanc. 470.

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the 30th of July, 1879, and Tuck now complains that that right, which he acquired under the agreement, of imitating the picture was infringed by the production by the defendant of another imitation in chromo-lithography of the same picture. That being so, Tuck, as it seems to me, escapes from the difficulty in which he would have been placed if his cause of action had been that Canton has produced simply an imitation of the chromo-lithograph, which he was entitled to publish under his agreement with Gow and Butterfield. That is the first point.

Then the second point is that Tuck is suing here as the assignee of a copyright within the meaning of 25 & 26 Vict. c. 68; that, being such assignee, and it being admitted there is no registration of the assignment to him, he is not entitled to the benefit of the Act, and cannot maintain his action. The answer to that seems to me to be that Tuck is not an assignee of the copyright within the meaning of the Act of Parliament, but that he is a licensee to reproduce, in the form of chromo-lithography, an imitation of the picture, and is in a different position from the assignee of the whole copyright under the Act of Parliament.

The Act of Parliament is one that is not very easy to construe. It is a difficult and troublesome Act of Parliament, and it has perplexed other Judges besides myself; but, looking at its provisions carefully, I do not find any prohibition of a licensee to reproduce, in the terms in which this document of the 20th of July was prepared, unless it should be registered, and that document is most certainly not an assignment of the entire copyright, but only a licence to imitate. Upon that ground I should be prepared to pronounce my judgment in favour of Tuck.

I do not think it necessary to deal with the other questions that have been suggested, whether or not there is a necessity for registering any assignment, assuming that there was a registration of the original copyright. That is a difficult question, and one that I should take further time to consider, if I thought it necessary to decide it for the purposes of this case. But, for the grounds I have mentioned, I think the judgment should be for Tuck

for 15*l.* over and above the amount paid into Court, and judgment must be against the other two plaintiffs, Gow and Butterfield.

*Judgment for Tuck for 15*l.* and costs.*

Judgment for defendant against Gow and Butterfield with costs.

Solicitors—H. Bentwitch, for plaintiffs; Kilvington & Stock, for defendant.

[IN THE COURT OF APPEAL.]

1882.	}	BROWN v. NORTH.*
March 11.		
April 3.		

Practice—Married Woman suing without Husband—Special Leave—Security for Costs—Separate Property—Order XVI. rule 8.

A married woman who has obtained leave to sue without her husband under Order XVI. rule 8, and has separate property available for costs in the event of judgment being obtained against her, will not be required to give security for costs.

Appeal from an order of the Divisional Court that all proceedings in the action should be stayed until security for costs had been given by the plaintiff to the satisfaction of a Master.

The action was to recover damages against the defendant, a solicitor, for alleged negligence.

The plaintiff, who was a married woman living apart from her husband, had obtained a special order to sue without her husband, and without giving security for costs.

It appeared from the affidavits that the plaintiff had about 1,500*l.* settled to her separate use without power of anticipation, and that she had certain furniture and apparel of the value of upwards of 500*l.*, and also jewellery worth upwards of 2,000*l.* which were in her possession and for her own separate use.

The Master, and Williams, J., at chambers dismissed an application by the de-

* *Cirum* Brett, L.J.; and Holker, L.J.

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defendant that the plaintiff should give security for costs.

The Divisional Court (Field, J., and Cave, J.), on appeal, made the order.

The plaintiff appealed.

Herbert Reed, for the plaintiff.—The plaintiff has ample means of her own, which can be attached in the event of judgment being obtained against her; and therefore she ought not to be required to give security for costs under Order XVI. rule 8 (1)—*Noel v. Noel* (2) and *Martano v. Mann* (3).

Alfred Wills and *J. V. Fitzgerald*, for the defendant.—The alleged 2,000*l.* worth of jewellery is sure not to be forthcoming if judgment is obtained against the plaintiff. *Prima facie* a married woman is not entitled to sue without the consent of her husband, but she may do so by leave—Order XVI. rule 8. Jewellery is property which, in law, belongs to the husband, and cannot, therefore, be attached if judgment goes against the plaintiff. In *Noel v. Noel* (2) there was a fund available for costs—namely, an annuity of 1,500*l.* settled on the wife under a separation deed; so that there was property which could be made the subject of a charging order. In *Martano v. Mann* (3) the plaintiff sued, by her next friend, the surviving trustee and the executors of a deceased trustee of a settlement under which she was a life-tenant. It was admitted by the surviving trustee that he had 1,500*l.* of trust funds in his hands, so that there were ample funds by way of security for costs. Where the property is not settled to the separate use of the married woman there are no practical means of enforcing the judgment.

Cur. adv. vult.

BRETT, L.J. (on April 3).—In this case an order was made that the plaintiff, who was a married woman living apart from

(1) Order XVI. rule 8: “. . . . Married women may . . . by the leave of the Court or a Judge, sue or defend without their husbands and without a next friend, on giving such security (if any) for costs as the Court or a Judge may require.”

(2) Law Rep. 13 Ch. D. 510.

(3) 49 Law J. Rep. Chanc. 510; Law Rep. 14 Ch. D. 419.

her husband, should give security for costs under the rule and order applicable to married women.

It was not denied that the plaintiff might properly bring the action, and it appeared from the affidavits that she had certain property of her own which was settled to her separate use without power of anticipation, and which could not therefore be made liable for costs incurred in the action. It was further stated on the affidavits that there was certain other property—jewellery, furniture, &c.—also settled to her separate use, but as to which there was no limitation as regards the power of anticipation. Those affidavits have not been denied, and we therefore took time to consult with the other members of the Court in order that we might lay down a general rule. It struck me that the general rule might be the same as that in the ordinary case of giving security for costs, in which it is necessary that there should be special circumstances; but this Court has held that, although there is no hard and fast rule, it is one which ought not to be departed from. The general rule is that security should be given where the party has no property, but this rule is subject to any exception which the Court may be able to see. If, then, a married woman has no visible means of payment, she must, as a general rule, give security for costs; but where she has visible means, we can see no case under these rules in which she should be obliged to give security.

HOLKER, L.J.—I think that there ought to be no inflexible rule as to giving security, but that there should be a rule that a party who has no means should be called upon to give security. Where, however, a party has property which would be available for costs, it seems to me that he ought not to be required to give security. The decision of the Court below must be reversed.

Appeal allowed.

Solicitors—W. B. Harte, for plaintiff; Jacobs & Vincent, agents for J. North, Leeds, for defendant.

[IN THE HOUSE OF LORDS.]

1882.
Feb. 28. } PUGH AND ANOTHER v. HEATH
March 28. } AND ANOTHER.

Statutes of Limitation (3 & 4 Will. 4. c. 27. ss. 2, 3, 24, 7 Will. 4. and 1 Vict. c. 28)—*Mortgagee out of Possession—Foreclosure—Ejectment.*

The bringing of an action for foreclosure stops the Statute of Limitations from running to defeat the mortgagee's right to recover in an action of ejectment the property comprised in the mortgage.

A mortgagee who obtains a decree for foreclosure thereby acquires a new title, namely, that of absolute owner, and his right to bring an action upon that title first accrues at the date of the decree.

This was an appeal from a decision of the Court of Appeal which reversed one of the Common Pleas Division. The case is reported in the Courts below 50 Law J. Rep. Q.B. 473; Law Rep. 6 Q.B. D. 345.

The action was one of ejectment brought by mortgagees after foreclosure. The defendants set up the Statute of Limitations.

The plaintiff Heath and one Crealock in the year 1856 invested certain trust funds upon a mortgage of the lands now sought to be recovered.

The mortgagor, with the privity of Crealock, but not of Heath, sold the lands in 1859 without disclosing the mortgage. In 1870 a reconveyance of the land was made, Heath having been induced to execute it by the representations of Crealock and the mortgagor that the mortgage debt would be repaid out of the purchase-money.

Crealock received the purchase-money and shortly after absconded.

Heath then commenced the action of *Heath v. Crealock* (1) to have the deed of reconveyance set aside and for foreclosure. Bacon, V.C., gave judgment in his favour, which was affirmed with a variation by the Court of Appeal. The decree for foreclosure absolute was dated the 6th of September, 1877.

(1) 43 Law J. Rep. Chanc. 169; 44 *ibid.* 157; Law Rep. 18 Eq. 215; *ibid.* 10 Chanc. 22.

The present action was commenced on the 18th of October, 1878.

It appeared at the trial that the mortgagees had never been in possession, and there was no evidence of any payment of principal or interest or of any acknowledgment of the mortgagees' title within twenty years before the commencement of this action. The defendants claimed the benefit of the Statute of Limitations. Denman, J., held that the foreclosure action had prevented the statute from running, and gave judgment for the plaintiffs.

The Common Pleas Division reversed the judgment, which was, however, restored by the Court of Appeal.

The defendants appealed.

Cohen, Q.C., and *Robinson, Q.C.* (*Trevelyan* with them), for the appellants, contended that the right to recover the land accrued at the date of the mortgage, and was unaffected by the foreclosure decree, which in no way dealt with the possession.

They cited the following cases—*Hurlock v. Ashberry* (2), *Heath v. Crealock* (1), *Bampton v. Birchall* (3), *Thorp v. Facey* (4), *Colyer v. Finch* (5) and *Wriason v. Vize* (6).

Arthur Charles, Q.C., *H. A. Giffard, Q.C.*, and *Muir McKenzie*, for the respondents, were not called upon.

Cur. adv. vult.

EARL CAIRNS.—At the end of the argument for the appellant in this case your Lordships desired the case to be adjourned, in order that you might consider how far he had shewn any reason to impeach the judgment of the Court of Appeal. I am now prepared for myself (and I understand that your Lordships take the same view) to say that I am satisfied that the judgment appealed against is correct, and that the appeal must be dismissed.

I concur so fully in the reasoning of the Lord Chancellor in delivering the judgment of the Court of Appeal, that I pro-

(2) 50 Law J. Rep. Chanc. 745; 51 *ibid.* 394; Law Rep. 18 Ch. D. 229; *ibid.* 19 Ch. D. 539.

(3) 5 Beav. 67; 11 Law J. Rep. Chanc. 200.

(4) 35 Law J. Rep. C.P. 349.

(5) 19 Beav. 500; 5 H.L. Cas. 905; 26 Law J. Rep. Chanc. 65.

(6) 3 Dr. & War. 104.

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pose to add but little to it. The case may be stripped of many facts which, in the result, are immaterial, and may be looked at thus. A legal mortgage of freehold land in 1856, no possession by the mortgagee, and no payment of principal and interest to him, nor any acknowledgment of his title. Then in 1870, that is, after fourteen years, the mortgagee files a bill for foreclosure. He obtains a decree *nisi* in 1874, and a decree absolute in 1877. Then, in 1878, he brings the present action, under that decree, to recover possession of the land. The appellant alleges that the action is barred by the Statute of Limitations. Is this so?

It was scarcely contended in the argument of the appellant, and I do not think it could have been contended, that if, instead of a legal mortgage, the mortgagee had had only an equitable mortgage or charge, and had within twenty years brought a suit of foreclosure, and obtained a decree, he would not have been entitled to do so, and to hold and enforce that decree for twenty years by every process which a Court of equity could give. The Court is now not a Court of law or a Court of equity, it is a Court of complete jurisdiction, and if there were a variance between what, before the Judicature Act, a Court of law and a Court of equity would have done, the rule of the Court of equity must now prevail. The argument of the appellant must therefore be that the possession of a legal mortgage, passing the legal estate as a pledge, put the mortgagee in a worse position than if he had not got it, and exposed him to the risk, as soon as twenty years from the date of the legal mortgage had expired, of forfeiting and losing the benefit of the suit and proceedings which he had in the meantime properly taken, in the proper Court, to have himself adjudged, by reason of the default of the mortgagor, the absolute owner of the land. This is an argument which appears to me to be as repugnant to reason as to justice, and I think, moreover, that your Lordships could not admit it without acting in direct opposition to the spirit and principle of the case before Lord St. Leonards of *Wriakon v. Vise* (6), which has long been a governing authority on this subject. Lord St. Leonards in that case,

besides the observations cited from his judgment by the Lord Chancellor in the Court of Appeal, makes this remark with reference to section 24 of the 3 & 4 Will. 4. c. 27, "The 24th section is not well framed, for . . . it would apply only to an equitable mortgage, and give him the same right in equity as he would have had at law if he were a legal mortgagee; but it is impossible to suppose that where a mortgagee is entitled to relief in equity, he was not still to have the right within the time appointed, although he had a legal estate."

These observations, coupled with the more extended reasoning of the Court below, would be sufficient to dispose of the case. But I must add that if it were necessary I should have little doubt that the present action, being not an action of ejectment by a legal mortgagee to put himself in possession of land which he is to hold as a pledge, subject to account, and to all the infirmities of a mortgagee's title, but being an action by one who has become absolute owner of the land under a decree of the Court, is an action as to which the right to bring it must be taken to have accrued, within the meaning of section 2 of the 3 & 4 Will. 4. c. 27, at the date of that decree of the Court, and that section 3 of that Act, in defining when the right shall be deemed to have accrued, is not necessarily exhaustive or otherwise inconsistent with this view.

LORD O'HAGAN, LORD BLACKBURN and LORD WATSON concurred.

Judgment appealed from affirmed, and appeal dismissed with costs.

Solicitors—Combe & Wainwright, for appellants; Talbot & Tasker, agents for Budd, Son & Brodie, for respondents.

[IN THE COURT OF APPEAL.]

1882. }
May 4. }

NEILSON v. JAMES.*

Shares, Sale of—Joint Stock Bank—Custom of Stock Exchange—Negligence—Requirements of 30 Vict. c. 29, s. 1—Damages.

The defendant, in pursuance of directions given him by the plaintiff, sold on the 4th of December, for the account on the 15th of December, on the Bristol Exchange, to B, a jobber, certain shares in a joint stock bank. Bought and sold notes were exchanged, and the defendant sent to the plaintiff on the 4th of December a contract note. The bought and sold notes did not contain the name of the person in whose name the shares stood at the time of the sale, so that the contract was, by 30 Vict. c. 29, s. 1, void. B gave on the name-day a name of a person as the transferee, but as the bank had suspended payment before that day, the transferee refused to accept the shares, and repudiated the contract. The defendant alleged that there was a custom on the Exchange to disregard the provisions of 30 Vict. c. 29. The plaintiff remained the possessor of the shares, lost the price, and became liable for calls. In an action for damages,—Held, that the duty of the defendant was to make a valid contract on the 4th of December, that the custom alleged was not legal or reasonable, and could not bind the plaintiff, and that he was entitled to recover the price for which the shares were sold.

Appeal from the judgment of Stephen, J., at the trial without a jury.

The action was brought to recover 199*l.* 10*s.* from the defendant, a broker on the Bristol Stock Exchange, as damages for negligence in not making a valid contract for the sale of certain shares belonging to the plaintiff.

It appeared that the plaintiff directed the defendant to sell for him seven shares in the West of England and South Wales District Bank, and that he told him that he wished to get rid of the shares because he was doubtful if they were a sound investment.

On the 4th of December the defendant

* *Coram* Lord Coleridge, C.J.; Brett, L.J.; and Cotton, L.J.

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sold the shares to Messrs. Bryant, Perry & Lowe, who act both as brokers and jobbers on the Bristol Exchange, and bought and sold notes were exchanged. The bought note was as follows:—

“Bristol, Dec. 4.

“Bought of Mr. Harry James seven shares in the West of England Bank, at 16*l.* 12*s.* 6*d.* per share.

“For the acct.

“Bryant Perry & Lowe.”

On the same day the defendant sent to the plaintiff the following stamped contract note:—

“Bristol, Dec. 4.

“Sold by order, and for the account of R. Neilson, Esq. (subject to the rules of the Stock Exchange), seven shares in the West of England Bank.

15 <i>l.</i> paid, at 16 <i>l.</i> 12 <i>s.</i> 6 <i>d.</i>	£116	7	6
Brokerage	0	17	6
	£115	10	0

“For the acct.

Harry James.”

The name-day was on the 13th of December, and the account-day on the 15th of December; the bank stopped on the 7th of December, and on the 20th of December a winding-up order was made. On the 13th of December the purchasing jobbers passed the name of Gould as the ultimate purchaser; but he repudiated the contract, on the ground that it did not contain the name of the person in whose name the shares stood at the time of making the contract, pursuant to 30 Vict. c. 29 (1). The shares remained in the

(1) 30 Vict. c. 29. s. 1: “All contracts, agreements and tokens of sale and purchase which shall, from and after the first day of July, 1867, be made or entered into for the sale or transfer, or purporting to be for the sale or transfer, of any share or shares, or of any stock or other interest in any joint stock banking company in the United Kingdom of Great Britain and Ireland, constituted under or regulated by the provisions of any Act of Parliament, royal charter, or letters patent, issuing shares or stock transferable by any deed or written instrument, shall be null and void to all intents and purposes whatsoever, unless such contract, agreement or other token shall set forth and designate in writing such shares, stock or interest by the respective numbers by which the same are distinguished at the making of such contract, agreement, or token on the register or books of such banking company as aforesaid; or where there is no such register of shares or stock by

Neilson v. James, App.

possession of the plaintiff, and he had to pay a call of 12l. on each share. Evidence was given that the custom in dealing with bank shares on the Bristol Exchange was the same as that in dealing with any other shares, that it was usual to sell shares for an account-day, and to give the name of the ultimate purchaser the day before the account-day.

Stephen, J., gave judgment for the defendant.

The plaintiff appealed.

Petheram, Q.C., and *Poole*, for the plaintiff.—The plaintiff is entitled to judgment, because there was on the 4th of December a completed contract for the sale of these shares—that is, the defendant professed to make such a contract, he had the opportunity of doing so, and the contract would have been complete and valid if the defendant had not failed in his duty, if he had not omitted to comply with the provisions of 30 Vict. c. 29 (1), in consequence of which the person whose name the jobbers gave as the ultimate purchaser was enabled to repudiate the contract.

The nature of a contract of this kind is well understood and well settled—*Maxted v. Paine* (2) and *Bowring v. Shepherd* (3). *Rudge v. Bowman* (4) shews that the fact that the transferee may not be able to be registered can make no difference, for the register can be rectified after the winding-up order by an application to the Court.

If the defendant is liable in this action to the plaintiff, he is, of course, liable for the price of the shares; but he is also liable

distinguishing numbers, then, unless such contract, agreement or other token shall set forth the person or persons in whose name or names such shares, stock or interest shall, at the time of making such contract, stand as the registered proprietor thereof in the books of such banking company; and every person, whether principal, broker or agent, who shall wilfully insert in any such contract, agreement or other token any false entry of such numbers, or any name or names other than that of the person or persons in whose name such shares, stock or interest shall stand as aforesaid, shall be guilty of a misdemeanour, and be punished accordingly, and if in Scotland shall be guilty of an offence punishable by fine or imprisonment."

(2) 40 Law J. Rep. Exch. 57; Law Rep. 6 Exch. 132.

(3) 40 Law J. Rep. Q.B. 129; Law Rep. 6 Q.B. 309.

(4) 37 Law J. Rep. Q.B. 193; Law Rep. 3 Q.B. 689.

to pay the damages incurred by the plaintiff, through his being still the possessor of the shares; he is liable to indemnify the plaintiff against the payment of the amount unpaid on the shares, and against the calls which, as the bank was unlimited, the plaintiff has had to pay—*Davis v. Haycock* (5) and *Bowring v. Shepherd* (3). The purchaser would not accept the shares, and what the plaintiff would have had to pay some one else to take the shares on the 13th of December would have been an amount which would indemnify the purchaser against all claims in respect of the shares.

Charles, Q.C., and *H. Atkinson*, for the defendant.—The defendant is not liable in this action, because he has done all that it was his duty to do: he has put these shares on the market at the Bristol Stock Exchange, in accordance with the custom of that exchange, and no statute can change the nature of that duty.

[BAGG, L.J.—Was it not his duty to make a valid contract?]

He could not make any contract that any one should take these shares till the 13th of December, he could only make an arrangement which should become a completed contract on the name-day, when, and when only, there would be a completed contract between the plaintiff and the ultimate purchaser; and when the day for completing the contract arrived the bank was being wound up, so that the plaintiff could not deliver the shares in question and could not transfer the property which he on that day would contract to sell, for section 153 of 25 & 26 Vict. c. 89 (6) makes a transfer made without the leave of the Court void if made after the commencement of a winding-up. The transfer of the shares is a condition precedent to the payment of the price, and the plaintiff was not in a position to transfer the shares.

(5) 38 Law J. Rep. Exch. 155; Law Rep. 4 Exch. 373.

(6) 25 & 26 Vict. c. 89. s. 153: "Where any company is being wound up by the Court, or subject to the supervision of the Court, all dispositions of the property, effects and things in action of the company, and every transfer of shares, or alteration in the status of the members of the company made between the commencement of the winding-up and the order for winding-up, shall, unless the Court otherwise orders, be void."

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Even if it be held that the defendant failed in his duty, the plaintiff is only entitled to nominal damages or, at the outside, to the price of the shares; but he cannot recover that price unless he was in a position to give delivery of the shares. The calls which the plaintiff has had to pay are not damages resulting from the breach of the contract—*The British Columbia Saw Mill Company v. Nettleship* (7), *Sanders v. Stuart* (8) and *Horne v. The Midland Railway Company* (9).

Petheram, Q.C., in reply.—The Court of Chancery would order the contract to be carried out and the register to be rectified; but it is not desired to press the claim for calls if the judgment of the Court be given for the plaintiff for the price of the shares.

LORD COLERIDGE, C.J.—I am of opinion that the plaintiff is entitled to recover in this action to the extent of 115*l.* 10*s.*, which is the amount for which his shares were sold. The plaintiff sued the defendant for damages sustained by him in consequence of the defendant not having fulfilled a contract and performed an engagement which it is alleged he undertook. It is admitted that an order to sell seven shares in the West of England Bank was given by the plaintiff to the defendant, that that order was accepted by the defendant, and that the defendant went on to the Bristol Stock Exchange in order to sell those shares; he purported to sell those shares by a contract dated the 4th of December, and he sent to the plaintiff the following contract note, by the terms of which he must be bound—

“Bristol, Dec. 4, 1878.

“Sold by order, and for account of R. Neilson, Esq. (subject to the rules of the Stock Exchange), seven shares in the West of England Bank.

15 <i>l.</i> paid at 16 <i>l.</i> 12 <i>s.</i> 6 <i>d.</i> . . .	£116	7	6
Commission		17	6
	£115	10	0

“For the acct. Harry James.”

(7) 37 Law J. Rep. C.P. 235; Law Rep. 8 C.P. 499.

(8) 45 Law J. Rep. C.P. 682; Law Rep. 1 C.P. D. 326.

(9) 42 Law J. Rep. C.P. 59; Law Rep. 8 C.P. 131.

And on that day he sold the shares to certain jobbers, who gave to him the following bought note:—

“Bristol, Dec. 4.

“Bought of Mr. Harry James seven shares in the West of England Bank at 16*l.* 12*s.* 6*d.* per share.

“For the acct.

“Bryant Perry & Lowe.”

A sold note was also given. The name-day was on the 13th of December and the account-day two days later. Now these notes did not comply with the requirements of 30 Vict. c. 29 (1), which enacts that all contracts for the sale of shares in joint stock banking companies shall be null and void, unless the contract sets forth the numbers of the shares, or if there are not any numbers, the name of the person in whose name the shares stand registered at the time the contract is made; so that as far as the alleged contract is concerned the defendant did not, as far as the paper purporting to contain the contract goes, make any contract at all. The paper in question was, so far as it is considered to be a contract, wholly inoperative; it was of no value to the plaintiff, and it did not relieve him from any liability which he might incur in respect of the shares in question, so that he was still a possessor in every respect of these seven shares, and was liable after the failure of the bank to be saddled with liabilities in respect of that possession. The plaintiff accordingly brought his action for damages, when the defendant by way of answer said that he dealt according to the custom of the Bristol Stock Exchange, that the plaintiff was aware of this, and that there has been on that exchange a custom to disregard the provision of the statute in question, and to sell such shares as these by a form which is in fact inoperative and which is by the alleged custom a mere agreement to make a contract to be completed on the account-day. The answer to this is clear. The custom alleged must, if it is to prevail, be legal; it must be one which can be incorporated with the contract without any violation of the law, and the defendant cannot, by disregarding the enactment of the statute, profess to make a contract and yet at the

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same time assert that it is not a contract at all. This note professed to be a contract purporting to be a discharge of the duty the defendant owed to the plaintiff, and yet it was not a contract or a discharge of that duty; it was not a valid contract according to the statute relating to the subject-matter. The result is that the plaintiff is still the owner of these shares and that he has lost the benefit of the contract; the damage that he has sustained is most certainly the price obtained for the article which he directed to be sold, that is, 115*l.* 10*s.* It is further alleged that he is entitled to recover from the defendant damages resulting from the fact that these were shares not fully paid and shares in a bank the liability of which was unlimited. On this point it is unnecessary to express an opinion as the appellant declined to claim our judgment for the amount remaining unpaid on the shares and gave up any claim for 35*l.*, which was what the sums unpaid on the shares amounted to; and with regard to the question of liability for calls, I will only say that in my opinion no evidence has been brought before us which would justify us in saying that the plaintiff had so expressed himself with regard to his desire to part with the shares as to fix the defendant with notice of any such liability, or with any liability beyond the price of the shares.

The plaintiff is entitled to recover that price, and the judgment must be entered for him for that amount. All that the vendor of shares has to do is to deliver the shares at the time fixed, and the delivery of the shares would be a complete performance by him of the contract; that which remained to be done it would be for the purchaser to do; so that the damages are more than nominal, and are, as I have said, the price of the shares.

BRETT, L.J.—The defendant carries on a business or trade which is well known to the law. The plaintiff gave the defendant an order in respect of that business, and the defendant accepted that order in the course of his business. Thereupon there arose *prima facie* a well known duty which the defendant undertook to perform—that is, that he would make a

reasonable effort within a reasonable time to find a purchaser on the stock exchange, and that he would make a contract in such a form as would bind the purchaser. *Prima facie* the defendant undertook that; he did find a purchaser, and whatever he did with that purchaser he did on the 4th of December: he undertook, as it seems to me, to make a contract on that day which should be valid and which should bind the shares in question. The defendant, however, alleges that he, although a broker on the Bristol Stock Exchange, did not so undertake, for that he only undertook to act according to the custom of the Bristol Stock Exchange, a custom which he alleges must bind the plaintiff. He does not allege that the plaintiff actually knew of this custom and that he agreed to be bound by it; but he contends that the plaintiff is bound by it, whether he is or is not aware of it, and that the plaintiff therefore authorised him to act according to that custom. I am, however, of opinion that the plaintiff can only be bound by a custom which is both legal and reasonable, for he cannot be assumed to take notice of an illegal custom of which he is in fact ignorant. Now the contract made by the defendant fails to comply with the provisions of 30 Vict. c. 29 (1), and it is consequently void. It is then urged that the defendant has not failed in his duty, for that he used reasonable exertions to find a purchaser, and that he did not succeed in finding one. It is said that what took place on the 4th of December did not constitute a contract, but only amounted to an arrangement, which cannot be enforced, that the jobber would on the account-day or on the name-day make a contract if he should so please, and that the dealing of the 4th of December was not a contract but only an arrangement. That seemed to me to be a startling proposition, for on the 4th of December the defendant undertook with the jobber that he, the jobber, should accept the shares on the account-day; bought and sold notes were given, and the defendant sent to the plaintiff the advice note which has been read. Then it is said there was no contract; but there was a contract such as is made daily on stock exchanges, and there is everything necessary to make it a binding contract, if it is

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properly entered into and authenticated, that the jobber will take the shares if they are tendered to him. The defendant, therefore, in my opinion, made a contract with the jobber, and he was bound to see that his contract was in proper form; he, however, omitted certain particulars required by statute, and the contract therefore cannot be enforced. Then the defendant urges that even if the contract is void, and if he is liable to the plaintiff, still that the plaintiff is only entitled to nominal damages; as if the contract had been in due form, still the jobber would not be bound to take the shares, as the plaintiff could not on the account-day give him shares in respect of which he could claim to be registered. That may be true, inasmuch as the bank was being wound up; but the vendor is only bound to be ready to deliver on the account-day shares which, if the company had remained in the condition in which it was at the time of the sale, would entitle the purchaser to be registered. The vendor does not undertake that the company shall remain a going concern until the account-day. The plaintiff then was ready to do all that he was bound to do. If the jobber had accepted the shares on that day he would then and there be bound to pay the price, so that the plaintiff lost the price of the shares through the failure of the defendant to perform his duty. It was said that he lost something more—that is, that he lost a right to be indemnified against the calls of the amount unpaid on the shares, and against all further liabilities which might accrue from the fact that the liability of the bank was unlimited. It seems to me that, as between the plaintiff and the jobber, the latter might be bound to indemnify the plaintiff, and the jobber could not put forward the argument that the plaintiff could not get a transfer directed by the Court unless he could shew that the transferee was a solvent person. But the case as regards the defendant is different, and I am of opinion that the consequences of the contingent liability of the bank are too remote and indefinite for the defendant to be held liable to pay damages to the plaintiff on that account. With regard to the calls of the amount not paid

up on the nominal value of each share, it is, as the claim is not now pressed, enough to say that I am not at present prepared to say the plaintiff could not recover this sum. I agree that if notice was necessary to make the defendant liable for the further sums to the plaintiff, then there was here no such notice as would make him so liable. The appeal must be allowed.

COTTON, L.J.—I am also of opinion that this appeal must be allowed. The defendant sets up the rules of the Bristol Stock Exchange by way of answer to the claim of the plaintiff; he alleges that he followed the practice of the Bristol Stock Exchange, and that he made no contract on the 4th of December; he alleges that the arrangement between himself and the jobber was not a contract. I am of opinion that that contention is erroneous. I consider that the selling broker made a contract for sale to the jobber, and that the jobber contracted to buy, subject to this, that the jobber has a right to give a name, and that if he does so on the name-day, his liability on that contract is at an end. In *Cruse v. Paine* (10) Lord Hatherley said it was established “that in the case of an ordinary sale to a jobber the real contract was that at the settling day he would either take the shares himself, or give the name of one or more transferees who would pay for the shares, and to whom no reasonable objection would be taken.” Now there was here a contract with the buying jobber, and he was bound to take and pay for the shares, if nothing else was done by him before the name-day. It is, however, said that this contract is void, because it does not comply with the provisions of 30 Vict. c. 29 (1), and it is urged that it is a custom on the Bristol Stock Exchange not to regard the provisions of that Act. If that be the practice I would remark that the sooner it is altered the better; but the plaintiff cannot be held to be bound by such a practice or custom, unless the custom alleged be both reasonable and legal, for it is not suggested that any express agreement was made in this case, and I am of

(10) 37 Law J. Rep. Chanc. 711; Law Rep. 4 Chanc. 441.

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opinion that this custom was neither reasonable nor legal. It was negligence on the part of the defendant, when he had an opportunity of making a contract for sale, not to make that contract in such a form that it could be enforced.

The question, then, remains, what is the liability of the defendant? I understand that the plaintiff gives up all claim for damages in the nature of indemnity, and therefore I will say nothing about that claim. The plaintiff is entitled to recover the net price of the shares. It has been said that he is not so entitled because he could not give a valid transfer of the shares. No doubt it was not a case for specific performance; but the authorities shew that the contract for the sale of the shares was made on the 4th of December, and that the purchaser took all chance of depreciation of property. All that the vendor undertook was that he would give to the purchaser a duly executed transfer of the shares. In this case he could do that, and that having been done, the vendor was not bound to do anything more, he was then entitled to recover the consideration, and it was for the jobber or the purchaser to get the shares registered if they could. The appeal, therefore, must be allowed.

Solicitors—Darley & Cumberland, agents for Clifton & Carter, Bristol, for plaintiff; Merediths, Roberts & Mills, agents for J. W. S. Dix, Bristol, for defendant.

1882. } TURNER v. BRIDGETT.
Feb. 15. } WRIGHT (claimant).

Interpleader—Seizure under or over 50l. —Legal and incidental Expenses and Possession Money—Judgment for under 50l., including Costs—Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), s. 6, sub-s. 5, s. 87—"Sale."

Where execution has issued against the goods of a trader debtor upon a judgment for a sum which together with the expenses would exceed 50l., but the sheriff by order of the creditor has realised by sale less than 50l., the creditor is entitled to the proceeds of the levy as against the trustee in bankruptcy of the debtor. The amount to be

calculated under section 87 of the Bankruptcy Act, 1869, is the amount actually realised by the sale.

This was a sheriff's interpleader issue, referred by Stephen, J., to the Court.

Judgment was issued against the defendant Bridgett, a trader, for a sum of 44l. 9s., including the debt sued for and costs, and a writ of *fi. fa.* was, on the 25th of November, 1881, issued to the sheriff to levy that sum, with sheriff's fees and poundage, and all other legal and incidental expenses. The sheriff sold goods to the amount of 49l. 17s., made up thus:—

Poundage	£2 9 10
Levy fee	1 1 0
Possession (9 days) . .	3 5 0
Expenses of sale . . .	2 10 0
Debt and costs	41 11 2
	£49 17 0

On the 25th of November a petition for liquidation of the affairs of the debtor was presented, and on the 30th notice of it was given to the execution creditor, and direction was given by him to the sheriff not to levy and sell for more than 50l.

Had the sheriff levied and sold for the whole amount of the debt, the poundage, levy fee, possession money and expenses of sale would have brought the amount to more than 50l.

The question was, whether the amount of the judgment and legal and incidental expenses, or the amount actually realised by levy and sale, was to be looked at for the purpose of determining whether the proceeds in the hands of the sheriff belonged to the execution creditor or the trustee in liquidation.

Cyril Dodd, for the claimant, contended that the amount of the judgment, together with the expenses, was the true criterion, and cited *Ex parte The Liverpool Loan Company*; *in re Bullen* (1), as shewing that the costs of the execution are included in the term "judgment"; and *Ex parte Sims*; *in re Grubb* (2), that "costs of execution" include all the expenses that the sheriff is entitled to charge.

Yelverton, for the execution creditor, contended that the expenses were not to be

(1) 42 Law J. Rep. Bankr. 14; Law Rep. 7 Ch. App. 732.

(2) 46 Law J. Rep. Bankr. 108; Law Rep. 6 Ch. D. 375.

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taken into account, that the amount actually realised, irrespective of the amount of the judgment, which by the direction of the execution creditor the sheriff was to keep and did keep under 50*l.*, was to be considered the criterion, and cited *In re Salinger; ex parte Reya* (3).

Cyril Dodd, in reply.—The time to consider the question is at the time of the seizure, not of the sale.

The judgment of the Court was delivered (on March 3) by

BOWEN, J.—This is a summons of interpleader, referred to the Court by Mr. Justice Stephen.

The question is, whether the execution creditor or the trustee in liquidation of an execution debtor is entitled to the proceeds of a levy in execution made by the former.

The judgment under which the writ of execution was issued was signed on the 24th of November, and was for a sum less than 50*l.*—namely, 44*l.* 9*s.*—including the debt recovered and the costs of the action.

The writ was delivered to the sheriff on the 25th, indorsed to levy 44*l.* 9*s.*, with sheriff's fees and poundage, and all other legal and incidental expenses; and if that direction to levy had continued unaltered, the sum levied under the writ would have exceeded the sum of 50*l.*, the fees, poundage and legal and incidental expenses having at the time of the sale amounted, with the sum levied for, to more than that sum.

On the 25th of November a petition for liquidation of the affairs of the debtor was presented, and on the 30th notice of it was given to the execution creditor. He, on the same day, gave notice to the sheriff's officer in possession, directing him not to sell goods beyond 50*l.*, and the sheriff's officers undertook not to do so. He accordingly sold goods, realising a total of 49*l.* 17*s.*, which was thus made up—

Poundage . . .	£2	9	10
Levy fee 1	1	0
Possession (9 days) . .	. 2	5	0
Expenses of sale 2	10	0
Debt and costs 41	11	2
	£49	17	0

It is this sum which is in dispute.

(3) 46 Law J. Rep. Bankr. 122; Law Rep. 6 Ch. D. 332.

Now the question whether it belongs to the execution creditor or the trustee depends for its answer upon the meaning of the 87th section of the Bankruptcy Act of 1869, read in conjunction with section 6, sub-section 5 of the same Act (4). By the latter section a petition for adjudication of bankruptcy may be presented against a trader debtor, where execution issued on any legal process for the purpose of obtaining payment of not less than 50*l.* has been levied by seizure and sale of his goods, by which section, therefore, no *status* of bankruptcy is conferred upon a debtor until "sale." By section 87 it is provided that where the goods of a trader have been "taken in execution" in respect of a judgment for a sum exceeding 50*l.*, and "sold," the sheriff, in the events which have happened in this case, is to hold the proceeds of the sale, after deducting expenses, in trust to pay them to the trustee; but if no notice of a petition for liquidation is served, or no adjudication made on any petition, the sheriff is to deal with the proceeds according to his mandate.

Now it will be observed that these sections are not correlative, that the *status* of bankruptcy does not come into exist-

(4) 32 & 33 Vict. c. 71. s. 6. sub-s. 5: "That execution issued against the debtor on any legal process, for the purpose of obtaining payment of not less than fifty pounds, has in the case of a trader been levied by seizure and sale of his goods."

Section 87: "Where the goods of any trader have been taken in execution, in respect of a judgment for a sum exceeding fifty pounds, and sold, the sheriff, or in the case of a sale under the direction of the County Court, the high bailiff or other officer of the County Court, shall retain the proceeds of such sale in his hands for a period of fourteen days, and upon notice being served upon him within that period of a bankruptcy petition having been presented against such trader, shall hold the proceeds of such sale, after deducting expenses, on trust to pay the same to the trustee; but if no notice of such petition having been presented be served on him within such period of fourteen days, or if such notice having been served, the trader against whom the petition has been presented is not adjudged a bankrupt on such petition or on any other petition of which the sheriff, high bailiff or other officer has notice, he may deal with the proceeds of such sale in the same manner as he would have done had no notice of the presentation of a bankruptcy petition been served on him."

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ence merely where there has been a judgment, whilst the trustee is entitled to the proceeds of the levy only when the taking in execution and sale are in respect of a "judgment." In the absence also of any indication in the statute of the principle upon which these two sections are based, or of the reason why 50*l.* should be the limit, or whether that 50*l.* is to be fixed by the amount recoverable at the date of the judgment, or the levy, or the sale, the construction of the sections may be thought not to be free from difficulty. If we had been left to our own unaided construction we should have been inclined to think that the true period of time and the true measure of amount were to be found at the date of the judgment and in the sum ascertained by it, for whilst on the one hand that period and measure are fixed and permanent, on the other hand, if they are to be taken at any later period, the legislation ceases to give any certain measure. If, however, the time and amount are to be fixed at a later period than the judgment, it must be either that of the levy, or that of the sale; but, inasmuch as the direction to levy is the act of the creditor, who may direct any sum less than the amount of his judgment to be levied—*Ex parte Berthier & Co.* (5)—this construction leaves the amount uncertain up to the time of and dependent upon his election. Again, if they are to be ascertained at the date of the sale, then other elements of the amount to be levied have intervened, some reasonably certain, such as expenses of execution and levy fee, others absolutely uncertain, such as poundage (varying the amount of the proceeds of the sale accordingly as they are less than or equal to the debt), and possession money (varying according to the length of the time during which a sheriff's officer may properly or improperly hold the goods before sale). But however this may be, we are not at liberty to act on any view of our own upon this question, for these sections have received a judicial construction by which we are bound. The true construction of the section is, says Lord Justice James,

with the concurrence of Lord Justice Mellish, "taken in execution for a sum exceeding 50*l.* in respect of a judgment," and the plain meaning of the words, he says, is that they apply where a levy has been made for a sum exceeding 50*l.*, and the goods sold—*Ex parte The Liverpool Loan Company; in re Bullen* (1); and in accordance with that construction the Appellate Court in that case confirmed the order of the Chief Judge, directing the proceeds to be paid over to the trustee, the excess beyond 50*l.* having been brought into existence by the addition to the debt of the costs of execution.

In a subsequent case, indeed—*Ex parte Sims; in re Grubb* (2)—Lord Justice Mellish expressed a doubt whether the amount in the statute ought not to have been confined to the judgment debt and interest, but he did not dissent from the conclusion at which the other members of the Court (Lord Justice James and Lord Justice Baggallay) arrived, which was that the amount was to be that which the sheriff was to levy by sale, and therefore included at least one day's possession money, which the Chief Judge had assumed as a necessary incident, and made the amount in that case 50*l.* 2*s.* 6*d.*, which was handed over to the trustee in bankruptcy. The construction then put upon the section in *Ex parte The Liverpool Loan Company* (1) was followed (without expression of either approval or doubt) by the Exchequer Division in *Howes v. Young and Others, Howes v. Stone and Others* (6), in one of which cases the statutory amount of 50*l.* was made up by including poundage, which was thought by Baron Bramwell to be certain, and in the other case by poundage and levy fee.

In *Ex parte Reya; in re Salinger* (3) it was held (as it seems to us rightly) that it was not the actual debt due by the judgment debtor which was to form the limit, and that therefore, where the execution plaintiff had recovered a debt exceeding 50*l.*, but had signed judgment for less than that sum, he was entitled to the proceeds of the same.

The Chief Judge in Bankruptcy carried

(5) 47 Law J. Rep. Bankr. 64; Law Rep. 7 Ch. D. 882.

(6) 45 Law J. Rep. Exch. 499; Law Rep. 1 Ex. D. 146.

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this one step further, by holding that a creditor who had signed judgment for 5,000*l.* might levy for any part of his debt under 50*l.*, and so entitle himself to the proceeds—*Ex parte Berthier* (5).

Now, in the present case, the judgment creditor is, in our opinion, entitled to the proceeds, whether the judgment or the subsequent levy and expenses are to be regarded as the criterion.

If the judgment is to rule, the judgment debt is less than 50*l.*, and is therefore within the words of the statute read in their natural order, and according to what would have seemed to us their natural sense. If, on the other hand, the matter is to be decided according to the principles laid down and acted upon in the authorities we have referred to, yet, inasmuch as the execution creditor before sale directed that less than 50*l.* should be levied, and the sale accordingly made was limited to a sum which with all charges and expenses was under 50*l.*, and as, according to those authorities, the real question is, what is the amount actually levied by sale, it follows that the execution creditor is equally entitled.

We therefore bar the trustee, the claimant, with costs, leaving the sheriff to proceed in due course to deal with the proceeds, according to his duty, under the *fi. fa.*

Judgment for plaintiff in the interpleader suit.

Solicitors—G. H. Carthew, for the execution creditor; T. White & Son, agents for Hand & Co., Stafford, for the sheriff and the claimant.

[IN THE COURT OF APPEAL.]

1882. }	TURNER v. BRIDGETT. WRIGHT (claimant).*
April 5. }	
May 5. }	

Practice—Interpleader—Appeal—Order made by Court in a Summary Manner—Common Law Procedure Act (23 & 24 Vict. c. 126), ss. 14 and 17.

When a Judge at chambers refers an interpleader summons to the Court, and the Court gives judgment and makes an order thereon without directing an issue, that order is final, and no appeal can be brought from that judgment.

Appeal from a judgment of the Queen's Bench Division on an interpleader summons referred to the Court by Stephen, J.

The question was whether Wright, the trustee in liquidation, or whether Turner, the execution creditor, was entitled to the proceeds of a levy made under a judgment for less than 50*l.*

An interpleader summons being taken out was referred by Stephen, J., at chambers, to the Court, when the Divisional Court gave judgment for the execution creditor. (*Ante*, p. 374.)

The trustee in liquidation appealed.

Charles, Q.C., and *Yelverton*, for the execution creditor.—There is a preliminary objection to the hearing of this appeal, for the order was made under sections 14 and 17 of the Common Law Procedure Act, 1860 (1), in a summary manner, and from

* *Coram Brett, L.J.*; and *Holker, L.J.*

(1) 23 & 24 Vict. c. 126 (Common Law Procedure Act, 1860), s. 14: "Upon the hearing of any rule or order calling upon persons to appear and state the nature and particulars of their claims, it shall be lawful for the Court or Judge, wherever, from the smallness of the amount in dispute, or of the value of the goods seized, it shall appear to them or him desirable and right so to do, at the request of either party, to dispose of the merits of the respective claims of such parties, and to determine the same in a summary manner upon such terms as they or he shall think fit to impose, and to make such other rules and orders therein as to costs, and all other matters as may be just."

Section 15: "In all cases of interpleader proceedings, where the question is one of law, and the facts are not in dispute, the Judge shall be at liberty at his discretion to decide the question without directing an action or issue, and if

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such an order there is no appeal. If the Judge had made this order at chambers, there would clearly have been no appeal—*Dodds v. Shepherd* (2)—and as the Judge at chambers, instead of making the order himself, referred the question to the Court, the judgment of the Court is “final and conclusive.”

[BRETT, L.J.—If the Judge tries an issue and gives judgment, there is then a right of appeal. Do those words mean more than that the judgment is in such a case a final judgment?]

The section says that the decision of the Court or a Judge in a summary manner shall be final and conclusive against the parties. By section 2 of the old Interpleader Act, 1 & 2 Will. 4. c. 58 (3), the judgment in an issue and the decision of a Court or a Judge in a summary manner was to be final; and under that statute it has been held that where an issue is directed a new trial may be granted if the

he shall think it desirable, to order that a special case be stated for the opinion of the Court.”

Section 16: “The proceedings upon such case shall, as nearly as may be, be the same as upon a special case stated under the Common Law Procedure Act, 1852; and error may be brought upon a judgment upon such case; and the provisions of the Common Law Procedure Act, 1854, as to bringing error upon a special case, shall apply to the proceedings in error upon a special case under this Act.”

Section 17: “The judgment in any such action or issue as may be directed by the Court or Judge in any interpleader proceedings, and the decision of the Court or Judge in a summary manner shall be final and conclusive against the parties and all persons claiming by, from, or under them.”

(2) 45 Law J. Rep. Exch. 457; Law Rep. 1 Ex. D. 75.

(3) 1 & 2 Will. 4. c. 58. s. 2: “The judgment in any such action or issue as may be directed by the Court or Judge, and the decision of the Court or Judge in a summary manner shall be final and conclusive against the parties, and all persons claiming by, from, or under them.”

Section 5: “Provided also, and be it further enacted, that if upon application to a Judge in the first instance, or in any later stage of the proceedings, he shall think the matter more fit for the decision of the Court, it shall be lawful for him to refer the matter to the Court; and thereupon the Court shall and may hear and dispose of the same in the same manner as if the proceeding had originally commenced by rule of Court instead of the order of a Judge.”

verdict be against evidence. It has also been held that there is an appeal from a judgment in an action or issue—*Witt v. Parker* (4)—but that does not apply to the case of a decision given in a summary manner.

Harrison, Q.C. (Cyril Dodd with him), for the trustee.—If it be necessary this Court will review the decision in *Dodds v. Shepherd* (2), and it can be contended, as has been said by the Master of the Rolls in *Ex parte Streeter* (5), that the *ratio decidendi* of that case is inconsistent with the principle laid down by the House of Lords in *Garnett v. Bradley* (6), and that if it were rightly decided the provision in section 20 of 39 & 40 Vict. c. 69 (7) would have been unnecessary.

[BRETT, L.J.—If the decision in *Dodds v. Shepherd* (2) cannot be supported, yet does not that section of the Appellate Jurisdiction Act take away the right of appeal in this case?]

It is submitted that the question does not arise here; as there was no summary decision in this case, this case was not treated as a trifling matter; but the facts being admitted, the Judge at chambers was requested to refer the matter to the Court on account of its complexity.

[BRETT, L.J.—How could the Court make any order, save in a summary manner, as no issue has been directed?]

All the facts were admitted as though they had been stated on a special case, and if a special case had been stated then there would have been a right of appeal. This case was really taken as though it came within section 5 of the Interpleader Act, 1 & 2 Will. 4. c. 58 (3), as though an application had been made to the Judge, and he had referred it to the Court, in which case it would be disposed of as though the proceedings had commenced by rule of Court, and then an appeal could be brought. The words

(4) 46 Law J. Rep. Q.B. 450.

(5) Law Rep. 19 Ch. D. 216.

(6) 48 Law J. Rep. Exch. 186; Law Rep. 3 App. Cas. 944.

(7) 39 & 40 Vict. c. 59. s. 20: “Where by Act of Parliament it is provided that the decision of any Court or Judge, the jurisdiction of which Court or Judge is transferred to the High Court of Justice, is to be final, an appeal shall not lie in any such case from the decision of the High Court of Justice, or of any Judge thereof, to Her Majesty's Court of Appeal.”

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in section 2 of that Act as to a judgment being final are the same as those in the section now relied on by the respondent, and yet *Witt v. Parker* (4) shews that an appeal lay.

[BRETT, L.J.—Is not that true in cases in which there has been an issue and a trial, and is there not a distinction between such cases and a case of the exercise of a summary jurisdiction?]

Sections 15 and 16 of the Common Law Procedure Act, 1860 (1), provide that a special case may be stated in interpleader, and that error may be brought upon such a case.

[BRETT, L.J.—It does not appear that section 20 of the Appellate Jurisdiction Act, 1876 (7), was brought to the notice of the Court in *Witt v. Parker* (4)].

The general enactment that an appeal may be brought on orders of the High Court must override the special enactment of the interpleader statutes.

Charles, Q.C., in reply.—In *Buse v. Roper* (8), the Court of Appeal followed *Dodds v. Shepherd* (2). So that that case, which is not in conflict with *Witt v. Parker* (4), binds this Court, and even if it did not, section 20 of the Appellate Jurisdiction Act, 1876 (7), would bar this appeal.

Cur. adv. vult.

BRETT, L.J., on May 5, delivered the judgment of the Court.—In this case an interpleader summons was taken out at chambers, and was in consequence of some difficulty referred by the Judge at chambers to the Divisional Court. The Divisional Court did not order an interpleader issue, but decided the case by barring the trustee in liquidation, and directing the sheriff to pay the proceeds over to one of the other parties. Then an appeal was brought here from that decision, and on that appeal a preliminary objection was taken that no appeal could be brought from that decision of the Divisional Court. We took time to consider the point, and to look into the cases which were cited. Lord Justice Holker and I, before whom the case was heard, think that this preliminary objection must prevail. We have come to the conclusion, which is the same conclusion that has before been expressed in this Court, that

(8) 41 L.T. N.S. 457.

the sections of the Common Law Procedure Act which refer to interpleader are not repealed or altered by the Judicature Acts. Those Acts leave the interpleader procedure the same as it was before they were passed. I think that the rule which existed before the Judicature Act, and which exists now, is this, that upon anything which occurs at the trial of an interpleader issue, there is—if the case is tried before a Judge with a jury—an appeal to the Divisional Court, and then an appeal from the judgment of the Divisional Court to this Court, and if the issue is tried without a jury then there is an appeal from the judgment of the Judge to this Court. Wherever a Judge at chambers, or a tribunal which considers an interpleader summons, does not order an issue, but decides the case on the summons, that is, as it seems to me, an exercise of summary jurisdiction, and from that there is by the provisions of the Common Law Procedure Act, 1860 (1), no appeal. The decision of the tribunal is final.

The cases cited, as it seems to me, draw that distinction, so that the only question here is whether the decision in this case can be said to be a summary decision or not. If the Judge at chambers had come to the same decision, and given the same judgment as the Divisional Court has done in this case, then that would certainly be a summary decision. Is the case then altered because the Judge referred the case to the Divisional Court, and the Divisional Court dealt with it as he would have done? It cannot be altered; a Judge at chambers is always acting for the Court, and when he refers a question to the Court he refers his jurisdiction to the Court. If the Court had ordered an interpleader issue, then there would be a right of appeal, but as the Court barred the claimant, and directed the money to be paid over to one of the other parties, that judgment is final, and we cannot hear this appeal, for the preliminary objection must prevail.

Appeal dismissed.

Solicitors—White & Son, agents for Hand & Co.,
Stafford, for appellant; G. H. Carthew, for
respondent.

1882. }
March 20. }

SCOTT v. SAMPSON.

Libel—Plea of Justification—Evidence of Rumours to same effect as Allegations in Libel—Evidence of particular acts of Misconduct on the part of the Plaintiff—General Evidence of Reputation of the Plaintiff in Mitigation of Damages—Material Facts on which the Defendant relies—Order XIX. rule 4.

Action for a libel alleging that the plaintiff, a journalist and dramatic critic, had extorted money by threatening to publish defamatory matter of a deceased actress. Statement of defence, inter alia, plea of justification:—Held, by MATHEW, J., and CAVE, J., that—first, evidence of the existence of rumours to the same effect as allegations in the libel is not admissible; secondly, evidence of particular acts of misconduct on the part of the plaintiff is not admissible; though, thirdly, semble that general evidence of the reputation of the plaintiff may be given in mitigation of damages—but to entitle the defendant to give such evidence it must be stated or referred to in his pleadings, as a material fact on which the defendant relies, within Order XIX. rule 4.

This was an action for libel in which a verdict passed for the plaintiff. A rule nisi was obtained for a new trial on the ground of the improper rejection of evidence relating to the character of the plaintiff, and tending to shew that rumours existed previously to the same effect as the libellous statements.

C. Russell, Q.C., and F. O. Crump, shewed cause.

W. Willis, Q.C., Moloney and Macdonell, in support of rule.

The facts of the case and the arguments appear sufficiently in the judgments.

In addition to the authorities cited in the judgments, counsel referred to *Odgers on Libel*, p. 304; *Short's Law of Literature and Art*, and *Townshend on Libel*, 3rd ed. p. 677.

Cur. adv. vult.

The following judgments were (on March 20) delivered:—

MATHEW, J.—This was an action brought for publishing in a paper called the *Referee* a libel, imputing to the plaintiff that, by threatening to publish in a journal called the *Theatre* defamatory statements with reference to a deceased actress, he had extorted a sum of 500*l.* from Admiral Glyn.

The case was tried before the Lord Chief Justice and a special jury, when the defence set up was that the alleged libel was true. The jury returned a verdict for the plaintiff, damages 1,500*l.*

A rule was afterwards obtained by Mr. Willis to set the verdict aside, on the ground that the Chief Justice had refused to admit evidence of rumours before the publication of the libel that the plaintiff had been guilty of the misconduct imputed to him, and also had declined to permit the defendant to give evidence of previous acts of the plaintiff which were said to have been of a discreditable character.

It was urged for the defendant upon the argument of the rule, that even upon the assumption that the libel in question was false and malicious, it was open to the defendant to attack the character of the plaintiff with a view of reducing the damages. This it was said might be accomplished, either by calling witnesses to shew that before the libel was published they had been told that the plaintiff was guilty of the misconduct charged against him, or by giving evidence of any acts of the plaintiff in the course of his life, from which the jury might infer that he was not a person of good conduct or reputation, and therefore ought not to be compensated in damages as if he were.

The learned counsel for the defendant did not insist upon the right to disparage the character of the plaintiff, in reduction of damages, as one peculiar to publishers of newspapers, but he claimed it on behalf of all persons who were shewn to the satisfaction of a jury to have published what was defamatory, and who had failed in the attempt to prove a justification.

It was treated as a matter too clear for argument, that evidence of such rumours about a plaintiff's conduct ought to influence the minds of a jury in reduction of the damages, even though the rumours were admitted to be false; and it was insisted that the defendant might give the

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evidence in the course of the case, although the effect would be to make it extremely difficult for a jury to discriminate between evidence which might appear to be, but which was not, legitimate proof of the truth of the libel, and that which was offered merely in reduction of damages.

Now, if rumours of the truth of the libel might be proved in reduction of damages, it would seem to follow that rumours of any other misconduct on the part of the plaintiff ought also to be admitted.

In each case the jury might infer that the plaintiff was not a person of good character, and the evidence would therefore become relevant in mitigation of damages; but this extreme view of the defendant's right was not insisted upon by Mr. Willis.

The contention, that for a similar purpose any previous misconduct of the plaintiff might be proved, was referred to the same supposed rule of law.

It was pointed out, on behalf of the plaintiff, that if the defendant were right, a plaintiff in an action for libel would be placed in a position of great difficulty, for he might not be prepared to meet charges of which he would have had no notice; and an unscrupulous or vindictive defendant might thus make use of the action brought to clear the plaintiff's character, to heap calumnies upon him as unfounded as the original libel. The result would be, that a Court of law would be less dreaded by the worst libellers than by their victims, for few men would face a trial at the risk of having to encounter charges which the malicious ingenuity of the defendant might render it almost impossible to meet. Thus a man of the highest reputation in his own country, who had been cruelly libelled, might be charged with having done something many years before, and in another country, while it would be practically out of his power to disprove the charge by any other evidence than his own testimony, and this the jury might be asked to disbelieve.

It was not disputed by the counsel for the defendant, when pressed with these considerations, that where such evidence was offered on behalf of the defendant, it might be reasonable to permit the plaintiff

to call witnesses to contradict the witnesses for the defendant, and if the plaintiff were not able to do so at once it was pointed out that the Court possesses a power to adjourn any trial in order that further evidence may be obtained, and that this power would doubtless in a proper case be exercised in the plaintiff's favour.

When it was pointed out for the plaintiff that such a course must inflict grievous hardship, the counsel for the defendant insisted that considerations of hardship were not admissible in discussing the question, because, as he maintained, the law upon the subject was settled and must continue to be enforced.

In support of his contention, Mr. Willis mainly relied on the case of *Leicester v. Walter* (1), a decision which he asserted was recognised by writers of authority on the subject of defamation, to several of whose works he referred.

I have had the advantage of seeing the judgment which my brother Cave is about to deliver, and I agree with him in the conclusions at which he has arrived after a careful examination of the cases. I think that under our old system of pleading, the more weighty authority was in favour of the admissibility of general evidence of bad character, even though no notice were given to the plaintiff of the intention to raise any such issue. I do not think that evidence of rumours that the plaintiff had done what was charged against him in the libel, or of particular acts of misconduct, would have been admissible. But I rest my judgment in this case upon the consideration that the authorities relied upon by Mr. Willis have no application to the pleadings which have been prescribed by the Judicature Acts.

Under our new procedure a statement of the material facts upon which the defendant intended to rely ought to have appeared in his pleadings. But there had been no notice upon the statement of defence in this case that evidence would be offered at the trial of the matters with respect to which the ruling of the Lord Chief Justice is complained of, and on this ground I am of opinion that the evidence was properly rejected.

A further ground upon which the rule

(1) 2 Campb. 251.

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was opposed by Mr. Russell was this, that under Order XXXIX. rule 3, even upon the assumption that the evidence should have been admitted, a new trial ought not to be granted unless the defendant could shew that some substantial wrong had been done him.

The particular acts of misconduct which were sought to be proved at the trial, and with reference to which the evidence was rejected, arose out of the plaintiff's relations to two newspapers, the *Daily Telegraph* and the *Hornet*.

It was asserted that the plaintiff had published in the *Daily Telegraph*, in the year 1878, a hostile criticism on an actor with whom it was alleged he had quarrelled. The only information before this Court with respect to the article was the statement of counsel that he had read it, and that it was severe.

I cannot say upon this information that any substantial wrong was done the defendant, within the meaning of Order XXXIX. rule 3, by the rejection of this evidence.

With respect to the *Hornet* it was said that the plaintiff had instituted in 1873 a prosecution against that paper from which he had withdrawn under discreditable circumstances. But this evidence was withdrawn by Mr. Willis at the trial, and I understood it to have been admitted in the course of the argument that there was no such rejection of the evidence by the Lord Chief Justice as amounted to a misdirection.

With respect to the rumours which the defendant was prevented from giving in evidence, I may add that I am not satisfied that any substantial wrong has been thereby done the defendant, for the defendant was not prepared to shew that the rumours were believed.

The heavy damages would seem to be due to the vindictive spirit in which the action was defended. For this the jury appear to have thought that the defendant deserved to be punished in an exemplary manner. I see no reason to think that the rejected evidence would have had any effect in inducing the jury to take a more indulgent view of the defendant's conduct towards the plaintiff.

The rule must be discharged.

CAVE, J.—In this case the defendant claims a new trial on the ground that the Lord Chief Justice misdirected the jury, in rejecting, first, evidence of the plaintiff's general bad character; secondly, evidence that rumours to the same effect as the libel complained of were in general circulation before the publication of the libel.

The action was for a libel published by the defendant of the plaintiff, alleging that the latter had extorted a sum of 500*l.* from Admiral Carr Glynn by threatening to publish defamatory matter of Miss Neilson, an actress, then lately dead.

The questions which were rejected consisted in part of questions put to the plaintiff, who was called by the defendant as his own witness, and in part of questions put to other witnesses called by the defendant. The questions put to the plaintiff were directed to prove—first, That being engaged as a theatrical critic on the *Daily Telegraph*, he had after a quarrel with Mr. Vezin, the actor, written for the *Daily Telegraph* a false and dishonest criticism of Mr. Vezin's acting for the purpose of gratifying his spite against that gentleman; secondly, That he had apologised to other people for libels he had published of them; and thirdly, That he had taken proceedings for libel against a paper called the *Hornet*, and in the course of those proceedings had made statements on oath diametrically opposed to those he had made in the witness-box on the then proceeding trial.

The questions put to the other witnesses were—first, Questions put to Mr. Martin, chief clerk at the Guildhall Police Court, directed to prove what had been sworn by the plaintiff in the course of his proceedings against the *Hornet*; and, secondly, A question put to Mr. Ledger as to whether he had anywhere heard from any one before the publication of the libel in question a statement about the plaintiff to the same effect as the libel.

As to the questions put to the plaintiff himself, the case is a little complicated from the adoption by the defendant of the very unusual course of calling the plaintiff as his own witness. The consequence of this was that the questions could not, as was admitted, be justified as going to the plaintiff's credit, since the defendant by

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electing to call him as his own witness had disabled himself from impeaching his credit. The rule was moved and obtained on the ground that the evidence was admissible in mitigation of damages, but on the argument it was also contended that the evidence was admissible under the plea of justification.

The authorities on the subject consist principally of decisions at Nisi Prius, some of which are contained in Nisi Prius reports, while others are to be found only in the shape of short extracts in text-books, in which last cases the principle underlying the admission of the evidence is not always easy to discover. These decisions relate to the admissibility—first, of evidence of reputation; secondly, evidence of rumours of and suspicions to the same effect as the defamatory matter complained of; and, thirdly, evidence of particular facts tending to shew the character and disposition of the plaintiff. The case most often cited is that of *Leicester v. Walter* (1), decided in 1809, which was an action for a libel in a newspaper, alleging that the plaintiff had been guilty of unnatural practices. Sir James Mansfield allowed the defendant to call witnesses to prove, in mitigation of damages, that before the publication of the libel there was a general suspicion of the plaintiff's character and habits, that it was generally rumoured that such a charge had been brought against him, and that his relations and former acquaintances had on this ground ceased to visit him. The learned Judge in summing up told the jury that they would have to consider in assessing the damages whether the reports which had been proved were sufficient to shew that he could receive little injury, and that in this point of view it did not matter whether the reports were well or ill founded, provided they got into many men's mouths.

Sir James Mansfield in that case expressed his own dissatisfaction with the arguments adduced in support of the admissibility of the evidence, but yielded to three cases which were cited to him: one was *Knobell v. Fuller* (2), where Chief Justice Eyre held that the defendant may on the general issue prove, in mitigation of

damages, such facts and circumstances as shew a ground of suspicion not amounting to actual proof of the plaintiff's guilt. The second was *Eamer v. Merle* (3), where Lord Ellenborough in an action for words of insolvency permitted the defendant to prove that at the time there were rumours in circulation that the plaintiff's acceptances were dishonoured. The third was an anonymous case, in which Mr. Justice Le Blanc was stated to have received evidence under the general issue that the plaintiff had been guilty of attempts to commit the crime which the defendant had imputed to him.

In *Eamer v. Merle* (3) the evidence admitted fell under the second of the above heads, while in *Knobell v. Fuller* (2) and the anonymous case, the evidence was admitted on the principle that facts not amounting to a complete justification might, under the plea of not guilty, be proved, in mitigation of damages, as in some way excusing the defendant. This principle has long been exploded, as it is obvious that it was impossible in practice to draw the line between facts amounting to suspicion only and facts amounting to a justification.

In *Leicester v. Walter* (1) there seems to have been some confusion between evidence of general reputation and evidence of rumours and suspicions, which may account for Sir James Mansfield's doubts as to the admissibility of the evidence.

In *Kirkman v. Oxley* (4), the date of which I have not been able to ascertain precisely, Mr. Justice Heath, in an action for slander, allowed the defendant to go into evidence of the plaintiff's bad character in mitigation of damages. Here the evidence admitted would seem to fall under the first head.

In *Williams v. Callender* (5), decided in 1810, Lord Ellenborough held that in libel the defendant might give in evidence somewhat of the real character of the plaintiff, and shew that it was not unblemished and entire; and in this case, again, the evidence appears to range itself under the first head.

(3) Not reported.

(4) Phil. on Ev. 189; 2 Stark on Ev. 306n (K).

(5) Holt, N.P. 307.

(2) Peake Ad. C. 139.

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In — *v. Moor* (6), decided in 1813, the question came before a Court in banc, consisting of Lord Chief Justice Ellenborough, and Mr. Justice Grose and Mr. Justice Bayley. That was an action for words imputing to the plaintiff unnatural practices, and the declaration alleged that the plaintiff had never been suspected to have been guilty of the misconduct alleged, and claimed general damages. Mr. Justice Grose allowed the witness who proved the words to be asked on cross-examination whether he had not heard reports in the neighbourhood that the plaintiff had been guilty of similar practices. This was done upon the authority of *Leicester v. Walter* (1), and on the ground that it was evidence to contradict the plaintiff's allegation that he was of good fame, and that the speaking of the words occasioned the injury to it, whereupon the plaintiff elected to be nonsuited. Upon motion for a new trial the rule was refused on the ground that a person of disparaged fame is not entitled to the same measure of damages with one whose character is unblemished, and that it was competent to shew that by evidence. In this case the evidence fell under the first head.

In *Newsam v. Carr* (7), decided in 1817, which was an action for malicious prosecution, Baron Wood refused to allow a witness to be asked whether he had not searched the plaintiff's house upon a former occasion, and whether he was not a person of suspicious character, but expressed an opinion that such evidence was admissible in slander in mitigation of damages.

In *Waithman v. Weaver* (8), decided in 1822, which was an action for a libel in attributing to the plaintiff that having sold two shawls he had repurchased them the next day from a man of suspicious character at a much lower price, Chief Justice Abbot expressed a doubt whether evidence was admissible that rumours were prevalent at the time of the publication of the libel to the effect of the facts there stated, and in deference to the Judge's doubt the evidence was withdrawn. The evidence here appears to fall under the second head.

(6) 1 M. & S. 284.

(7) 2 Stark. 69.

(8) 11 Price, 217ⁿ.

In *Jones v. Stevens* (9) which was an action for libel on the plaintiff in the way of his profession of an attorney, the Judge, at the trial, had rejected evidence that the plaintiff was of general bad character and repute in his practice and profession of an attorney. On a rule for a new trial the evidence was held inadmissible, on the ground that it would allow the defendant to impeach all the transactions of the plaintiff's life, and throw on him the difficulty of shewing a uniform propriety of conduct during all his existence. Looking at the reasons given by the learned Judges it would almost appear that they regarded the evidence tendered in that case as evidence of particular facts tending to shew the plaintiff's disposition, or evidence under the third of the heads given above. Although this case was decided by the Court in banc in 1822, it seems to have attracted but little attention, and does not appear to have been cited in any of the five cases next following.

In *Ellershaw v. Robinson* (10), decided in 1824, an action for words imputing adultery to the plaintiff, a widow, Mr. Justice Holroyd held that it was competent to the defendant to go into general evidence to impeach the plaintiff's general character for chastity. So in *Manby v. Baker* (10), decided in 1826, Lord Chief Justice Tenterden admitted general evidence of the plaintiff's bad character; and in *Moore v. Ostler* (10), decided in 1836, Lord Chief Justice Denman did the same after consulting Baron Parke. A similar course was adopted by Mr. Justice Colman in *Hardy v. Alexander* (11), decided in 1837; but Mr. Justice Cresswell in *Richards v. Richards* (12) stated from his own recollection that in that case the evidence was received without opposition. In all of these last four cases the evidence admitted fell under the first head.

In *Richards v. Richards* (12), decided in 1844, which was an action of slander for imputing to the plaintiff that he had grossly ill-treated a woman, Mr. Justice Cresswell, after consulting Mr. Justice Wightman, allowed the defendant to cross-

(9) 11 Price, 235.

(10) 2 Stark. on Ev. 641ⁿ (E).

(11) Ibid. 642ⁿ (E).

(12) 2 Moo. & R. 557.

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examine the plaintiff's witnesses for the purpose of shewing that the supposed misconduct of the plaintiff had been a frequent topic of conversation amongst those who were employed by the plaintiff in his business, and was commonly rumoured in the town in which the plaintiff resided before the conversation, which was the subject of the action, for the purpose of shewing that the defendant was at all events not the inventor of the slander, and that the injury arising from the slander could not be wholly ascribed to him. In this case the evidence would seem to fall under the second head.

In *Thompson v. Nye* (13), decided 1850, which was an action for words imputing unnatural practices, it was held that a witness could not be asked generally whether he had heard that the plaintiff was addicted to such practices, the question being general and not confined to reports existing before the time of the slander. The other Judges declined to express an opinion whether the question would have been admissible if limited to rumours in existence before the date of the alleged slander; but Mr. Justice Coleridge stated that his impression was that evidence of rumours that the plaintiff had been guilty of the conduct imputed to him by the defamatory matter complained of was not admissible. The question in this case was very loosely put, and the evidence which was rejected hardly seems to have amounted to general evidence of reputation.

In *Bracegirdle v. Bailey* (14), decided in 1859, which was an action for slander imputing a forgery, Mr. Justice Byles, after consulting Mr. Justice Willes, held that the plaintiff, not having been examined in chief, could not, in mitigation of damages, be cross-examined as to his past conduct and life. The evidence here rejected would seem to fall under the third head, as evidence of particular facts tending to shew the disposition of the plaintiff.

In *Bell v. Parke* (15), decided in 1860, which was an action of slander imputing to the plaintiff that he had attempted to steal a gold chain, the Judge at the trial

had rejected evidence of rumours that the plaintiff had committed the act imputed to him by the slander, which was tendered in mitigation of damages. Upon the argument for a conditional order for a new trial, Chief Baron Pigot was of opinion that not only could evidence of general reputation of general bad character, or of habitual vice, or habitual misconduct, be adduced, but also what he called general evidence of a general reputation of a particular crime alleged in the imputed slander to have been committed by the plaintiff; but Baron Fitzgerald and Baron Hughes were of opinion that the latter class of evidence was not admissible. The evidence rejected in this case seems to have fallen under the second head.

From this review of the authorities it will be seen that there is considerable conflict of opinion, and before discussing them further it seems desirable to consider the principles underlying them. Speaking generally, the law recognises in every man a right to have the estimation in which he stands in the opinion of others unaffected by false statements to his discredit; and if such false statements are made without lawful excuse, and damage results to the person of whom they are made, he has a right of action. The damage, however, which he has sustained must depend almost entirely on the estimation in which he was previously held. He complains of an injury to his reputation, and seeks to recover damages for that injury, and it seems most material that the jury who have to award those damages should know, if the fact is so, that he is a man of no reputation. "To deny this would," as is observed in *Starkie on Evidence*, "be to decide that a man of the worst character is entitled to the same measure of damages with one of unsullied and unblemished reputation. A reputed thief would be placed on the same footing with the most honourable merchant, a virtuous woman with the most abandoned prostitute. To enable the jury to estimate the probable quantum of injury sustained, a knowledge of the party's previous character is not only material, but seems to be absolutely essential."

It is said that the admission of such evidence will be a hardship upon the

(13) 16 Q.B. Rep. 175; 20 Law J. Rep. Q.B. 85.

(14) 1 Falc. & F. 536.

(15) 11 Tr. C. L. Rep. 413.

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plaintiff, who may not be prepared to rebut it; and under the former practice, where the damages could not be pleaded to and general evidence of bad character was allowed to be given under a plea of not guilty, there was something in this objection, which however is removed under the present system of pleading, which requires that all material facts shall be pleaded, and a plaintiff who has notice that general evidence of bad character will be adduced against him can have no difficulty whatever, if he is a man of good character, in coming prepared with friends who have known him to prove that his reputation has been good.

On principle, therefore, it would seem that general evidence of reputation should be admitted; and on turning to the authorities previously cited it will be found that it has been admitted in a great majority of those cases, and that its admission has been approved by a great majority of the Judges who have expressed an opinion on the subject.

As to the second head of evidence, or evidence of rumours and suspicions to the same effect as the defamatory matter complained of, it would seem that on principle such evidence is not admissible, as only indirectly tending to affect the plaintiff's reputation. If these rumours and suspicions have, in fact, affected the plaintiff's reputation, that may be proved by general evidence of reputation. If they have not affected it, they are not relevant to the issue. To admit evidence of rumours and suspicions is to give any one who knows nothing whatever of the plaintiff, or who may even have a grudge against him, an opportunity of spreading, through the means of the publicity attending judicial proceedings, what he may have picked from the most disreputable sources, and what no man of sense who knows the plaintiff's character would for a moment believe in. Unlike evidence of general reputation, it is particularly difficult for the plaintiff to meet and rebut such evidence; for all that those who know him best can say is that they have not heard anything of these rumours. Moreover, it may be that it is the defendant who himself has started them.

Turning to the authorities, it will be

seen that while such evidence appears to have been admitted by Lord Chief Justice Ellenborough in *Eamer v. Merle* (3), and by Mr. Justice Cresswell, with the approbation of Mr. Justice Wightman, in *Richards v. Richards* (12), and while its admissibility was supported by Chief Baron Pigot in *Bell v. Parke* (15), it was doubted by Chief Justice Abbot in *Waithman v. Weaver* (8), and by Mr. Justice Coleridge in *Nye v. Thompson* (13), and it was held inadmissible by Baron Fitzgerald and Baron Hughes in *Bell v. Parke* (15), and by the whole Court of Exchequer in *Jones v. Stevens* (9).

In *Leicester v. Walter* (1) evidence of rumours and suspicions was admitted by Sir James Mansfield against his own judgment, but in that case it was proposed to prove that the plaintiff's relations and former acquaintances had ceased to visit him on account of these rumours and suspicions, so that the evidence would seem really to have amounted to evidence of general reputation.

Upon the whole, both the weight of authority and principle seem against the admission of such evidence.

As to the third head—or evidence of facts and circumstances tending to shew the disposition of the plaintiff—both principle and authority seem equally against its admission. At the most it tends to prove not that the plaintiff has not, but that he ought not to have, a good reputation—and to admit evidence of this kind is, in effect, as was said in *Jones v. Stevens* (9), to throw upon the plaintiff the difficulty of shewing an uniform propriety of conduct during his whole life. It would give rise to interminable issues which would have but a very remote bearing on the question in dispute, which is to what extent the reputation which he actually possesses has been damaged by the defamatory matter complained of. Among all the cases which have been reviewed, there is not one which can be cited in support of the admissibility of this evidence. In *Bracegirdle v. Bailey* (14) such evidence was rejected by Mr. Justice Byles, after consulting with Mr. Justice Willes, and in *Jones v. Stevens* (9) the evils attending its admission are eloquently pointed out.

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To apply these principles to the case in hand. In the course of his examination in chief of the plaintiff, Mr. Willis asked him whether he had used his position as a critic of the *Daily Telegraph* to injure or annoy an actor. The witness answered "Never"; whereupon a discussion ensued between Mr. Russell and Mr. Willis as to the admissibility of the question. Ultimately Mr. Willis proposed to pursue the inquiry further by asking the witness whether, on the 16th of May, 1881, he reviewed in the *Daily Telegraph* Mr. Vezin's appearance as Iago at Drury Lane. The question was objected to, and Mr. Willis supported the question on the ground that it was material to the justification as shewing that the plaintiff had abused his position as a critic for other purposes than that of extorting money—namely, for the purpose of grossly abusing a man he personally disliked.

Lord Coleridge held, as I think rightly, that the question was not admissible, as tending to prove justification, the natural meaning of the libel being that the witness abused his position as a critic for the purpose of extorting money. Mr. Willis now contends that it was also admissible as evidence tending to shew the plaintiff's general bad character. I am of opinion that it falls under the third head of evidence above discussed—namely, evidence of particular facts tending to shew the plaintiff's disposition, and is therefore inadmissible.

Mr. Willis next asked the witness whether he had published libels himself, to which the witness answered, "No; not within my knowledge." Mr. Russell objected that this was cross-examination to credit. Lord Coleridge thereupon said, "It is open to every conceivable objection," and the topic was not further pursued by Mr. Willis.

Mr. Willis next asked, "Have you apologised for libels?" This question was objected to and rejected by his Lordship. Mr. Willis, who appears at the time to have acquiesced in this decision, now contends that he should have been allowed to pursue the first question and put the second; but I am clearly of opinion that both were inadmissible on the same ground

as the first question about the article in the *Daily Telegraph*.

In the re-examination of the plaintiff Mr. Macdonell asked him whether he took criminal proceedings in 1873 at the Guildhall against the *Hornet*, and afterwards stopped the proceedings. This question was objected to as not arising out of the cross-examination, and on Mr. Macdonell's admission that it did not so arise it was rejected. The rejection of the evidence on this ground was a matter for the discretion of the Judge who presided at the trial, and that discretion appears to have been rightly exercised, as the question was clearly inadmissible on the same ground as those already discussed.

Mr. Macdonell then called Mr. Martin, the chief clerk at the Guildhall Police Court, to prove what took place at the Guildhall in 1873, when the plaintiff took proceedings against the *Hornet*, with a view to shew, by this among other instances, what the plaintiff's character was, and that he had been in the habit of libelling persons. This evidence was objected to, and rejected, and, I think, rightly rejected, for the same reason as the former questions.

Lastly, Mr. Ledger was called on behalf of the defendant, and was asked whether he had heard anywhere the story which was the libel in question before he saw it in the *Referee*. This question was also objected to and rejected. The form of the question shews to my mind very forcibly the injustice of admitting evidence of rumours. The witness was asked whether he had heard the story anywhere; but in the discussion which ensued it was stated that he had heard it in some club. The defendant was charged with having published a false and malicious libel in a magazine, and it is suggested that he ought to be allowed to call a witness to say that he had previously heard the same story from some one in a club. How can the gossip of some idler in a club be material in this case? How is it shewn that the plaintiff's reputation was in the slightest degree affected by such gossip? and how can the plaintiff meet such evidence as this? The person who repeated the story to Mr. Ledger might, if he were put into the witness-box, be compelled to

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admit on cross-examination that he had himself heard the story from the defendant, or that he had told the story without the slightest ground for it, or be shewn to be a person whom no one who knew him would believe for a moment. I hold that the evidence was rightly rejected as falling under the second head of evidence—namely, evidence of rumours and suspicions discussed above.

I have now gone through the whole of the evidence which was tendered, and, in my opinion, the whole of it was properly rejected. There is, however, still another ground on which, even assuming the evidence to have been material, it was rightly rejected. The defendant proposed to prove certain facts which he alleged were material, but these facts were not stated or referred to in the pleadings as required by Order XIX. rule 4, and it appears to me that on that ground their rejection might have been supported, had they been material, which, however, I have said I think they were not.

Rule discharged.

Solicitors—Lewis & Lewis, for plaintiff; Watson, Sons, & Room, for defendant.

1882. } THE QUEEN v. THE GREAT
Feb. 24, 27. } YARMOUTH JUSTICES.

Justice of the Peace—Bias—Judez in sua Causa—Special Assessment Sessions.

[For the report of the above case, see 51 Law J. Rep. M.C. 39.]

1881. } THE DUKE OF BEDFORD v. THE
Dec. 12. } OVERSEERS OF ST. PAUL, COVENT
GARDEN.

Rating—Poor-rates—Market Tolls—User of the Soil—Tolls in the nature of Stallage.

[For the report of the above case, see 51 Law J. Rep. M.C. 41.]

[IN THE COURT OF APPEAL.]

1882. }
April 19. } PERCIVAL v. HUGHES.*

Negligence—Principal and Agent—Liability of Employer for Injury caused by Negligence of Contractor's Workmen—Duty of Employer to take necessary Precautions to prevent Injury.

The plaintiff and defendant were the owners of two adjoining houses with a party wall between them. The defendant employed a competent architect and contractor to pull down and rebuild his house. Before the works were completely executed the contractor's workmen, in order to erect a wooden staircase, so negligently and unskilfully cut into the party wall of another house, which adjoined the defendant's house, as to cause it to fall, and in consequence thereof damage was done to the plaintiff's house. The workmen had no authority to cut into the party wall. The building contract provided that no deviations from the contract were to be made without the written consent of the defendant and his architect; and also that the contractor was to be responsible for all damage to property caused by the negligent acts or want of care of himself or his workmen. In an action to recover damages for the injury done to the plaintiff's house,—Held (per BAGGALLAY, L.J., BRETT, L.J.; HOLKER, L.J., dissenting), that the defendant was liable, inasmuch as a duty was imposed upon him to take all such precautions as were necessary to prevent any injury happening to the plaintiff's house during the execution of the works.

Appeal by the defendant from a decision of the Queen's Bench Division.

The defendant was the owner of a house situated between two other houses, one of which belonged to the plaintiff, and the other to a third person. The defendant desiring to rebuild his house, employed a competent architect and builder to execute the works. The new house was one story higher and one floor lower than the old house. The building contract contained a clause that no deviations were to be made from the contract without the written consent of the defendant and his architect; and

* *Coram* Baggallay, L.J.; Brett, L.J.; and Holker, L.J.

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also that the building, from the commencement of the works to the completion of the same, were to be under the charge of the contractor, who was to hold the employer harmless from any claims for injuries to persons or things, or structural damage to property happening from any neglect, default, want of care or misconduct on the part of the contractor, or of any one in his employ during the execution of the works. Before the works were completely executed, the workmen, in order to erect a staircase, cut into the party wall of the house which belonged to the third person in such a negligent and unskilful manner as to cause the house to fall, and in consequence thereof certain girders in the defendant's house were displaced, and injury was caused to the plaintiff's house. The workmen had no authority to cut into the party wall, and in doing so were acting contrary to orders which had been given to them. The party wall of the plaintiff's house, and also that of the third person, had been properly under-pinned.

The action was brought to recover damages for the injury caused to the plaintiff's house by the fall of the party wall, and at the trial Manisty, J., directed a verdict to be entered for the plaintiff. The Queen's Bench Division (1) discharged a rule for a new trial.

The defendant appealed.

Philbrick, Q.C., and *Douglas Kingsford*, for the defendant.—The act which caused the damage was an unauthorised collateral act done in another portion of the works by the builder's workmen. Where damage is caused by an improper mode of doing that which it is lawful to do, there the employer is not liable unless the relation of master and servant exists—*Butler v. Hunter* (2), *Rapson v. Cubitt* (3), and *Hole v. The Sittingbourne Railway Company* (4).

(1) Lord Coleridge, C.J.; Manisty, J.; and Bowen, J.

(2) 7 Hurl. & N. 826; 31 Law J. Rep. Exch. 214.

(3) 9 Mee. & W. 710; 11 Law J. Rep. Exch. 271.

(4) 6 Hurl. & N. 488; 30 Law J. Rep. Exch. 81.

[BRETT, L.J., referred to *Dalton v. Angus* (5).]

Where the doing of an act imposes a duty upon the person who causes the act to be done, he cannot escape from his liability to see the duty performed by employing another person to do it for him. If the damage had been caused by the underpinning of the party wall, then this case would be undistinguishable from *Bower v. Peate* (6). The act of fixing the staircase was not a hazardous act in itself; and the plaintiff to maintain the action must shew that his rights have been invaded. There was no act of commission on the part of the defendant which authorised the workmen to cut into the party wall. A person who employs a contractor to execute certain works for him, is not liable for the tortious acts of the contractor's workmen—*Gayford v. Nicholls* (7). This decision is not overruled by *Bower v. Peate* (6), the judgment of which proceeded on the ground that the contractors were employed by the defendant to remove a support to which the plaintiff was entitled, and that they were not employed to substitute anything in the place of what was removed. The general rule is, that a person who employs another to do certain acts, is not liable for the acts of negligence of the person employed, except where the employment is to do an unlawful act, or where one person employs another to perform a duty imposed upon him by statute.

Harrison, Q.C. (with him *McCall*), for the plaintiff.—It is the duty of a person who conducts hazardous operations on his own land to see that no injury is caused to his neighbours—*Rylands v. Fletcher* (8). The reasoning in *Bower v. Peate* (6) is approved of by Lord Blackburn in *Dalton v. Angus* (5). The works here must be viewed as a whole, and the defendant cannot shift the responsibility from himself by alleging that it was the wrongful act of a contractor

(5) 50 Law J. Rep. Q.B. 689; Law Rep. 6 App. Cas. 740, 829.

(6) 45 Law J. Rep. Q.B. 446; Law Rep. 1 Q.B. D. 321.

(7) 9 Exch. Rep. 702; 23 Law J. Rep. Exch. 205.

(8) 37 Law J. Rep. Exch. 161; Law Rep. 3 H.L. 330.

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whom he had employed—*Lemaitre v. Davis* (9).

Philbrick, Q.C., in reply.—The liability of the defendant to see that proper precautions were taken to prevent injury to the plaintiff's house ceased when the work of building was finished. The fixing of the staircase must be taken as an isolated act done after the other work was finished.

BAGGALLAY, L.J.—I am of opinion that this appeal must be dismissed. I can hardly imagine a case in which greater care and caution would be required on the part of the architect and those working under his directions, in seeing that every precaution was taken to protect the plaintiff's property from injury.

This is not the case, as I understand it, of an accident caused by a negligent act of the defendant, but it is one caused by the omission to do an act of prudence and precaution which ought to have been done. That appears to me to be the distinction between the several classes of cases to which our attention has been drawn on behalf of the defendant. Where the act is merely one of commission, the employer is not, except under special circumstances, liable for the misconduct of a contractor's workmen; but where the act is one of omission—an omission to discharge a duty which the law has imposed upon the contractor or the employer, as the case may be—there the employer is liable even though he may have entrusted the work to an architect or contractor, as in the case of *Bower v. Peate* (6), where it was suggested that the employer was not liable, because he had obtained an indemnity from the contractor for any injury which might be occasioned. The present case was well explained in the Court below by Mr. Justice Bowen, who said, "It was urged upon us that the mischief was caused by a negligent act of commission on the part of the contractor's men done without orders. But this distinction cannot avail the defendant in the present instance. If the only duty cast upon the defendant had been the negative duty of abstaining from all acts which would damage the plaintiff's premises, it might with reason be argued that an act

(9) *Ante*, Chanc. 173; Law Rep. 19 Ch. D. 281, 292.

of commission done by workmen in violation of their instructions rendered neither the contractor, their immediate master, nor the plaintiff himself liable. But the duty of the defendant went further. It was to see that at all times during a hazardous operation set in motion by his order, effectual support was given to his neighbour's house. This was a positive obligation, not a negative one. He was bound not merely not to sanction it, but to prevent it; for wilful acts of mischief he might not indeed be responsible, but it was his duty to hinder negligence, whether in the shape of acts of omission or commission. As the defendant has failed to fulfil his duty, the plaintiff is entitled to succeed."

There was, therefore, a duty imposed upon the defendant, and upon those working under his directions, to take all precaution necessary to prevent any damage or injury being occasioned to the plaintiff's building.

BRETT, L.J.—The first question is whether there was any duty on the part of the defendant to the plaintiff, and if so, when did that duty begin, and when did it end. The fact that the plaintiff and defendant were owners of two adjoining houses, between which there was a party wall, gave the plaintiff a right to have his part of the party wall left untampered with by the defendant. Now the defendant, either by himself, or by his contractor and his servants, undertook to take down and to rebuild his house, and it was admitted that this could not be done without hazard or a substantial danger of injuring the plaintiff's house. The duty on the part of the defendant to the plaintiff is raised the moment the defendant undertakes to do something with his own house which will expose the plaintiff to that hazard or danger. The duty is to do that dangerous act either by himself, or by his contractor or his servants, so as not to injure the plaintiff's house; and he is bound not merely to do the thing carefully but to take such precautions as will prevent any damage being done to the plaintiff's house. That duty arises the moment the defendant begins to tamper with his own house, and continues during the progress of the works, and ends at the

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time when the house is rebuilt and completed—not so far as relates to the ornamental portion of the house, but completed—so as to be a house which would support the plaintiff's house. If, therefore, the duty began and ended at the time stated, the defendant would, in the meantime, be liable only for the commission or omission of things which he has actually ordered to be done or omitted to do; or he is liable for everything which the contractor and his workmen may do, or omit to do which ought to be done. *Bower v. Peate* (6) shews that the existence of a contract of indemnity between the defendant and some other person who is doing the work is wholly immaterial as between him and the plaintiff. The defendant is liable for the acts of all the persons, whether done by the contractor or by his workmen, who are doing what he has undertaken to do. The effect of the decision referred to is that the defendant cannot delegate that duty so as to excuse himself from the performance of it, and cannot therefore get rid of his liability to the plaintiff. The accident here was caused by an act done by the contractor's servants in the course of rebuilding the defendant's house; and that act was done after the undertaking to pull down the defendant's house had begun, and before the work of putting it up again was completely finished. It is true that the workmen did something which ought not to have been done, but it was unskilfully and negligently done with the intention of completing the house; and it is immaterial whether the workmen did the act of their own accord, or under the directions of the architect, for a duty is imposed upon the defendant to see that the person employed to do that which he has undertaken to do, shall do it so as not to injure the plaintiff's house.

The defendant, although absent, is liable if the persons, who are doing that which he has undertaken to do, omit to perform the duty which he himself, if present, would have been bound to perform.

It was said that the workmen had only been ordered to fix the wooden staircase, and not to tamper with the wall, and that if they had only been employed for that purpose, or if the defendant had only undertaken from the beginning to erect a

staircase in the way in which it was intended to be erected, and that then the workmen had tampered with the wall so as to cause the accident, the defendant would not be liable. I agree to that proposition if the defendant had only intended to put up a wooden staircase which was not to be affixed to the wall, even if the contractor's workmen had chosen to tamper with the wall; because such a work if done with reasonable care would not endanger the plaintiff's house. Such an instance would not come within the rule laid down.

The only way to deal with this case is to see what, as a whole, the defendant intended and undertook to do; now the intention and undertaking of the defendant was to pull down the house and to build up a new one; and therefore he would be liable for every act committed or omitted to be done during that period—whether by the contractor and his servants, or by himself—which did not insure the safety of the plaintiff's house. I am of opinion that the judgment of the Court below was right.

HOLKER, L.J.—I am unable to agree with my learned brethren, and I think that this appeal ought to be allowed. The question depends upon the real decision in *Bower v. Peate* (6). It had been decided by a long series of cases prior to that decision, that if a man employed a competent contractor to do work for him, and that contractor or his servants, by the negligent way in which they did the work, or from any other cause, produced injury to a third person, the man who so employed the contractor was not liable; but he was liable for the negligent acts of his servants in the course of their employment, but not for the acts of his contractors. *Bower v. Peate* (6) has not interfered with that doctrine, but is merely an exception to that rule. There are several other exceptions—for instance, if a man employed a contractor to do work which he, the employer, was bound to do under the provisions of an Act of Parliament, and injury resulted therefrom, he would be liable, and so also if he employed a contractor to do work which necessarily produces injury. *Bower v. Peate* (6) seems to introduce a

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more extensive exception, the ground upon which it is based being thus explained by Chief Justice Cockburn—"The answer to the defendant's contention may, however, as it appears to us, be placed on a broader ground, namely, that a man who orders a work to be executed, from which in the natural course of things injurious consequences to his neighbour must be expected to arise, unless means are adopted by which such consequences may be prevented, is bound to see to the doing of that which is necessary to prevent the mischief, and cannot relieve himself of his responsibility by employing some one else, whether it be the contractor employed to do the work from which the danger arises, or some independent person, to do what is necessary to prevent the act which he has ordered to be done from becoming wrongful." The House of Lords in *Dalton v. Angus* (5) came to the conclusion that *Bower v. Peate* (6) was rightly decided, and Lord Blackburn there said, "The second defence is a question of pure law. Ever since *Quarman v. Burnett* (10) it has been considered settled law that one employing another is not liable for his collateral negligence unless the relation of master and servant existed between them. So that a person employing a contractor to do work is not liable for the negligence of that contractor or his servants. On the other hand, a person causing something to be done, the doing of which casts on him a duty, cannot escape from the responsibility attaching on him of seeing that duty performed by delegating it to a contractor." Then Lord Watson also says, "Upon the point of law which was not remitted to the learned Judges who favoured the House with their opinions upon the main questions arising in this appeal, I agree with your Lordships. The operations of the commissioners were obviously attended with danger to the building in question; but these appellants seek to shelter themselves from responsibility by proving that they bound their contractor to adopt all measures necessary for ensuring the safety of the building. When an employer contracts for the performance of work which, properly conducted, can occasion no risk to

(10) 6 Mee. & W. 499; 9 Law J. Rep. Exch. 308.

his neighbour's house which he is under obligation to support, he is not liable for damage arising from the negligence of the contractor. But in cases where the work is necessarily attended with risk he cannot free himself from liability by binding the contractor to take effectual precautions. He is bound, as in a question with the party injured, to see that the contract is performed, and is therefore liable, as well as the contractor, to repair any damage which may be done."

The doctrine laid down in *Bower v. Peate* (6), therefore seems to be this—that a man who contracts for work, the performance of which will, or which probably will, produce hazard to the property of his neighbour, is bound to see that the work is done in such a manner as to avoid the hazard. If the work cannot be done without certain precautions being taken, he must take care that such precautions are effectually taken; and whether, owing to the ignorance or negligence of the contractor or himself, such precautions are not taken, makes no difference, for he must be liable. The chief question here is what was the hazard, or what produced the hazard to the plaintiff's building. It was said that what produced the hazard was the taking down and building up again the house of the defendant; and that because the defendant did not take down and build up again the house so that at the end of the work the plaintiff's house was just as secure as it was before, therefore the defendant is liable. I admit that if the whole of the work is to be taken together some, but not all, of the operations were hazardous to the plaintiff's house. The operation which was likely to produce danger to the plaintiff's house, was the operation of taking down the defendant's house and of excavating lower than the plaintiff's house, and therefore of doing that which would probably cause a subsidence of the plaintiff's building. But after that operation had been properly and effectually done, there was nothing else that would produce hazard to the plaintiff's house; and there was no reason to suppose that the plaintiff's house would give way.

The next question is, whether assuming that all the work is to be taken into con-

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sideration as a whole, the duty was imposed upon the defendant to protect the plaintiff's building from injury in every possible way, at all times during the performance of the hazardous operation. If that is the question, I admit that my learned brethren are right. But to my mind the question is, whether work which the workmen were ordered to do, but who exceeded their duty and were guilty of negligence in so doing it, produced hazard to the plaintiff's building. If the work did produce hazard, then it was the duty of the defendant to see that all proper precautions were taken, and he would be liable for any negligence on the part of such workmen.

The workmen here were ordered to fit in a staircase from the ground floor to the basement; but such staircase, according to the instructions given, was not to be fitted into the wall. Was that a piece of work which could not be performed without hazard to the plaintiff's building? Now the period at which the instructions were given is the time at which to ascertain whether the work is hazardous or not. It seems to me that the work was not hazardous; the workmen exceeded their duty, and came to a wrong conclusion that it was right and proper to cut away a portion of this wall, and it would be very extraordinary if this liability were to prevail. It is admitted that if the putting up of this staircase were the only work to be done, and that if the contractor had ordered the workmen to put up the staircase in the manner described, and that if an accident had happened in consequence of the workmen weakening the wall as was done in the present case, there the defendant would not be liable. If it is to be said that the defendant is to be liable for all accidents that happen to the plaintiff's building during the performance of the hazardous operations, then I am of opinion that the hazardous operation was over when the walls had been properly constructed so as to give the same support to the plaintiff's house that it had before. It would be a strange consequence if, after a house had been pulled down and built up again, and after everything but a few trifling matters had been completed, some work is ordered to be done which in itself

is not of a hazardous character, and those who are employed to do it, do it in such a manner as to produce injury, that the owner of the house should be liable, but that he should not be liable if that work had been delayed for a few months, and had then been executed by another contractor.

For these reasons I am unable to come to the same conclusions as my Lords have arrived at, and I think that this appeal ought to be allowed.

Appeal dismissed.

Solicitors—Apps, for plaintiff; Hughes, Hooker, Buttanshaw & Thunder, for defendant.

1882.
Feb. 23, 24.
April 5.

THE CHARTERED MERCANTILE
BANK OF INDIA, LONDON AND
CHINA v. THE NETHERLANDS
INDIA STEAM NAVIGATION
COMPANY (LIMITED).

Ship and Shipping—Exceptions in Bill of Lading—Collision between Ships belonging to same Owners—Default of Servants—Excepted Perils—Measure of Damages—Both Ships in fault.

Goods were shipped by the plaintiffs on a vessel of the defendants, under a bill of lading containing exceptions, among others, "of loss and damage from collision . . . and accidents, loss or damage from any act, neglect or default whatsoever of the pilots, master or mariners or other servants of the company in navigating the said ship."

The ship came into collision on the voyage with another ship belonging also to the defendants, and the jury found that, though both ships were in fault, the chief blame was to be attached to the latter ship. The goods were lost, and the plaintiffs sued to recover their full value on the contract to carry safely contained in the bill of lading:—

Held, that the defendants were liable—first, because the exception of "collision" did not apply to a collision which was brought about mainly by the negligence of

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the defendants' servants engaged in navigating the other ship.

Secondly, because the defendants had failed to shew that the loss was occasioned wholly by the neglect or default of those who were navigating the carrying ship, and, consequently, they were not protected by the other exceptions in the bill of lading.

This was an action brought by the shippers of specie against the owners of the vessel in which it had been shipped, to recover for its loss, which occurred by reason of a collision between the carrying vessel, the *Crown Prince*, and another vessel, the *Atjeh*, which also belonged to the same owners, the defendants.

The bill of lading contained exceptions of (among other matters) "collision, accidents, loss or damage, from any act, neglect or default whatsoever of the pilots, master or mariners, or other servants of the company in navigating the ship."

At the trial at the Guildhall, before Manisty, J., and a special jury, the findings were that the *Atjeh* was mainly in fault, but that the *Crown Prince* was also in some degree to blame.

The learned Judge left the parties to move for judgment.

C. P. Butt, Q.C., Myburgh, Q.C., and Barnes, for the plaintiffs.

Benjamin, Q.C., Cohen, Q.C., and Raikes, for the defendants.

The facts and arguments and cases cited are fully referred to in the judgments.

Cur. adv. vult.

The following judgments were delivered:—

POLLOCK, B.—This is an action brought by the plaintiffs, who are bankers carrying on business in London, against the defendants, who are a joint-stock company (limited), constituted and duly registered pursuant to the Companies Act, 1862, having their head office in London, to recover the value of a quantity of specie, which, in the month of November, 1875, was shipped by the plaintiffs at Singapore, on board the defendants' steamship called *Wm. Kroon Prins de Nederlanden* (which I shall call the *Crown Prince*, for the sake of brevity), to be carried by the defend-

dants from Singapore to Sourabaya, and there delivered in good order and condition to the order of the plaintiffs, they paying freight for the same upon the terms of the bill of lading, which contained the following exceptions: "The act of God, the king's enemies, restraint of princes and rulers, pirates or robbers by sea or land, accidents, loss and damage from vermin, barratry, jettison, collision, fire, machinery, boilers, steam, and all the perils, dangers and accidents of the sea, rivers, land carriage and steam navigation, of whatsoever nature and kind soever, and accidents, loss or damage, from any act, neglect or default whatsoever of the pilots, master or mariners, or other servants of the company, in navigating the ship, or from any deviation excepted."

The *Crown Prince* sailed from Singapore on her voyage to Sourabaya, and in the course of it she came into collision with another steamship of the defendants, called the *Atjeh*, and was sunk, with the plaintiff's specie on board. Some of the specie was recovered, and the action is brought to recover the value of the residue which was lost.

The plaintiffs alleged by their statement of claim (in paragraph 4) that the collision was caused by the negligence of the defendants' servants on board the *Atjeh*, and that the loss of the specie was not caused by any of the perils excepted in the bill of lading.

The defendants, by their statement of defence, admitted that their steamship the *Crown Prince* in the course of the voyage came into collision with their steamship called the *Atjeh*, and was sunk with the plaintiffs' goods on board; but they denied that the collision was caused by negligence, and alleged that if it was so caused, such negligence was wholly that of their servants on board their ship the *Crown Prince*, and that such negligence is one of the perils specially excepted in and by the bill of lading.

The defendants also denied the allegation in the 4th paragraph of the plaintiff's statement of claim, that the loss was not caused by any of the perils excepted by the bill of lading. In other words, they alleged that the loss was caused by a peril or by perils excepted by the bill of lading.

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The plaintiffs joined issue upon the defendants' statement of defence.

The cause came on for trial at the Guildhall sittings on the 15th of December last, before Manisty, J., and a special jury.

A great deal of evidence was given on both sides as to the cause of the collision, and in the result the jury found that the *Atjeh* was mainly in fault, but that the *Crown Prince* was also in some degree to blame.

Upon these facts it was contended before us on the part of the plaintiffs that the defendants are liable for the loss of the specie, first, by reason of the contract into which they had entered by the bill of lading for the carriage of it; and secondly, that they are liable in *tort*, as owners of the *Atjeh*, for the negligence of their servants, the master and the crew of that vessel, whereby the collision was mainly occasioned.

In the view which I have taken of this case it becomes unnecessary to consider the questions which arise out of the second contention; as to the first question, it was suggested for the defendants that the contract contained in the bill of lading was not governed by English law. I cannot, however, think that there is room for serious argument upon this point.

The goods were shipped at an English port, the plaintiffs are an English company. The defendants are a limited company whose registered office is in London, and by their memorandum of association they describe as one of the objects for which the company is established, the hiring of vessels. The bill of lading is in the English language throughout, and the defendants are therein described as "The Netherlands India Steam Navigation Company, Limited," which obviously has reference to the Companies Act, 1862, whereby the liability of the members of limited companies is limited to the amount unpaid on the shares held by them, or to the amount which the members may undertake by the memorandum of association to contribute to the assets of the company in the event of its being wound up. Under all these circumstances, adopting the well-known rule of law acted upon in *Lloyd v. Guibert* (1), the law of the place where the

(1) 35 Law J. Rep. Q.B. 34; Law Rep. 1 Q.B. 115.

contract is made is *prima facie* that which the parties intended or ought to be presumed to have adopted as the footing upon which they dealt, and there exist here none of those facts from which the Court were in that case led to infer the contrary. Assuming then that the English law governs, two matters must be dealt with before the liability of the defendants' case be determined; namely, first, What is the true construction of the bill of lading? and, secondly, Have the defendants succeeded in shewing that the event whereby the loss of the plaintiffs' specie was occasioned was within the excepted perils? With regard to the perils excepted by the bill of lading they may be divided into two classes: first, those which are dealt with by the first clause and mentioned by name, one of these being "collision"; and secondly, those which are covered by the second clause, which provides for "accidents," "loss or damage from any act, neglect or default whatsoever of the pilots, masters or mariners, or other servants of the company in navigating the ship," which would include all acts so caused, and therefore, *inter alia*, collision, if it was caused by the neglect or default of the defendants' servants in navigating the *Crown Prince*.

Dealing first with the second of these clauses, it is obvious that had the loss been occasioned wholly by those who were navigating the *Crown Prince*, the defendants would have been protected; but the jury having found that the crew of the *Atjeh* were mainly in fault, although the *Crown Prince* was also in some degree to blame, it appears to me that the defendants are not protected by this clause, inasmuch as they have not succeeded in shewing that the loss was occasioned wholly by the neglect or default of those who were navigating the *Crown Prince*.

With respect to the first clause there is no doubt that the loss in question was occasioned by collision, and the only question that arises is whether the word "collision" as here used applies to a collision which was mainly brought about by the negligence of those who were servants of the defendants engaged in the navigation of one of their vessels other than that in which the specie was shipped. It is necessary here to bear in mind that the

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clause in question is inserted in limitation of the common law liability, which would otherwise attach to the defendants in the discharge of their duty as carriers, and should its intention and effect be open to doubt it must be construed most strongly against the carriers. This proposition is very clearly dealt with by Mr. Justice Story, in section 512*a* of his work on *Bailments*, in which, speaking of the well known and long established exception contained in maritime contracts for the carriage of goods of "perils of the sea," he says—"The phrase 'perils of the sea,' whether understood in its most limited sense as importing a loss by natural accidents peculiar to that element, or whether understood in its more extended sense as including inevitable accidents occurring upon that element, must still in either case be understood to include such losses only to the goods on board as are of an extraordinary nature or arise from some irresistible force or from inevitable accident, or from some overwhelming power which cannot be guarded against by the ordinary exertions of human skill and prudence. Hence it is that if the loss occurs by a peril of the sea which might have been avoided by the exercise of any reasonable skill or diligence at the time when it occurred, it is not deemed to be, in the sense of the phrase, such a loss by the perils of the sea as will exempt the carrier from liability, but rather a loss by the gross negligence of the party." The same principle of construction has been acted upon by the English Courts and applied to the case of a loss occasioned by collision. Thus in *Lloyd v. The General Iron Screw Collier Company (Limited)* (2) it was held that the exception in the bill of lading of accidents or damage of the seas, rivers and steam navigation of whatever nature or kind soever, did not exempt the shipowner from responsibility for the loss of goods which arose from a collision caused by the negligence of the master or crew. This decision was discussed and followed in *Grill v. The General Iron Screw Collier Company (Limited)* (3). A similar construction was given to a bill

of lading which contained a clause that the shipowner is not to be accountable for leakage or breakage—in the earlier case of *Phillips v. Clark* (4), and more recently in *Czech v. The General Steam Navigation Company* (5). These cases shew that but for the general words excepting the neglect or default of the defendants' servants in navigating the *Crown Prince*, the defendants would not be protected in the event of a collision occasioned by such neglect or default; and as there are no words in the bill of lading which apply to a collision arising from the neglect or default of the defendants' servants in navigating another vessel, the word "collision" itself is of no avail; and it is hardly necessary to add that where goods are damaged by reason of a collision occasioned by the fault of the master or crew of a vessel other than that in which they are shipped, or by the default of those on board both vessels, the owner of the carrying vessel, in the absence of an express stipulation to the contrary, is liable for the loss. The law as to this will be found in 3 *Kent's Commentaries*, Lecture xlvii. s. 5, and in *Parson's Law of Shipping*, vol. i. p. 260.

It was pressed upon us by the defendants' counsel in argument that it bore hardly upon the defendants to extend their liability beyond the negligence of those of their servants who were engaged in carrying out the contract of carriage, and that it ought not to be supposed that under any circumstances they could intend to make themselves liable for the acts of their servants who were navigating another vessel, whose duties had no connection with the performance of the contract for carriage upon which the plaintiffs are suing.

There is much that is plausible in this, but it only raises in another form the question already answered, by saying that the defendants, as carriers, are liable for all events, other than the act of God, which they have not excepted by their bill of lading; although, if the collision had taken place between two ships which were the only vessels owned by the defendants, and these were engaged in wholly different

(2) 3 Hurl. & C. 284; 33 Law J. Rep. Exch. 269.

(3) 35 Law J. Rep. C.P. 321; Law Rep. 1 C.P. 600.

(4) 2 Com. B. Rep. N.S. 256; 26 Law J. Rep. C.P. 167.

(5) 37 Law J. Rep. C.P. 3; Law Rep. 3 C.P. 14.

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voyages and happened to meet by accident upon the high seas, the result might appear to be more unforeseen and peculiar than in the present case. It must be remembered that the defendants are owners of ships which are engaged in a carrying trade between certain fixed ports and which make regular voyages over the same seas, and in saying that they are liable for a loss occasioned by the negligence of their crews on board a vessel other than that in which the plaintiffs' goods are shipped, it is only applying a rule, the equity of which would not be contested if it were applied to a carrying company who own a large fleet of vessels trading in such a manner to and from a port that in the course of their voyage they would constantly pass or meet in a river or harbour, or would be brought up in close proximity to the same landing wharf.

The liability of the defendants being established, a question still arises, What is the proper amount of damages? Until recently, the defendants, who had contracted to carry the specie in question from Singapore to Sourabaya, and had failed to do so by reason of a peril, against the occurrence of which they were not protected by the contract of carriage, must have been held to be liable for the full value of the specie. A doubt, however, has been raised by reason of the language contained in section 25 sub-section 9 of the Judicature Act, 1873.

The language of that sub-section is as follows: "In any cause or proceeding for damages arising out of a collision between two ships, if both ships shall be found to have been in fault, the rules hitherto in force in the Court of Admiralty, so far as they have been at variance with the rules in force in the Courts of common law, shall prevail."

If this provision is applicable to the present case, inasmuch as both the *Crown Prince* and the *Atjeh* were found by the jury to have been in fault, the Court of Admiralty rule must be held to apply; and that rule is, that where both parties to a collision are to blame they must share the loss equally. See *The Milan* (6) and *Hey v. Le Neve* (7).

(6) Lush. 388.

(7) 2 Shaw, Sc. App. Cas. 395.

The language of this sub-section is, no doubt, very general; but, before effect is given to it, it would seem necessary to refer to what was the condition of the law before the passing of the Judicature Act. The only cause or proceeding for damages arising out of a collision between two ships, in which the rules in force in the Court of Admiralty were at variance with those in force in the Courts of common law, were cases in which actions were brought by the owner of one ship against the owner of another ship, or by the owner of goods on board one ship against the owner of another ship in respect of a collision. In either of these cases the Admiralty rule and the common law rule with respect to damages differed, the Admiralty rule being as I have already expressed it, and the common law rule being that, where both vessels were in fault, in the sense that those navigating the plaintiffs' ship were guilty of negligence which substantially contributed to the collision, the plaintiffs could not recover.

It was, I apprehend, to prevent this variance, and to make the practice in both Courts uniform, that this sub-section was passed; but it seems to me equally clear that its effect must be confined to those cases in which such variance previously existed. Where the action is brought, not by one ship-owner or goods-owner against a ship which has run into the carrying vessel, but by the goods-owner who seeks to enforce the contract for carriage against the owner of the ship to whom he has entrusted his goods, no such variance in practice could arise. The result, therefore, is that there will be a verdict and judgment for the plaintiffs, the damages to be agreed.

MANISTY, J.—I concur with my learned brother Pollock in the conclusion at which he has arrived, and in the reasons which he has stated in support of them; but, as the case is somewhat novel, and it will probably be submitted to a higher tribunal, I wish to add a few observations of my own as to the liability of the defendants upon their contract.

The question which lies at the root of the case is, to what cause ought the loss of the plaintiffs' goods to be attributed?

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Doubtless the collision of the defendants' ship the *Crown Prince* with the defendants' ship the *Atjeh* was the *causa proxima*; but, according to the finding of the jury, the negligence of the defendants' servants on board the two ships was the *causa causans*—in other words, the efficient cause of the loss.

Now it is a settled rule of law that in the case of an action on a contract of marine insurance, regard is to be had to the *causa proxima*—*Thompson v. Hopper* (8); but in the case of an action for breach of a contract contained in a bill of lading, regard is to be had to the *causa causans*—see *Lloyd v. The General Iron Screw Collier Company* (2), cited by my brother Pollock.

It was conceded on the part of the defendants that, but for the express exception of negligence of their servants on board the *Crown Prince*, they would have been liable for the loss in question, notwithstanding "collision" is one of the excepted perils in the bill of lading; but they contend that, without any express exception of the negligence of their servants on board the *Atjeh*, they are protected by the exception of "collision."

I am unable to see any sound ground for the distinction between the negligence of the defendants' servants on board the *Crown Prince*, and similar negligence of their servants on board the *Atjeh*.

No authority was cited in support of it, but it was contended that there was an implied contract in the bill of lading that the defendants' servants on board the carrying ship (the *Crown Prince*) would use all reasonable care to carry safely, and consequently it was necessary expressly to except their negligence, whereas there was no such implied contract with respect to their servants in any other ship, and therefore there was no need of any express exception of their negligence. It seems to me that this argument admits a ready answer—namely, that there is no implied contract whatever in the case. The contract contained in the bill of lading is express—namely, to carry the goods safely and deliver them in good order and condition, subject to certain specified ex-

(8) E. B. & E. 1038; 27 Law J. Rep. Q.B. 441.

ceptions, which do not include the negligence of their servants on board their ship *Atjeh*.

Having regard to the finding of the jury—namely, that the *Atjeh* was mainly to blame, but that the *Crown Prince* was in some degree to blame—I think the defendants are liable, by virtue of their contract, for the whole of the loss.

STEPHEN, J.—I have nothing to add to the judgment of my brother Pollock, in which I concur.

Judgment for the plaintiffs.

Solicitors—Waltons, Bubb & Walton, for plaintiffs; Lovell, Son & Pitfield, for defendants.

1881. } THE QUEEN v. PAGET.
Dec. 14, 20. }

Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), ss. 6 and 35—Railway Clauses Consolidation Act, 1845 (8 Vict. c. 20), ss. 103, 145, 146, 147—Penalty—Criminal Offence—"Civil debt"—Distress Warrant—Imprisonment.

[For the report of the above case, see 51 Law J. Rep. M.C. 9.]

1881. } THE GUARDIANS OF THE POOR
Dec. 19. } OF SUNDERLAND (*appellants*)
v. THE CLERK OF THE PEACE
OF THE COUNTY OF SUSSEX
(*respondent*).

Poor Law—Settlement by Residence—Removal to Parish in the same Union—39 & 40 Vict. c. 61. s. 34.

[For the report of the above case, see 51 Law J. Rep. M.C. 33.]

[IN THE QUEEN'S BENCH DIVISION AND
IN THE COURT OF APPEAL.]

1882. { WESTON AND OTHERS v. THE
Feb. 28. { MANAGERS OF THE METROPO-
May 5. { LITAN ASYLUM DISTRICT.*

*Landlord and Tenant—Breach of Cove-
nant by Lessee—Reddendum Clause—
Proviso for Re-entry—Forfeiture—Rights
of Lessor—Alternative Remedy.*

A lease granted by the plaintiffs for a term of years, contained a covenant on the part of the lessees and their assigns, not to carry on upon the premises demised any offensive trade or occupation, nor to do or suffer to be done anything which might be or grow to the damage or annoyance of the lessors. The reddendum clause of the deed in question contained a provision that, in addition to the rent reserved, a further rent should become payable if any offensive trade or occupation were carried on, or things were done which were covenanted not to be done upon the premises. There was also a proviso for re-entry in the lease for non-payment of the rent reserved, or of the further rent, in case the same should become payable and were in arrear, or if and whenever there should be any breach of covenant on the part of the lessees or their assigns.

In an action brought against the defendants, as assignees of the lease, to recover possession of the premises for a breach of the above covenant,—

Held, that the lessors were entitled to re-enter for the breach of covenant complained of, they having the right, under the terms of the lease, either to demand the increased rent or to treat the act complained of as a forfeiture.

This was a demurrer to a statement of defence in an action brought for the recovery of certain premises by the plaintiffs, as lessors, against the defendants, who were in possession under an under-lease, upon a forfeiture for breach of covenant.

The statement of claim alleged that in the lease the lessees covenanted for themselves, their heirs, executors, administrators and assigns, that they would

* *Coram* Mathew, J., and Cave, J., in the Queen's Bench Division; Brett, L.J., and Cotton, L.J., in the Court of Appeal.

not at any time during the said term cut, maim, injure, or suffer to be cut, maimed or injured, any of the principal timbers, walls or joists of the said messuage and premises, or make any alterations therein, or exercise or carry on, or suffer to be exercised or carried on upon the said premises or any part thereof, certain offensive trades or occupations mentioned in the deed, or any offensive, noisome or noisy trade or business whatsoever; nor do or suffer to be done anything which might be or grow to the damage or annoyance of the lessors, their heirs or assigns, or any of their tenants.

The deed contained a clause of re-entry, entitling the plaintiffs to re-enter upon the said premises in case of a breach of the aforesaid covenant, and of any of the covenants therein contained, on the part of the lessees, their executors, administrators and assigns.

During the term the defendants made divers alterations in the premises, contrary to the covenant in the deed, which were converted from a dwelling-house into a dépôt for ambulances, horses, drivers and nurses engaged in the removal of small-pox patients.

The material part of the statement of defence was as follows:—

The reddendum clause in the deed is as follows:—

“Yielding and paying during the said term unto the lessors, their heirs and assigns, the net yearly rent of 30*l.* . . . and also yielding and paying unto the lessors, their heirs or assigns, the further net yearly rent of 25*l.* . . . in case any of the trades, occupations or things hereinafter covenanted not to be carried on or done upon the said premises, shall be carried on or done, the first payment of such last-mentioned rent to be made on the first of the days of payment of rent hereinbefore mentioned as shall happen next thereafter, and such last-mentioned rent to continue and be paid thenceforth during the residue of the said term.”

The clause for re-entry was as follows:—
“Provided always, and these presents are upon this express condition, that if the said net yearly rent of 30*l.* hereinbefore reserved, or the said further rent of 25*l.* (in case the same shall become payable), or

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any part thereof respectively shall be in arrear for twenty-one days, or if and whenever there shall be any breach of the covenants hereinbefore contained on the part of the lessee, his executors, administrators and assigns, then it shall be lawful for the lessors, their heirs or assigns, into and upon the said premises or any part thereof to re-enter," &c.

The plaintiffs demurred to the above paragraphs of the statement of defence on the ground that it was consistent with the reddendum clause and the clause for re-entry that the plaintiffs should be entitled to re-enter for the breach of covenant.

Fullarton appeared in support of the demurrer.—The lessors had an alternative remedy under this lease; it was optional with them to treat the act complained of as a forfeiture, or to waive the forfeiture, and in that case demand an increased rent. This is the reasonable construction of the lease, and carries out the intentions of all parties. He cited *The Mayor of London v. Pugh* (1), *Barrett v. Blagrove* (2), *French v. Macauls* (3), *Bringloe v. Goodson* (4) and *Cole v. Sims* (5).

Proudfoot, in support of the statement of defence.—The clause of forfeiture is controlled by the earlier part of the lease. The deed must be read as if permission were given to carry on any of the specified trades upon payment of an increased rent. He cited *Legh v. Lillie* (6), *Payler v. Hommersham* (7), *Sicklemore v. Thistleton* (8) and *Woodford v. Gyles* (9).

MATHEW, J.—I am of opinion that this demurrer should be allowed. Mr. Fullarton has contended on behalf of the plaintiff that there was a breach of covenant, and that under the condition of re-entry the term was forfeited. Mr. Proudfoot contended, on the other hand, that there was no breach of covenant, and therefore no forfeiture. The question is, therefore,

- (1) 4 Bro. P.C. 395.
- (2) 5 Ves. 555.
- (3) 2 Dr. & W. 269.
- (4) 5 Bing. N.C. 738; 8 Law J. Rep. C.P. 116.
- (5) 5 De Gex, M. & G. 1; 23 Law J. Rep. Chanc. 258.
- (6) 6 Hurl. & N. 165; 30 Law J. Rep. Exch. 25.
- (7) 4 M. & S. 423.
- (8) 6 M. & S. 9.
- (9) 2 Vern. 119.

what the lease means. The lease contains a covenant not to carry on certain specified trades, or any other offensive trade or business, and there is a clause of re-entry in case of a breach of any of the covenants entered into by the lessees. But Mr. Proudfoot has contended that we must look at the terms of the reddendum, one of which, as he argues, is that the lessees are to be at liberty to carry on the trades prohibited by the covenant on condition that they paid an increased rent as provided for by the reddendum. It has, however, been pointed out on behalf of the plaintiffs that in the reddendum itself those very things are treated as breaches of covenant. I confess I cannot construe the reddendum clause as meaning that the lessees are entitled to do the things mentioned in the covenant upon the terms of paying an additional rent. Mr. Fullarton has argued that the additional rent must be treated as a penal rent, but not as shewing that there has been no breach of covenant, and I think his contention must prevail. The demurrer must therefore be allowed.

CAVE, J.—I am of the same opinion. The deed gives in my judgment an alternative remedy to the lessors, and there is no reason why it should not. Either of the remedies alone might be insufficient. If the breach of covenant was trivial, and rents were down, forfeiture might be a very undesirable remedy for the lessors to insist upon. On the other hand, if the breach was a serious one, the extra rent of 25*l.* would be utterly inadequate. If the defendants' contention were correct the lessees might, upon payment of this extra rent, use the premises to carry on any trade, however offensive. Would this be reasonable? I think not, and cannot so construe the lease. I read it as plainly importing a covenant not to do the specified thing, an interpretation which gives a sensible meaning to the whole deed. For these reasons I agree that the demurrer must be allowed.

The defendants appealed.

May 5.—*Grantham, Q.C.*, and *E. Clarke, Q.C.* (*Proudfoot* with them), for the defendants.

Sir H. Giffard, Q.C., and *Fullarton*, for the plaintiffs, were not called upon.

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BRETT, L.J.—I am unable to see any real doubt in this case. It seems to me that the judgment of the Court below was perfectly right, and for the reasons given. Here is a lease with separate covenants, among which are several covenants by the lessee not to do certain things. There is a clause for re-entry, which is in very plain and express terms. The question is, whether there is anything contained in the lease which can cut down the plain meaning of the clause for re-entry. It is said there is, and that the meaning of that clause is cut down by the reddendum clause, which contains a stipulation that, in case of the breach of certain covenants not to injure the structure of the building, nor carry on certain noisy and objectionable trades, the lessee shall be liable to pay an increased rent of 25*l.* a year. If that clause were drawn in such a way that it could not be read without cutting down the meaning of the clause for re-entry—that is, if it could not be read consistently with the latter clause—I think that it ought to be read so as to cut it down. In construing a document, the rule is to read the parts of the document altogether, according to the plain terms of each part, provided that they are not inconsistent. It seems to me that the terms of the two clauses in this case are made perfectly consistent by holding that the lessor has the option, in case of breaches of the particular covenants, to re-enter, or if he prefers not to do so, to demand that the lessee should pay an increased rent. It was said that this was an unilateral covenant in favour of the lessor; but it can also be read in favour of the lessee. These two covenants can be read independently of each other, so as to give the lessor an option either to re-enter or to accept an increased rent. I am of opinion that this appeal must be dismissed.

COTTON, L.J.—I am of the same opinion. It is said that under the clause for re-entry the lessor would have a clear right to re-enter except for the covenant which provides that in case of a breach of certain covenants an additional rent shall be paid by the lessee. It is said that that term is inconsistent with the right to re-enter on breach of the covenants in respect

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of which the extra rent is to be paid. But that contention cannot prevail.

Now there are two alternatives here; the lessor may either re-enter or he may not desire to do so. The additional rent is only to be paid if the lessor continues the term of the lessee after the act has been done. The lessor can put an end to the term and to all the rent payable during it; but if he does not do so, then the lessee is bound to pay the additional rent. It was said that a question might arise as to whether the sum payable as additional rent was payable by way of penalty or as liquidated damages; but here there is an agreed rent, and not a penalty to be enforced. I am therefore of opinion that this appeal fails.

Appeal dismissed.

Solicitors—Perkins & Weston, for plaintiffs;
Rogers, Sons & Russell, for defendants.

[IN THE COURT OF APPEAL.]

1882. } SUFFELL v. THE BANK OF
April 28. } ENGLAND.*

Bank of England Note—Alteration of Number of Note—Material Alteration—Bona fide Holder for Value—Right of Action.

The alteration of a Bank of England note, by erasing the number upon it and substituting another, is a material alteration which avoids the instrument, so that a bona fide holder for value cannot afterwards maintain an action upon such note.

Appeal by the defendants from a judgment of Lord Coleridge, C.J., on further consideration.

Action by the plaintiff as *bona fide* holder for value of Bank of England notes—ten of 20*l.* each and six of 50*l.* each—alleging that payment had been demanded of the defendants and refused.

Certain notes had been obtained from Payne, Smith & Co., bankers in London, by a forged cheque; these notes were

* *Coram* Jessel, M.R.; Brett, L.J.; and Cotton, L.J.

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changed at the Bank of England for the notes sued upon in this action, which notes were bought by the plaintiff, a banker at Brussels, in the ordinary way of his trade. The numbers of the notes in question had been erased and others substituted; payment also had been stopped at the bank, and a notice specifying their original numbers had been issued. At the trial the jury were discharged, and on further consideration Lord Coleridge, C.J., gave judgment for the plaintiff.

The defendants appealed.

Cohen, Q.C., and *H. D. Greene*, for the appellants.—The authorities lay down that the alteration must be material; but a bank note differs from other notes, as to alter the number is by 24 & 25 Vict. c. 98 made a felony, and it was held in *The Queen v. Keith* (1) that, under a similar statute, an alteration of any part of the note altered the note itself. A bank note is a promise to pay the amount to a person who presents the note with that number, so that the ordinary rule that the variation must, to be material, alter the obligation of the party does not apply to this case. In *Master v. Miller* (2) the alteration of the date avoided the instrument. The true doctrine is, that if the alteration is made in such a part of the instrument as to lead to the presumption that it is made for the purpose of destroying the identity of the instrument, there the instrument is vitiated—*Davidson v. Cooper* (3), *Burchfield v. Moore* (4) and *Leake on Contracts*, p. 808. The doctrine as to the vitiation of an instrument by reason of an alteration is founded upon considerations of public policy, and especially as stated by Lord Kenyon in *Master v. Miller* (2), "because no man shall be permitted to take the chance of committing a fraud without running any risk of losing by the event when it is detected." The alteration here is such as to indicate an intention to defraud, and therefore *Master v. Miller* (2) is applicable. It is well established by the cases, that if a person

has altered an instrument in such a manner that the instrument, when altered, embodies a different contract from that contained in the original instrument, there the instrument is vitiated. Here the contract is to pay a note bearing a particular number, but if the number is altered, it is plain that the contract is altered. The authorities must be confined to the cases of ordinary commercial instruments. A Bank of England note is of a higher class and has special incidents, and the principles applicable to it are more strict. By 3 & 4 Will. 4. c. 98. s. 6, a Bank of England note is made a legal tender for all sums above five pounds. By 7 & 8 Vict. c. 32. s. 4, the bank is bound to issue notes in exchange for bullion. A bank note has not the incidents of deliberate transfer as of holding and endorsement. Bank notes are treated not as goods or securities, but as cash—*Miller v. Race* (5), per Lord Mansfield; and see *Byles on Bills* (13th ed.), p. 9.

Having regard to these general incidents, the number must be a material part of the bank note. It is a test of whether the note is genuine or not, and it is important for the purpose of stopping notes. The cases shew that, whenever the alteration affects the instrument and not merely the contract between the parties, as distinguished from adding something to or writing words on it which in law or in fact were superfluous, it is a material alteration—*Calvert v. Baker* (6). In *Catton v. Simson* (7) the distinction is drawn between an alteration and a mere addition of words. In *Trapp v. Spearman* (8) it was not suggested that a material alteration is that which controls the rights of the parties. See also *Kershaw v. Cox* (9), *Knill v. Williams* (10), *Tidmarsh v. Grover* (11) and *Simmons v. Taylor* (12).

W. G. Harrison, Q.C., and *C. H. Anderson*, for the respondent.—The doctrine in *Master v. Miller* (2) is confined to cases

(5) 1 Burr. 452; 1 Smith's L. Cas. 527-533.

(6) 4 Mee. & W. 417.

(7) 8 Ad. & E. 136; but see *Gardner v. Walsh*, 5 E. & B. 83; 24 Law J. Rep. Q.B. 288.

(8) 3 Esp. 57.

(9) Ibid. 246.

(10) 10 East, 431.

(11) 1 M. & S. 735.

(12) 4 Com. B. Rep. N.S. 463; 27 Law J. Rep. O.P. 46, 248.

(1) 24 Law J. Rep. M.C. 110.

(2) 4 Term Rep. 320; in error 5 ibid. 367, and 2 H. Black. 141; 1 Smith's L. Cas. 458-490.

(3) 13 Mee. & W. 343; 13 Law J. Rep. Exch. 276.

(4) 3 E. & B. 683; 23 Law J. Rep. Q.B. 47.

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where there is a material alteration in the contract. The meaning of "material" is that which has an effect on some contract or right contained in or arising out of the instrument itself—*Caldwell v. Parker* (13). In *Trapp v. Spearman* (8), Lord Kenyon, who was one of the Judges in *Master v. Miller* (2), held that the alteration must be in a material part, and from the note to *Cordwell v. Martin* (14), it appears that Lord Ellenborough held that if the addition of certain words had affected the responsibility of the acceptor, the bill would have been vitiated. See also *Hensfree v. Bromley* (15), *Waugh v. Russell* (16), *Sanderson v. Symonds* (17), *Trew v. Burton* (18) and *Collins v. Prosser* (19).

It appears from the judgment of Tindal, C.J., in *Crotty v. Hodges* (20), that *Calvert v. Baker* (6) is not to be relied upon. In *Burchfield v. Moore* (4) the material alteration was in the bill, which was the contract on which the defendant was being sued. The whole argument on behalf of the defendants rests on the application of the general rule that an alteration made by a stranger avoids the deed or instrument. Although the notes here have been obtained by fraud, there is no fraud as against the defendants, who have received full value for the notes.

Cohen, Q.C., replied.

JESSEL, M.R.—This appeal raises a very important question—namely, what is the effect of an alteration in the number of a Bank of England note as regards the liability of the bank to pay the note to an innocent holder for value?

The question depends partly upon general law, and partly upon special considerations affecting the peculiar nature of a bank note. It appears to me that the attention of Lord Coleridge was not directed to the important distinction which exists between a Bank of England note and an ordinary promissory note; but if it had been

I think it by no means probable that this decision would not have been to the same effect that it was. Another point to be remarked is, that a very large number of cases were cited in the Court below which are not technically binding upon this Court, but which were to a certain extent binding on that Court; and it may well be that, in differing from the judgment of Lord Coleridge, we are at liberty to do so by reason of that distinction.

First, as to the general law upon the subject, which I take to be settled now beyond dispute, it may be safer to cite the very words of the authorities which have settled the law. The leading case on the subject, which, from the time of James I when it was pronounced, has been so treated, is *Pigot's Case* (21), and whatever may be said of the third resolution in that case, no doubt or question has ever been raised as to the validity and application of the second resolution, which I will now read. "Secondly, it was resolved that when any deed is altered in a point material, by the plaintiff himself or by any stranger, without the privity of the obligee, be it by interlineation, addition, raising, or by drawing of a pen through a line or through the midst of any material word, the deed thereby becomes void."

So that the alteration must be in a point material, and the erasure of a single word which is material destroys the instrument. The next point to be determined—namely, whether the general rule of law which applied to deeds applied to documents not under seal—was raised in the well-known case of *Master v. Miller* (2), which was decided in the year 1791. There Lord Kenyon held that the rule which applied to instruments under seal applied also to documents not under seal. "That the alteration," said his Lordship, "in this instrument would have avoided it, if it had been a deed, no person can doubt. And why in point of policy would it have had that effect in a deed? Because no man shall be permitted to take the chance of committing a fraud, without running any risk of losing by the event when it is detected." Then he says, "The cases cited, which were all of deeds, were decisions

- (13) Ir. Rep. 3 Eq. 519, 526.
- (14) 1 Campb. 80, 81.
- (15) 6 East, 309.
- (16) 5 Taunt. 707.
- (17) 1 B. & B. 426.
- (18) 1 Cr. & M. 533.
- (19) 1 B. & C. 682.
- (20) 4 Man. & G. 561; 5 Sc. N.R. 221; 11 Law J. Rep. C.P. 289.

(21) 11 Rep. 265.

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which applied to and embraced the simplicity of all the transactions at that time; for at that time almost all written engagements were by deed only. Therefore those decisions, which were indeed confined to deeds, applied to the then state of affairs; but they establish this principle, that all written instruments which were altered or erased should be thereby avoided." Then Mr. Justice Ashurst says, "Now I cannot see any reason why the principle on which a deed would have been avoided should not extend to the case of a bill of exchange. All written contracts, whether by deed or not, are intended to be standing evidence against the parties entering into them. There is no magic in parchment or in wax; and a bill of exchange, though not a deed, is evidence of a contract as much as a deed; and the principle to be extracted from the cases cited is, that any alteration avoids the contract." I will not read the elaborate judgment of Mr. Justice Buller, because he was in the minority. The judgment of Mr. Justice Grose is very plain. "*Pigot's* (21) is the leading case; from that I collect, that when a deed is erased, whereby it becomes void, the obligor may plead *non est factum*, and give the matter in evidence, because at the time of plea pleaded it was not his deed; and secondly, that when a deed is altered in a material point by himself, or even by a stranger, the deed thereby becomes void."—I may say that by a stranger is there meant a person who is not a party or privy to the deed; and I say this, because in one of the cases cited, the meaning of the word "stranger" seems to have been forgotten.—"Now the effect of that determination is, that a material alteration in a deed causes it no longer to be the same deed. Such is the law respecting deeds; but it is said that that law does not extend to the case of a bill of exchange; whether it do or not must depend on the principle on which this law is founded. The policy of the law has been already stated—namely, that a man shall not take the chance of committing a fraud, and when that fraud is detected, recover on the instrument as it was originally made. In such a case the law intervenes and says that the deed thus altered no longer continues the same deed, and that no person can maintain an action upon it. In read-

ing that and the other cases cited, I observe that it is nowhere said that the deed is void merely because it is the case of a deed, but because it is not the same deed. A deed is nothing more than an instrument or agreement under seal; and the principle of those cases is that any alteration in a material part of any instrument or agreement avoids it, because it thereby ceases to be the same instrument. And this principle is founded on great good sense, because it tends to prevent the party, in whose favour it is made, from attempting to make any alteration in it. This principle, too, appears to me as applicable to one kind of instrument as to another." I have read those portions of the judgments because they distinctly state what the law is. That case went to the Exchequer Chamber, and there Lord Chief Justice Eyre says, "When it is admitted that the alteration of a deed would vitiate it, the point seems to me to be concluded; for, by the custom of merchants, a duty arises on bills of exchange from the operation of law, in the same manner as a duty is created on a deed by the act of the parties." And Lord Chief Baron Macdonald says, "I see no distinction as to the point in question between deeds and bills of exchange; and I entirely concur with my Lord Chief Justice in thinking there would be more dangerous consequences follow from permitting alterations to be made on bills than on deeds." The result is that the law, as settled by those cases, applied to all instruments in writing; and there was no distinction for this purpose between an instrument under seal, which is called a deed, and an instrument without a seal which is not a deed.

The only other case in the Exchequer Chamber is *Davidson v. Cooper* (3), which I mention because it is the only other case which is strictly binding upon this Court, and it is expressed in general terms. The action there was not on a bill of exchange but on a guarantee not under seal, although it had been rendered under seal by the alteration. The same doctrine had been applied since *Master v. Miller* (2) to various kinds of instruments not under seal—amongst others, to bought and sold notes, certain policies not under seal, &c.—and it has been fully recognised to be the law of England; nor was it disputed by the de-

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defendants here, nor by the plaintiff in the Court below, that that was the law.

The only question we have to determine is, the meaning of the words "material alteration"; it being agreed, and having regard to the authorities not now capable of dispute, that an instrument is avoided by a material alteration as against the person who would otherwise be liable upon it. It is to be observed that the decisions themselves are of extreme hardship, because it is assumed that the plaintiff is a *bona fide* holder for value, and that the defendant without any merit of his own gets rid of an obligation, at all events as regards that plaintiff, upon that instrument, and may perhaps, in some cases, get rid of the obligation altogether; although in others he might not, but would remain liable to be sued on some other contract which was not avoided by the alteration.

The first question to be considered is, whether this is an important or material alteration without regard to the cases on the subject, which are numerous and conflicting, and which are all cases decided at *Nisi Prius* or by the Court in banc, and which not having been affirmed on appeal to the Court of error, are not technically binding upon this Court. It is alleged on the part of the plaintiff that by these decisions the meaning of the words "material alteration" has been restricted; that an alteration which has been made in a contract must, in order to be a material alteration within this rule, be an alteration affecting the contract; but there are many cases in which there is no contract. It has been suggested that the limit in such cases affected the rights of the parties under the instrument. We, therefore, have two limits suggested: that in the case of a contract, the alteration must affect the contract; and that where there is no contract, but where rights are conferred otherwise than by way of contract, those rights must be interfered with. Two questions arise upon those suggested limits. First, whether those limits are reasonable, and such as should be adopted by the Court of Appeal in all cases; and secondly, if they are reasonable and ought to be adopted, whether the adoption ought to be limited to the class of cases to which the decisions have been applied—that is,

to ordinary commercial contracts—and whether, as regards other rights, they ought to be extended beyond the rights conferred by an ordinary deed or instrument. It does not at present appear to me necessary to decide whether those cases which limit the materiality in the case of an ordinary mercantile contract to an alteration which affects the contract itself have been rightly decided or not. Whenever it becomes necessary to do so, it will also be necessary to consider whether, in the case of such a contract, there is anything that can by any rational person be treated as material which does not affect the contract. An illustration will point out what I mean. In an ordinary case it may be said that the number put on a bill of exchange or on a cheque may not affect or alter the contract; but take the case of a debenture issued by a company, or a bond issued by a turnpike trust, or by a foreign government, or by an English municipal corporation, where the right to payment depended, although not so expressed on the face of the bond, but either by Act of Parliament or by general bond or otherwise by contract, upon the number—that is, the bond would be paid according to the numbers drawn by lot, which is a very common mode of payment. Now, although the number would not affect the contract on the face of the instrument, it really affects the contract in another way, and there would be no doubt that an alteration in the number would be a material alteration in the instrument. It seems therefore to me, that before the question, whether the alteration is one affecting the contract, can be considered, it is necessary to know exactly what the instrument is, what the alteration is, and what is the general effect of such alteration; and it may be that the majority of these cases—although they cannot all be rightly decided, for some conflict with others—may be well decided, and yet may not enable us to decide whether other considerations arise beside the mere question of the contract between the parties.

Now a Bank of England note is not an ordinary commercial contract to pay money. It is, in one sense, a promissory note in terms, but it cannot be described simply as a promissory note. It is part of

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the currency of the country ; it has been made by Act of Parliament ; it is a legal tender for any sum above five pounds ; it is an instrument which must be issued to any person bringing a certain quantity of bullion to the Bank, and any one has a right to demand it for the purpose of using it as currency. A Bank of England note is protected in a way in which no other instrument probably is protected against alteration or mutilation ; and its preservation in a pure state—to use a term applied to deeds—is certainly a matter of the utmost importance.

It appears to me by the statements which have been admitted in this case, that the usage of putting this number on the note dates from a very long period, and is a custom universally known and well understood. I will consider for a moment the operation of the Act of Parliament (7 & 8 Vict. c. 32. s. 4), which says that any man who produces at the Bank of England a certain quantity of gold bullion shall be entitled to receive bank notes. Could it be contended that the Bank, wanting to buy bullion, but not to increase the circulation of notes, could give to the person who brought the bullion notes without numbers, which would be so singular and unusual a form, that the person who received them could not use them as currency because no one would take them ? Or even supposing he could bring an action to compel a person to take them, it would embarrass him so much that he could not use them. I take it that the statute means that the bank must issue a note in the ordinary form in which it issues Bank of England notes. I do not say that the bank might not alter the ordinary form of its notes after due notice—that is quite a different consideration—but I do say that it would not comply with the terms of the statute unless it issued to the man who brought bullion notes which, being in the accustomed and ordinary form, would enable him to use them as currency. There is also another use of the number which, no doubt, may be of importance. It enables the person who receives notes to trace them ; to give evidence of their application in payment of debts ; to detect crime when the notes are stolen or otherwise improperly detained, and to guard

against the commission of felony or other crime by reason of the knowledge on the part of the person possessing himself of the notes that they may be so traced. But the utility of the number does not by any means stop there. We were told that there is a relation between the date and the number which enables the bank the more easily to detect forgery if that relation be altered, and also to keep, which they do, a register of the notes issued against the notes coming in so as to know the amount for which they are liable. Indeed, I think that no one knowing the use made of the number, the mode in which it is regarded by the public, and the mode in which it is utilised by the bank, could for a moment say that the number is not a material part of the note, or that the erasing of that number is not a material alteration of the note. It is therefore clear, if there is nothing to restrict the generality of the terms used, to which I have referred, that the alteration of the number is a material alteration of the note.

I now come to the consideration of the authorities, on which alone the Lord Chief Justice determined this case, and which only have relation to ordinary mercantile instruments. It by no means follows that the same considerations which enabled the Judges to decide what was a material alteration of an ordinary mercantile instrument, would even by those Judges have been treated as sufficient to enable them to decide what was a material alteration in the case of a Bank of England note. But what was decided is this—that where the alteration made merely states in writing what the law would otherwise imply, that is not a material alteration. I think there would be very little difficulty in acceding to that proposition in the case of ordinary mercantile documents. It is laid down that an alteration which does affect the contract, either by increasing or decreasing the amount of the obligation of the contracting party sued, is a material alteration, and in some cases it is stated that an alteration in a matter which affects the contract indirectly—that is, affects the position of the parties to the contract—is a material alteration. That was the case of *Knill v. Williams* (10), where, in addition

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to the words "value received" on a bill of exchange some one had added "for the good-will and lease of Mr. F. Knill, deceased," and such alteration did not directly affect the contract between the parties, which was a contract to pay money, but indirectly affected their position by shewing by way of evidence between the parties the consideration for which the value was received. I cannot find any case but one by the Master of the Rolls in Ireland, which was an *obiter dictum*, in which the doctrine was laid down in such explicit terms as those made use of by Lord Coleridge in this case, but it is rather, if I may say so, a deduction from the cases laid down by the Judges themselves. The words of the Lord Chief Justice are these—"It has always been held that the alteration which vitiates an instrument must be a material alteration, that is, must be one which alters or attempts to alter the character of the instrument itself, and which affects or may affect the contract which the instrument contains or is evidence of" (22). Then *Sanderson v. Symonds* (17) and *Aldous v. Cornwell* (23) are cited as clear authorities to shew that an immaterial alteration will not do. I am by no means satisfied at present that that statement is incorrect as regards an ordinary mercantile contract which contains nothing but a contract. It is difficult to see how an alteration could be material if it did not affect the contract, but there may be such cases, and I expressly reserve to myself the right of saying, if that case should ever occur, that it has not been decided by the authorities referred to. Again I agree that there is one authority in Ireland—*Caldwell v. Parker* (13)—which goes a step further, but I decline to say anything disrespectful of that decision, except that I do not agree with it. That was a decision arrived at by the Master of the Rolls, as he states, with great doubt, and he indicates at the end of his judgment that he thinks he may be carrying the matter further than the authorities warrant. I concur in that doubt. Now that was certainly the case of a deed depending upon some considerations which un-

(22) Law Rep. 7 Q.B. D. at p. 271.

(23) 9 B. & S. 607; 37 Law J. Rep. Q.B. 201; Law Rep. 3 Q.B. 573.

doubtedly apply to this case, but it is not binding on this Court, and I therefore prefer to leave it without making any further remarks upon it.

It seems clear to me therefore, that on the whole this is a case which comes within the general law, and that there is no authority which binds us to limit the meaning of the words "material alteration" so as to exclude this case from the general law. But there are, to my mind, very strong and unanswerable reasons for holding that this case is within the general law, and notwithstanding the hardship which our decision may inflict upon the plaintiff, we are bound to hold that the defendants are entitled to succeed upon this appeal.

BRETT, L.J.—The question is whether the plaintiff, the innocent holder of certain Bank of England notes, can recover from the bank in an action on those notes the exact sum for which they were issued; or whether the bank, although they have received full value for those notes, are, nevertheless, entitled to decline to pay the very sum which, by the issue of the notes, they undertook to pay to the person who should present them. If the Bank of England is not bound to pay the amount of the notes, it is obvious that a great hardship will be inflicted upon the plaintiff, who, by such a decision, will lose the money which he has innocently paid for the notes. And it equally follows that the bank, so far as any action upon these instruments is concerned, will escape from liability to pay the very sum which they undertook to pay for value received when these instruments were issued by them.

There can be no question that, as between the parties to this action, the one is afflicted with a considerable hardship, and the other becomes entitled to a considerable advantage.

After the notes had been issued by the defendants one of the figures in the numbers of each of them had been altered by some person into whose possession the notes had come, with a fraudulent intention, and, as stated by Lord Coleridge, for the purpose of preventing the notes from being traced. It seems to me that the material point is that the alteration was purposely made. Upon that it is

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argued for the plaintiff, that although the alteration was purposely made by some person who at the time had possession of the note, yet the bank is not relieved from liability to pay an innocent holder—first, because the alteration was made by a stranger to the note; and, secondly, because the alteration itself does not affect the contract contained in the note, and is therefore an immaterial alteration.

It was urged by the defendants that, assuming the alteration does not alter the contract contained in the note, yet a Bank of England note is not only an instrument containing a contract, but is an instrument which has a further effect than that of being the contract or the evidence of the contract contained in it, for it is an instrument which has a business effect, and is a piece of the currency; so that the payment of a debt by a bank note, whether the bank chose to pay that note or not, if the note has not otherwise been rendered void, is a good and absolute payment; and that an innocent holder of a bank note—if it has not been altered, and if the doctrine here cannot be applied to it—is entitled to payment of it from the bank, although the person from whom he received it may have obtained it by fraud. It was also urged by the defendants, that whether a bank note be a contract or not, the alteration of it is such as would have affected its identity, using the word "identity" in a manner which I will presently consider; and further, that where the instrument is either not a contract at all, or where it is a contract and something more than a contract, an alteration of that instrument may be material, although it does not alter or affect the contract contained in the instrument; and that in this case the alteration is a material alteration, although it does not affect the contract. It is clear that the bank note itself contains a contract—one of those ambulatory contracts which is contained in an ordinary promissory note or bill of exchange, and which, in these cases, is made obligatory only by indorsement. Now a Bank of England note, by reason of the stamp upon it, and by reason of the mere passing of it from one person to another contains an ambulatory contract. It is a contract by the bank that they will pay the amount of

it to the person who presents it, and that person can enforce that contract by means of an action. But I think that a bank note is something more than an instrument containing a contract; it is not an instrument the only effect of which is that it contains a contract, or is evidence of a contract only. It is something more, it is a thing which is in itself valued as money and as currency. I agree with the argument on the part of the plaintiff, that the alteration in this case has not in any way affected the contract; it is not an alteration of the contract at all. The number on the note is no part of the contract, and therefore if the rule of law contended for by the plaintiff—that the only alteration which vitiates an instrument is an alteration which affects the contract—be the true rule, then the plaintiff would be entitled to recover. The question, therefore, must be, whether that rule applies further than to an alteration of a contract in an instrument, and if it does, whether the alteration in this instrument, which does not affect the contract contained in it, is, nevertheless, a material alteration. I think the plaintiff is also right in this, that whatever the instrument may be to which the rule is applicable, the rule is only applicable where the alteration is material, leaving open for consideration the question what is a material alteration. It seems to me that an alteration which is admitted to be an immaterial alteration does not vitiate any instrument for any purpose. I incline to think that the cases support that view where an instrument contains only a contract, and can only be used for the purpose of maintaining an obligation by way of contract, or can only be used as evidence of a contract; and that no alteration of such an instrument as that, which does not alter or affect the contract, can be a material alteration. But I think that the rule is not confined to instruments which contain only a contract. I think it is applicable to instruments which contain no contract at all; and if that be true, it follows, of course, with regard to such instruments, that the alteration which is to be a material alteration cannot be confined to an alteration of something which affects the contract; because, assuming that there is no contract in the instrument, and yet

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that some alteration of it may vitiate it, of course that must be an alteration which is not in the contract. I think, therefore, that an alteration may be material in an instrument which is a contract, or merely evidence of a contract; but an alteration in such an instrument as that may be a material alteration, although it does not alter the contract. I incline to think, with regard to instruments which either contain the contract and something more, or which do not contain the contract at all, that the rule may be thus stated:—Whenever any instrument is purposely altered by a person in lawful possession of it, the instrument is void for the purpose of enabling any person to sue on it, or to defend himself by using it as a direct defence depending on its obligatory force as an instrument. I put in those precautionary words myself, because I am not sure that although an instrument may be avoided for the purposes which I have mentioned, nevertheless, it may not be used for other and collateral purposes, as, for instance, by way of proving or enforcing an admission where the instrument itself is not used, either for the purpose of suing upon it, or as a direct defence in the terms which I have stated. But wherever it is within those terms, it seems to me that any material alteration in it avoids it for those purposes, although that alteration does not alter any contract in it. But the further question as to what is a material alteration in such an instrument is still left open. I think that any alteration of an instrument would be material which would alter the business effect of the instrument if used for any ordinary business purpose for which such an instrument or any part of it is used. If that proposition be true, the question arises whether the alteration of the number of a Bank of England note comes within that definition. In my opinion, the alteration of the number of a bank note does not alter or affect the contract contained in the note; but that number does seem to me to be a material part of the instrument, and to be used in ordinary business as a material part of that instrument for business purposes. It is put there by the Bank of England, for purposes, as I might say, within the bank itself. I am not sure

whether, if that were the only purpose for which it is used, it could be said to be a material alteration within the definition which I have attempted to state; but it is important in a business sense, and is certainly used, or may be used, by everybody into whose hands the note may come. The defendants, as long as all their bank notes are marked with such a number, could not, it seems to me, issue a particular bank note without it; and for this reason, because the person entitled to demand from them the issue of a note is entitled to have a note which will pass as currency without question or doubt; so that where the bank have by their constant practice promulgated a promise that they will only issue notes with such numbers upon them, a bank note without such a number originally upon it could never pass without question or doubt as currency; and the number is therefore put there for that business purpose when it comes into the hands of any person to whom it is issued, or who is the holder of it. It is also most undoubtedly useful to, and used by every person into whose hands it comes, in case of accident, for the purpose of tracing the note, and I will not say that there are not other business purposes for which it is used. It seems to me those instances are enough to shew that it is a part of the note used in ordinary business for a business purpose. Then it seems to me that an alteration of part of such an instrument as that is within the definition, and is a material alteration. I do not rely upon the alteration of the identity of the note, if the word "identity" is to be used in the sense that the physical appearance of the document is altered, because it seems to me that an alteration on the face of an instrument which is admitted to be an immaterial alteration, does nevertheless alter the "identity," if the word is used in the sense of physical appearance. My view is, that in *Sanderson v. Symonds* (17) the word "identity" was used in the sense of identity in the case of a contract, and was equivalent to saying that there must be an alteration of the contract which is a material alteration of the effect of the contract. If there is an alteration which affects the legal effect of the contract, it is obvious that the two

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contracts then are not identical contracts, and I think that that must be the meaning of the Judges in that case. But the question is, whether the principle laid down is applicable, although applied now for the first time, to such an alteration in such an instrument as that under consideration.

It was urged that the doctrine had been confined to cases where the instrument contained a contract, and it was stated that in *Master v. Miller* (2) there was a contract and an alteration of the contract. The action was brought upon a bill of exchange, the date of which had been altered, and was therefore brought upon an instrument containing a contract, and nothing else. The alteration was one which altered the effect of that contract, so that the decision, so far as it goes, is only a binding authority upon a Court of co-ordinate jurisdiction, that an alteration in a contract which alters the effect of that contract, is a material alteration, and vitiates the instrument. It seems to me that the principle laid down by Lord Kenyon in *Master v. Miller* (2) is not confined in its application to an instrument which contains only a contract, but would certainly apply to documents which contain something more than a contract; and the words used are certainly larger than those which would apply to contracts only, because the words are that "all instruments which are altered or erased in a material part"—and it is necessary to read in these latter words—"shall be thereby avoided." That proposition, if true, applies not only to documents which contain a contract, but to all instruments. I do not think that the judgment of Mr. Justice Ashurst applies to instruments other than those containing a contract. It is not material to consider the judgment of Mr. Justice Buller, because his opinion did not prevail; but I think that what was said by Mr. Justice Grose is very material: "A deed is nothing more than an instrument or agreement under seal, and the principle of these cases"—that is, of the cases previous to *Master v. Miller* (2)—"is, that any alteration in a material part of any instrument or agreement avoids it, because it thereby ceases to be the same instrument." His Lordship so expresses himself

as in terms to apply the doctrine to a contract which is not an agreement in any instrument; and immediately afterwards shews that he intends to apply that doctrine to something more than an agreement, because he says, "This principle, too, appears to me as applicable to one kind of instrument as to another." I think, therefore, that he intended to comprise within the doctrine instruments which were not contracts, and which were also contracts. The case cited to us of an alteration in an award certainly carried the case beyond instruments which were mere agreements, for the alteration was one which certainly did not affect the contract, and it was held that although the alteration itself was void, yet the award was good—*Henfree v. Bromley* (15). The case which I ventured to suggest of an alteration in the statement of the consideration given at the time of the giving of a bill of sale, certainly would not alter the contract, because whatever the consideration was, the contract would be the same; but I cannot doubt myself that where the alteration is such as would affect the validity of the registration of such an instrument, and thereby affect the rights of the parties, it must be within the principle laid down, and would be an alteration which would avoid the bill of sale. Both principle and authority seem to shew that the doctrine is to be applied to instruments in which there is an alteration which is a material alteration, and that an alteration may be material, although it does not alter the contract. And I am inclined to admit that if the instrument contains nothing but a contract, and has no legal or business effect whatever except as a contract, there could then be no material alteration in the document, unless that alteration did alter the contract. With regard to the *dictum* expressed by the Master of the Rolls in Ireland in *Caldwell v. Parker* (13), I can only say that I do not, as at present advised, think that that case was decided according to law.

COTTON, L.J.—In this case the plaintiff is a *bona fide* holder for value of certain Bank of England notes, on which he sues the Bank of England. There is no imputation on him with regard to the way

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in which he took those notes; but the question which we have to consider is this—whether, in consequence of certain alterations which have been intentionally made in those notes, and evidently for the purpose of preventing them being traced, the plaintiff, in accordance with the rules of law long established in this country, has lost his right to sue upon them.

The rule relied upon by the Bank of England is that which is laid down in *Pigot's Case* (21)—namely, that a deed when altered in a point material is void. That rule, which was laid down as regards deeds only, was afterwards extended in *Master v. Miller* (2) to instruments not under seal; and, following that case, it has been well established that the principle so laid down extends to negotiable instruments, and a *bona fide* holder for value cannot recover on them when there has been an alteration in the instrument coming within the principle and rule laid down in the two cases referred to. The question is whether a material alteration is confined to an alteration which is material because it alters the contract contained in the instrument in question. Now that is not the language of the rule in *Pigot's Case* (21), nor is it the language of the rule as adopted and applied to instruments not under seal in *Master v. Miller* (2); and, with the exception of the case in Ireland—*Caldwell v. Parker* (13)—no case has been referred to. It may therefore be assumed that there is no case to shew that the Judges have restricted the rule so that the materiality must be material in the sense of altering the contract. I do not think it necessary to consider *Caldwell v. Parker* (13), but I agree with my brethren that it does not strike me as a right decision, and without criticising it or entering into the reasons why I think it erroneous, I certainly do not feel bound to follow it. Now that being so, there is no decision or series of decisions that the material alteration is restricted in the way contended for by the plaintiff; and it does not appear from the judgments from which the principle on which the cases were decided is to be gathered that the rule was so limited. The judgment of Mr. Justice Grose in *Master v. Miller* (2) is put upon this ground—not an alteration

of the contract, but an alteration of the instrument, so that it is no longer to be considered as the same instrument. "A deed is nothing more than an instrument or agreement under seal, and the principle of those cases is that any alteration in a material part of any instrument or agreement avoids it, because it thereby ceases to be the same instrument." It is not every small alteration in an instrument that will prevent it being the same instrument, but the alteration must be a material alteration, so that the defendant may say in a substantial way, that the instrument is not the same instrument as that which was executed by him. In *Sanderson v. Symonds* (17) Chief Justice Dallas says that "The original rule was not intended so much to guard against fraud as to insure the identity of the instrument, and prevent the substitution of another without the privity of the party concerned"—not that it was a different contract, but to prevent an alteration, so as to insure the instrument being in substance the same, and to prevent the parties substituting that which was not the same but a different instrument. The judgment of Mr. Justice Richardson is somewhat more ambiguous, because he says, "the ground on which the cases have turned is that the alteration has varied the identity of the contract," using a very ambiguous word, which may mean either the instrument containing a contract, or the contract contained in an instrument. In *Knill v. Williams* (10) the only alteration in the promissory note was the addition of the words "for the goodwill of the lease and trade of Mr. F. Knill, deceased" to the words "value received"; and this, it was argued by Mr. Harrison, was in fact an alteration of the contract, and therefore came within the principle for which he was contending. But the alteration of the contract is not the ground of the decision in that case. It is true that the alteration in the present case is an alteration not in the contract but in the instrument, which may be material for other purposes. Thus in *Knill v. Williams* (10) Lord Ellenborough says, by way of illustration, "If a bond, for example, were conditioned for the payment of money generally, could it afterwards be introduced by way of recital that the money had been

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advanced out of a particular fund; which might afterwards be made use of for other purposes?" The principle of his decision in that case was that the alteration was such an alteration of the instrument as would make it substantially a different instrument, and one which, although it would not affect the contract, would affect the rights of the parties in other matters. Then he says, "The effect of the alteration is to narrow the value from value received in general to the value expressed, which I cannot say is not a material alteration." Mr. Justice Grose also says, "The question is whether the alteration introduced made it a different note. If it be material, it is a different note; and it certainly is material, for it points out the goodwill and trade of F. Knill as the particular consideration for the note, and puts the holder upon enquiring whether that consideration had passed." Then Mr. Justice Bayley says, "The case of *Master v. Miller* (2) decided that an alteration in a material part of a bill after it has issued makes a new stamp necessary; and this was a material alteration, for it was evidence of a fact which, if necessary to be enquired into, must otherwise have been proved by different evidence." So that even if it could be said that that was an alteration in a particular contract in that case, that is not the ground on which the Judges put their decision. In *Simmons v. Taylor* (12), which came before the Exchequer Chamber, it was decided that the erasing of the crossing in a crossed cheque did not vitiate the cheque, upon the ground that even if the crossing were part of the cheque, which it was not, the alteration was not a material alteration, but a mere superadded direction to the banker, and did not come within 19 and 20 Vict. c. 25. s. 1, so as to avoid the instrument. That decision, therefore, does not assist the plaintiff. The cases, however, of which there is a long string, do as a rule deal with the question whether the contract contained in the instrument has been altered or not, as the test by which to decide whether the alteration is a material one within the rule laid down in *Pigot's Case* (21), and the plaintiff is undoubtedly entitled to rely on that test. But the question whether an alteration of an in-

strument is a material one must depend upon the nature of the instrument and the uses to which it is to be put, and although in the cases cited the proper test may have been whether the contract contained in the instrument was altered or not, it by no means follows, unless it has been so laid down, that the rule is that the alteration in the contract is essential, and that no other alteration will do. In my opinion that conclusion would be incorrect. But the question here is whether the bank note now before us is not a different instrument to those to which the test was applied in the cases which have been referred to, and whether the circumstances are not such that the alteration, although not an alteration in the contract entered into by the Bank of England, is nevertheless a material alteration. Having regard to the nature of the instrument and the purpose for which it is used, one cannot see why the alteration laid down in general terms as a material alteration in *Pigot's Case* (21), and in *Master v. Miller* (2), which extended it to an instrument not under seal, is to be confined to an alteration which affects the contract; for it has been held that an alteration in a contract is sufficient to be a material alteration within the meaning of that rule where it relieves a party who is sued from part of the obligation which he undertook when he originally issued the instrument. Although the test as to whether an alteration in an instrument alters the contract may in some instances be the proper and possibly the only test, yet, in my opinion, that would not be so in other instances, but the question would be whether the instrument has been altered in a material way. Now a Bank of England note is a well-known thing, which has been substantially in its present form for a very long time. It is, under an Act of Parliament, part of the circulating medium of the country, and the Bank of England, as regards the issue of that note and many other matters, are subject to restrictions in their operations. In this case certain numbers which are always stamped on the notes of the Bank of England before they are issued have been altered by the holder without doubt intentionally and for a particular purpose. Now can it be said that

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this number is not an essential part of the note? It has for many years been recognised as an essential and requisite part of every bank note which the public takes as part of the money circulation, and which no one would take unless it had a number upon it; and for a good reason, because the number and the date enable the bank and the public to identify the note and to secure themselves as far as possible against fraud, theft or accidental loss. The bank, when notice has been sent to them of the numbers of any notes which have been lost, stop the notes, and so endeavour to prevent persons from cashing them. The number of a note is also important as a protection to the bank against forgery; and its existence, therefore, affords both to the bank and to the public a most material protection. Having regard therefore to the nature of the instrument and to the purposes for which these numbers are used and put on the notes, I am of opinion that they must be considered as an essential part of the note. An alteration therefore of the number, by whomsoever it may be made, is a material alteration of the instrument within the rule to which I have referred.

Appeal allowed.

Solicitors—J. Rand Bailey, for plaintiff; Freshfield & Williams, for defendants.

1881. { THE METROPOLITAN BOARD
Dec. 7, 13. { OF WORKS (*appellants*) v.
STEED AND ANOTHER (*respondents*).

Metropolis—New Street—Width and Openings—Street Open at only One End—Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), s. 98.

[For the report of the above case, see 51 Law J. Rep. M.C. 22.]

1882. }
April 27. } LUMSDEN v. WINTER.

Practice—Motion for Judgment on Admissions in the Pleadings—Counter-claim—Default in delivering Reply—Orders XXIX. rule 12, XXXVI. rules 4 and 4a, and XL. rule 11.

Where a defendant delivers his statement of defence and counter-claim, and the plaintiff does not deliver his reply within the time limited, the defendant is entitled upon motion to sign judgment on the claim and counter-claim on the admissions in the pleadings under Order XL. rule 11.

This was an action for breach of contract.

The defendant delivered his statement of defence denying the breach, and counter-claimed for money lent by him to the plaintiff. The plaintiff did not, within three weeks of the delivery of the statement of defence and counter-claim, deliver a reply. Thereupon the defendant moved the Court for liberty to sign judgment on the claim and counter-claim on the admissions in the pleadings.

A. T. Lawrence, in support of the motion.

—By Order XXIX. rule 12 (1), the plaintiff in this case not having delivered a reply, the pleadings are closed, and the allegations of the defendant in the defence and counter-claim are to be deemed to be admitted. It appears, therefore, that on the admissions in the pleadings the defendant is entitled to judgment. By Order XL. rule 11 (2), any party may apply at

(1) Order XXIX. rule 12: "If the plaintiff does not deliver a reply or demurrer, or any party does not deliver any subsequent pleading or a demurrer, within the period allowed for that purpose, the pleading shall be deemed to be closed at the expiration of that period, and the statements of fact in the pleading last delivered shall be deemed to be admitted."

(2) Order XL. rule 11: "Any party to an action may at any stage thereof apply to the Court or a Judge for such order as he may, upon any admissions of fact in the pleadings, be entitled to, without waiting for the determination of any other question between the parties. The foregoing rules of this Order shall not apply to such applications; but any such application may be made by motion, so soon as the right of the party applying to the relief claimed has appeared from the pleadings. The Court or

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any stage of the proceedings for such order as he may appear upon the admissions in the pleadings to be entitled to. The defendant is therefore entitled to have this application granted. He cannot by any other process obtain judgment on both claim and counter-claim. It has been decided that Order XL. rule 11 (2) is not restricted to interlocutory orders—*Rutter v. Tregent* (3), *In re Smith's Estate*; *Bridson v. Smith* (4), *Parson v. Harris* (5) and *Jenkins v. Davis* (6).

Bennett Calvert, for the plaintiff, *contra*.—The plaintiff having failed to deliver his reply, the pleadings are, by Order XXIX. rule 12 (1), to be deemed to be closed. By Order XXXVI. rule 4 (7), a defendant can set down the action for trial if the plaintiff does not set it down within six weeks of the close of the pleadings, or under rule 4a (7) of the same Order the defendant may apply to dismiss the action for want of prosecution—*Litton v. Litton* (8). The counter-claim depends on the action—*Vavasour v. Krupp* (9), and is not in all respects equivalent to a cross-action. Six weeks from the close of the pleadings have not yet elapsed.

a Judge may, on any such application, give such relief, subject to such terms (if any) as such Court or Judge may think fit."

(3) 48 Law J. Rep. Chanc. 791; Law Rep. 12 Ch. D. 758.

(4) 24 W.R. 392.

(5) Law Rep. 6 Ch. D. 694.

(6) Law Rep. 1 Ch. D. 696.

(7) Order XXXVI. rule 4: "Subject to the provisions of the following rules, if the plaintiff does not, within six weeks after the close of the pleadings, or within such extended time as a Court or a Judge may allow, give notice of trial, the defendant may, before notice of trial given by the plaintiff, give notice of trial, and thereby specify one of the modes mentioned in rule 2; and in such case the plaintiff, on giving notice within the time fixed by rule 3 that he desires to have the issues of fact tried before a Judge and jury, shall be entitled to have the same so tried."

Rule 4a: "The defendant, instead of giving notice of trial, may apply to the Court or Judge to dismiss the action for want of prosecution; and, on the hearing of such application, the Court or a Judge may order the action to be dismissed accordingly, or may make such other order, and on such terms, as to the Court or Judge may seem just."

(8) 46 Law J. Rep. Chanc. 64; Law Rep. 3 Ch. D. 793.

(9) Law Rep. 15 Ch. D. 474.

GROVE, J.—I am not without great doubt on this point, but think on the whole that there should be judgment for the defendant on the claim and counter-claim in this case. There is no distinct rule as to the course to be pursued when the defendant has put in a defence and counter-claim and the plaintiff has failed to reply. But I think that as the provisions of section 24, sub-s. 3, of the Judicature Act of 1873 and Order XIX. rule 3 (10) render a counter-claim equivalent to a cross-action by the defendant, we can interpret the rules that exist as to signing final judgment to be applicable to such a case. By Order XXIX. rule 12 (1) default by a plaintiff in delivering a reply not only has the effect of closing the pleadings, but operates as an admission of the facts alleged in the previous pleading. In the absence of authority to the contrary, I should have been of opinion that Order XL. rule 11 (2), which gives a party power at any time to apply to the Court for such order as he may upon any admissions in the pleadings be entitled to, did not apply to an application to sign final judgment; but I find that Courts of co-ordinate jurisdiction have decided that it does apply, by which decision I am bound, and must therefore hold that on the true construction of Order XXIX. rule 12 (1) and Order XL. rule 11 (2) a case has been made out for judgment as prayed. Further than this, it is to be considered that if the defendant is not so entitled to sign judgment, but ought to apply to dismiss the action for want of prosecution, his counter-claim is suspended, and he must abandon it; and this though the default be not his, but wholly that of the plaintiff; whereas, though we give the

(10) Order XIX. rule 3: "A defendant in an action may set off or set up, by way of counter-claim against the claims of the plaintiff, any right or claim, whether such set-off or counter-claim sound in damages or not, and such set-off or counter-claim shall have the same effect as a statement of claim in a cross-action, so as to enable the Court to pronounce a final judgment in the same action, both on the original and on the cross-claim. But the Court or Judge may, on the application of the plaintiff before trial, if in the opinion of the Court or Judge such set-off or counter-claim cannot be conveniently disposed of in the pending action, or ought not to be allowed, refuse permission to the defendant to avail himself thereof."

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defendant leave to sign judgment, yet that judgment will be set aside, on terms, on an affidavit shewing merits and *bona fides*. Therefore I think the defendant should be at liberty to sign final judgment.

LOPES, J.—This is a motion that the defendant be allowed to sign judgment on the claim and counter-claim on the admissions in the pleadings. I quite agree with my brother Mr. Justice Grove, that had there been no decisions to the contrary, this Court would have been inclined to hold Order XL. rule 11 (2) not to apply to an application to sign final judgment, but only to interlocutory applications. But there have been several decisions on which the Courts have acted to the effect that it is so applicable, and we must therefore act upon them. There is this additional point—that there is no case which deals with facts similar to this where there is a counter-claim—but that seems to be answered by the principle on which a counter-claim is to be deemed equivalent to a cross-action. It has been urged that the defendant's proper course would have been to apply to dismiss the action for want of prosecution under Order XXXVI. rule 4a (7); but were that course followed the defendant's counter-claim would also have to be dismissed. I therefore think the defendant is entitled to judgment.

Judgment for the defendant on the claim and counter-claim with costs.

Solicitors—J. P. Garrod, for plaintiff; P. J. Birt, for defendant.

1881. } LAWS (*appellant*) v. ELTRINGHAM
Dec. 6. } (*respondent*).

Malicious Injuries to Property Act (24 & 25 Vict. c. 97), s. 52—Damage to Right of Herbage—Real and Personal Property—Information—Prosecutor—Ownership.

[For the report of the above case, see 51 Law J. Rep. M.C. 13.]

1882. }
March 3, 13. } NORDON v. DEFRIES AND
OTHERS.

Practice—Inspection of Documents—Shorthand Notes of Trial of previous Action—Privilege.

An issue had been directed in an action to determine whether the defendant in such action had executed a certain agreement. The defendant, during the trial of such issue, caused a shorthand note of the proceedings to be taken, having meanwhile commenced an action against other persons for conspiring to defraud him, and to utter, knowing it to be a forgery, the agreement in question in that issue.

The defendants in such second action sought inspection of the shorthand notes. The plaintiff claimed that they were privileged from inspection, on the ground stated in his affidavit that they were taken "for the purpose, amongst others," of his case in the second action:—

Held, that the shorthand notes were privileged from inspection, and that it was not essential that the affidavit claiming privilege should shew that they came into existence exclusively for the purpose of the second action.

This was an appeal from an order of North, J., ordering the plaintiff to give the defendants inspection.

The following are the material paragraphs of the plaintiff's affidavit:—

"I have in the possession of my solicitor a transcript and several prints of shorthand-writer's notes of the evidence, speeches and summing up on the trial of the issue of fact, directed by the Master of the Rolls to be had in the action *Nordon v. Nordon*, 1881 (in which action I am the defendant), relating to the question of the genuineness of the alleged agreement referred to in my statement of claim.

"The said shorthand notes were taken, transcribed and printed (at my sole expense), after the commencement of this action, for the purpose, amongst others, of my case in this action.

"I claim that the said shorthand notes are privileged from inspection in the same manner as notes taken by an advocate or a suitor are. Moreover, the said notes are

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not documents relating to the matters in question in this action."

H. Kisch (on March 3), for the plaintiff. —The shorthand notes would form part of the brief for the trial. *Nicholls v. Jones* (1) is distinguishable. In that case it does not appear that there was any affidavit stating that the notes were taken for the purpose of the Chancery proceedings. So in *Bustros v. White* (2) there was no evidence that the document came into existence for the purpose of the trial. In *Anderson v. The Bank of British Columbia* (3) there was no affidavit that the information was obtained in contemplation of the trial.

[MATHEW, J.—You do not say in your affidavit that these notes were taken by the advice of the plaintiff's solicitor.]

Mr. Nordon is a solicitor, and as such advised himself. There is no distinction between information obtained at the suggestion of the solicitor for the purpose of the action, and that procured by the client for the same purpose—see *The Southwark Waterworks v. Quick* (4). The statement in the affidavit that the notes were taken for the purpose of the action must be assumed to be true—*Friend v. The London, Chatham and Dover Railway Company* (5).

W. English Harrison, for the defendants. —The affidavit must be read most strongly against the person making it—*Thomas v. Rawlins* (6). I submit that these notes must be taken to have been made for the purposes of a new trial in the first action.

[CAVE, J.—If once privileged they would always be privileged—*Bullock v. Corrie* (7). Suppose they were taken for the purpose of the new trial, would they not then be privileged?]

Cur. adv. vult.

(1) 2 Hurl. & M. 538.

(2) 45 Law J. Rep. Q.B. 642; Law Rep. 1 Q.B. D. 423.

(3) 45 Law J. Rep. Chanc. 449; Law Rep. 2 Ch. D. 644.

(4) 47 Law J. Rep. Q.B. 258; Law Rep. 3 Q.B. D. 315.

(5) 46 Law J. Rep. Exch. 696; Law Rep. 2 Ex. D. 437.

(6) 27 Beav. 140.

(7) 47 Law J. Rep. Q.B. 352; Law Rep. 3 Q.B. D. 356.

The judgment of the Court (8) was (on March 13) delivered by

MATHEW, J.—This was an appeal from an order made at chambers directing the plaintiff to produce for the inspection of the defendants a print of shorthand notes of the evidence which had been taken for the plaintiff upon the hearing of a case of *Nordon v. Nordon*. In *Nordon v. Nordon*, an issue had been directed to determine whether the present plaintiff had or had not executed a certain agreement. While the suit of *Nordon v. Nordon* was pending, the plaintiff commenced the present action, charging the defendants with conspiring to defraud the plaintiff, and to utter the agreement as binding upon him, knowing it to be a forgery.

It appeared from the statements of counsel that the issue had been decided against the present plaintiff, and that this action was then proceeded with. Upon an application for the production of documents in the plaintiff's possession, he had resisted inspection of the shorthand notes on the ground that they were privileged.

Exception was taken to the form of the affidavit under which the privilege was set up, and if it were not that the material facts relating to the litigation were properly admitted by counsel in the course of the argument, the objection would seem well founded that the grounds of the privilege were not stated with sufficient precision. But having regard to these admissions, we think that the case ought not to be determined upon the technical point which was raised before us and at chambers. The affidavit states that the shorthand notes were taken "for the purpose, amongst others," of the plaintiff's case in this action. It was argued that unless the affidavit shewed that documents sought to be protected came into existence exclusively for the purpose of the pending action they were not privileged. But no authority was cited in support of this contention. It is probable in this case that the notes of the evidence were taken, as well with a view to ulterior proceedings in the case of *Nordon v. Nordon*, as for the purposes of this action. If so, the notes would seem to have been clearly privileged in that suit,

(8) Mathew, J.; and Cave, J.

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and it is difficult to see why their being privileged in one suit should destroy the privilege in another arising out of the same subject-matter. It seems unreasonable that a privilege in each should become a privilege in neither.

Assuming, then, that the privilege may exist if properly claimed, we have to see whether it is sufficiently made out in the present case. We think that it does appear that the documents came into existence with a view to and in contemplation of the present action, and in order to assist the plaintiff, who is a solicitor, in its conduct and prosecution. If the plaintiff has a cause of action against the defendants, it is manifest that it would be important for the plaintiff to be enabled to submit to his counsel a full and precise statement of the evidence given by the defendants and their witnesses at the former trial. We are, therefore, disposed to give credit to the suggestion that these notes were intended to form materials for the guidance of the plaintiff and his counsel in the prosecution of the present action, and we think that the affidavit of the plaintiff is sufficient to enable us to act upon this view.

In accordance, therefore, with the principles laid down in *The Southwark Water Company v. Quick* (4), *Anderson v. The Bank of Columbia* (3) and *McCorquodale v. Bell* (9), we are of opinion that the shorthand notes are protected from inspection, and that the appeal must be allowed.

Solicitors—A. Abrahams & Co., for plaintiff;
John Hands, for defendants.

1882. } GRAFF (*appellant*) v. EVANS
Feb. 28. } (*respondent*).

Licensing Act, 1872 (35 & 36 Vict. c. 94), s. 3—*Sale of Intoxicating Liquor by Retail without Licence—Club.*

[For the report of the above case, see 51 Law J. Rep. M.C. 25.]

(9) 45 Law J. Rep. C.P. 329; Law Rep. 1 C.P. D. 473.

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1882. } GORDON v. JENNINGS. (THE
May 10. } CARDIFF DISTRICT AND PEN-
ARTH HARBOUR TRAMWAYS
COMPANY, *garnishees*.)

Wages Attachment Abolition Act, 1870—
“*Servant, Labourer or Workman*”—*Secretary to Company.*

The Wages Attachment Abolition Act, 1870 (33 & 34 Vict. c. 30), prohibits the attachment of “*the wages of any servant, labourer or workman*”:—Held, that the secretary of a tramways company who was in receipt of a salary of 50*l.* a quarter and subject to dismissal at a quarter's notice, and whose duty it was to go daily to the company's office and there perform the ordinary duties of secretary, was not a “*servant, labourer or workman*,” within the meaning of the Act.

Appeal from chambers.

The plaintiff having recovered judgment against the defendant, obtained an order from the district Registrar at Cardiff to attach a quarter's salary of 50*l.* due to the defendant from the garnishee company.

The defendant was employed as secretary at a salary of 50*l.* a quarter, and he was subject to dismissal at a quarter's notice. His duties were to attend daily at the company's offices and there perform the ordinary duties of a secretary.

On appeal Denman, J., affirmed the order of the Registrar, holding that the defendant was not a servant, labourer or workman within the meaning of the *Wages Attachment Abolition Act, 1870* (1). From this decision the defendant now appealed.

Lamaison, for the defendant, in support of the appeal.—There is no direct authority to shew that the defendant is within 33 & 34 Vict. c. 30 (1), but from analogous cases it is submitted he is a person intended to be within the protection of that Act. In a case turning on the definition of the words “*clerk or servant*,” in 24 & 25 Vict. c. 96. s. 68, Blackburn, J.,

(1) By 33 & 34 Vict. c. 30. s. 1, it is enacted that “no order for the attachment of the wages of any servant, labourer or workman shall be made by the Judge of any Court of Record or inferior Court.”

3 H

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says, "The test is very much this, namely, whether the person charged is under the control and bound to obey the orders of his master"—*The Queen v. Negus* (2); and in *The Queen v. Proud* (3) it was held that the paid secretary to a friendly society was a clerk or servant within the meaning of the same Act.

Under section 10 of the Employers and Workmen Act, 1875, 38 & 39 Vict. c. 90, the word "workman" is defined not to include a domestic or menial servant, but a person who being engaged in manual labour has entered into a contract of service or a contract personally to execute any work or labour. Among the persons entitled to preferential charges in Bankruptcy are clerks or servants in the employment of the bankrupt—32 & 33 Vict. c. 71. s. 32. sub-s. 2. From the above authorities it is submitted that defendant is a "servant," and within the protection of the Wages Attachment Abolition Act, and consequently the order to attach his salary ought not to have been made.

Hughes, contra, was not called upon.

GROVE, J.—I am of opinion that the decision of Mr. Justice Denman was right. In construing Acts of Parliament we must pay regard to the subject-matter of the Act. If we were to construe Acts and documents by the authority of dictionaries without regard to the subject-matter we should reduce them in many instances to absurdities, because we should not give the same word the different meaning it should have in different instruments. For instance, in one sense a Secretary of State is a servant, but it could not have been intended that this Act should apply to such a case.

Regard must also be had to the object and intention of the Act, and to the collocation of the words used. The object of this Act was to abolish the attachment of wages. In the first place the word "wages" is some indication of the object of the Act—for though it might be said to include payment for any services, in general the word "salary" is used for payment of services of a higher class, and

"wages" is confined to the earnings of labourers and artisans. In the next place some inference may be drawn from the collocation of the words "servants, labourers and workmen." Taking those words in the way in which they are used, it is evidently intended by the Legislature that the Act is to apply to persons of small means who perform labourers' and servants' work, not necessarily work of a menial character, but work for which wages are paid at short periods. The object therefore of the Act is to protect persons who are considered to be in a position in which they are unable to protect themselves, and no light can be thrown on its interpretation by shewing that in other Acts the words "servant and workman" have other meanings.

What, then, is the position of the defendant?—he is in the employment of a company, and it is his duty to go daily to their office and there perform the ordinary duties of a secretary; he is in receipt of a salary of 50*l.* a quarter, and he is subject to dismissal at a quarter's notice. He is not, in my opinion, a servant within the meaning of the Act.

LOPES, J.—I agree that the order of my brother Denman was right. The question for our determination is whether the defendant is a servant within the meaning of the Act 33 & 34 Vict. c. 30. In order to determine this question one must consider the object of the Act. The object of the Act is to protect the earnings of workmen who might otherwise be prevented from providing subsistence for their families. If that be the object of the Act the defendant is not a person within its terms or spirit. In my opinion the Legislature introduced this Act in order to protect domestic or labouring servants and artisans in receipt of wages.

Appeal dismissed.

Solicitors—H. E. Sullivan, agent for Morgan & Scott, Cardiff, for plaintiff; Thomas Hulbert, for respondents.

(2) 42 Law J. Rep. M.C. 62; Law Rep. 2 C.O.R. 84.

(3) 1 L. & C. 97; 31 Law J. Rep. M.C. 71.

1882. }
March 30. }

THE QUEEN v. GANZ.

Extradition—Netherlands, treaty with—Extradition Act, 1870 (33 & 34 Vict. c. 52) ss. 10, 15 and 26—Alleged Criminal not Subject of State requiring Surrender—Foreign Warrant of Arrest—Authentication of Warrant.

By the Extradition Treaty between the United Kingdom and the Netherlands, it is provided that each Government shall, on requisition by their respective diplomatic agents, reciprocally deliver up persons accused or convicted of certain crimes committed within the jurisdiction of the requiring party, when found within the territories of the other party, so, however, that neither Government shall deliver up its own subjects. If a person be arrested in either country upon a warrant issued by competent authority on information, he shall, nevertheless, be discharged, unless within fourteen days a requisition for his surrender be "made by the diplomatic agent of his country."

Prisoner was arrested upon information of a crime having been committed by him in the Netherlands. His surrender was demanded by the diplomatic agent of the Netherlands. It was objected that he was not subject to the extradition law as between the United Kingdom and the Netherlands, because he was not shewn to be a subject of the Netherlands, but, on the contrary, there was evidence of his being a naturalised American citizen:—

Held, that he must be surrendered, as the provisions were of general application to all persons who had committed crimes in the territory of the Government whose diplomatic agent required the extradition, save only and except subjects of the State upon which the demand for surrender is made.

By section 10 of the Extradition Act, 1870 (33 & 34 Vict. c. 52), the police magistrate has authority to commit a fugitive criminal "if the foreign warrant authorising his arrest is duly authenticated." And by section 26 "warrant" is defined "in the case of any foreign State to include any judicial document authorising the arrest of a person accused of crime."

A document bearing the official seal of the department of justice at the Hague,

signed by the Vice-President and councillors of the Court, and purporting to be a copy of a decree of the Court, in which were recited the charges made against the prisoner, and the decision of the Criminal Court of Appeal that proceedings should be taken against him, and which in terms authorised his arrest, was produced before a police magistrate as the foreign warrant under section 10.

Held, that it was sufficient as a judicial document authorising arrest, and was duly authenticated, and satisfied the provisions of the section.

Per MANISTY, J.—That it was for the purpose not a copy but an original document.

This was an application for a writ of *habeas corpus* to bring up one Edward Nathan Ganz, who had been arrested on an extradition warrant granted by Sir J. Ingham, for the purpose of his being extradited to the Netherlands upon a charge of fraud committed in the Netherlands.

The rule had been drawn up as absolute in the first instance, and Ganz was accordingly brought up to the Court, to abide the result of the argument upon the sufficiency of the return that he was lawfully in custody; but it was pointed out by the Attorney-General that a rule of practice was, in 1873, laid down that the rule should be a rule *nisi*, when the discussion would take place upon the argument of such rule. As a matter of convenience, it was on this occasion arranged that the prisoner's counsel should first be heard, and on the points which would not strictly have been available to him on the return to the writ, which was on the face of it perfectly good.

The document produced before the magistrate was sealed by the department of justice at the Hague, and was as follows, when translated, headed "Copy":—

"Warrant of arrest in the name of the king. The Court of Justice at the Hague in Council assembled. Seen the report of the Arrondissement Court of Justice of Rotterdam assembled in Council of the 15th of November, 1881, in the case of Bernhardt Wyprecht (as he calls himself), from which report it appears that the papers in this case shewed no crime, the

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demanding prosecution was refused, and it is declared that there is no ground for further proceedings. Seen the act of protest, dated the 16th of November following, against the report submitted by the officers of justice of the mentioned Court of Justice. Seen the papers and requisition of the Public Prosecutor, shewing that he does not approve of the report of the Court, against which he protests, to do nothing, nevertheless demands institution of proceedings against Bernhardt Wyprecht in the mentioned case and warrant for his arrest. Seen the further papers. Considering that there exist sufficient reasons for complaint, the accused being said to reside in the course of 1881 at Rotterdam, to have advertised from there in different German newspapers, wherein he, stating that he traded as Bernhardt Wyprecht & Co., in Rotterdam, offered different wares, some of which he named, at in gros prices, guaranteeing his buyers that they were picked out through his own factories, and could be delivered at such low prices, that through buying from him many hundred marks per annum could be saved, all entirely fraudulent, and without any intention of keeping to his offer.

"Furthermore, he is said to have induced different persons by these advertisements to send him moneys as pre-payment in ordering some of the advertised goods, and also from the persons mentioned beneath the amounts standing against their names without sending them the ordered goods; to have received the same, and fraudulently become possessed of them to their damage, namely—[Names and amounts set out.]

"Taking into consideration that these acts are punishable by Art. 405 of the Penal Code. Seen the Arts. 88 and 89 of the Law Book of Demands for Punishment. That the before-mentioned report of the Court of Arrondissement will not be accepted. Authorised proceedings, with order for arrest, against Bernhardt Wyprecht (calling himself so), late living at Rotterdam, whence absconded.

"Done at the Hague, on the 21st of November, 1881, by the following gentlemen:—Mr. Spon, Vice-President; Councillors, Van Olden Barnevelt, Lette Van Ostvoorne, Van Lilaar, and Van Genns,

councillors of the Court, who have signed this besides the actuary.

(Signed)

"J. Spon.

"Councillor Van Olden Barnevelt.

"S. Lette Van Ostvoorne.

"Van Lilaar.

"J. J. Van Genns.

"Wyckerheld Bisdom.

"For copy, delivered on demand of the O. M. the actuary of the Court of Justice at the Hague.

(Signed) "Wyckerheld Bisdom and

"M. Vanderbergh.

"Seen for certifying the handwriting of the above-named,

"Jh. M. A. J. Th. Vanderbergh and

"M. C. J. J. Wyckerheld Bisdom.

"The Hague, December 2, 1881.

"For the Minister of Justice, the Secretary-General.

(Signed) "Clamm."

The following are the articles of the Extradition Treaty referred to in argument:—

[Treaty between Her Britannic Majesty and the King of the Netherlands, 1874. (*Parliamentary Papers*, 1874, vol. lxxvi.)]

Article I. "It is agreed that Her Britannic Majesty and His Majesty the King of the Netherlands shall, on requisition made in their name by their respective diplomatic agents, deliver up to each other reciprocally any persons who, being accused or convicted of any of the crimes hereinafter specified, committed within the jurisdiction of the requiring party, shall be found within the territories of the other party."

Article III. "No subject of the Netherlands shall be delivered up by the Government of the Netherlands to the Government of the United Kingdom, and no subject of the United Kingdom shall be delivered up by the Government thereof to the Government of the Netherlands.

"With reference to the application of the present treaty are comprised in the denomination of 'subjects' not only naturalised citizens of the country, but also such foreigners as according to the laws of either of the contracting parties are assimilated to subjects, as well as such foreigners who, being domiciled in the country, and having married a citizen thereof, have one

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or more children of that marriage born there."

Article VII. "A person surrendered can in no case be kept in prison or be brought to trial in the State to which surrender has been made for any other crime or on account of any other matters than those for which the extradition shall have taken place, until he has been restored or has had the opportunity of returning to the country from whence he was surrendered."

Article VIII. "The requisition for extradition shall be made through the diplomatic agents of the high contracting parties respectively.

"The requisition for the extradition of an accused person must be accompanied by a warrant of arrest issued by the competent authority of the State requiring the extradition, and by such evidence as, according to the laws of the place where the accused is found, would justify the arrest if the crime had been committed there."

Article XI. "A fugitive criminal may, however, be apprehended under a warrant issued by any police magistrate, justice of the peace, or other competent authority in either country, on such information or complaint and such evidence or after such proceedings as would, in the opinion of the person issuing the warrant, justify the issue of a warrant if the crime had been committed or the prisoner convicted in that part of the dominions of the high contracting parties in which he exercises jurisdiction, provided, however, that in the United Kingdom the accused shall, in such case, be sent as speedily as possible before a police magistrate in London. He shall be discharged as well in the United Kingdom as in the Netherlands, if within fourteen days a requisition shall not have been made for his surrender by the diplomatic agent of his country."

The prisoner was proved to be the same person as the Bernhardt Wyprecht referred to in the warrant.

Besley and Tickell argued for the prisoner Ganz.—The first point is that there is no provision in the Netherlands treaty for surrendering a fugitive criminal unless his diplomatic agent concur. The application

is only to the extradition of Dutch subjects to the Dutch, and English to the English. This appears from Article XI. of the treaty. This man is domiciled in, and is a naturalised citizen of, the United States of America. It is necessary here for the requiring country to shew that he is a subject of the Netherlands.

[The letters of naturalisation, dated the 28th of July, 1880, and a passport of the 29th of July, 1880, were produced.]

[POLLOCK, B.—May he not be domiciled in one country, although a naturalised citizen of another?]

There is no evidence that he is a natural born subject of the Netherlands; it is consistent with the evidence that he is an Englishman. At any rate I say that the *prima facie* evidence is rebutted by the letters of naturalisation. The second point is that here there was no warrant of arrest, so as to enable the surrender to be made. Section 10 of the Act of 1870 (33 & 34 Vict. c. 52) requires the foreign warrant authorising the arrest to be duly authenticated. Here there is merely a letter enclosing a certified copy of the document by which the arrest is ordered. It is a copy of the minute of the Court which set aside the decision of an inferior Court. Depositions are put on a different footing from warrants by section 15. Copies of depositions are admissible, but not copies of warrants. So it is contended here, first, that this is not a warrant at all; second, if it is it is only a copy, and the original is necessary. He referred to *Clarke on Extradition*, p. 178.

Sir H. James, Attorney-General (A. L. Smith with him).—As to nationality, every person residing in a country is amenable to the laws of that country, whether a native or stranger—*Wheaton's International Law*, p. 137; *Kent's Commentaries*.

The first article of the treaty is to deliver up "any persons," which would include strangers. Then the third article contains the only limitation, namely, that no subject of the United Kingdom should be delivered up to the Netherlands, nor *vice versa*. Then "subject" is explained as comprising foreigners under certain circumstances. In the eleventh article, on which an argument was founded, "his

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country" means the country asking for extradition. These considerations afford an answer to the first point, assuming that Ganz is an American citizen; but it is not so—though naturalised in America, when he returns to his own country, he is subject to the laws; he is found in the country, and would be liable to conscription.

As to the second point, reliance was placed on Article VIII. But if the proceedings before the magistrate be regular, the non-fulfilment of treaty obligation does not make them bad. In *In re Counhaye* (1), Blackburn, J., says, "As to the objection that the terms of the treaty have not been complied with, and the order of the Secretary of State ought not to have been made, I do not think that affects the magistrate's jurisdiction." Here the Secretary of State has made the order. Then it has been argued as if "warrant" was the technical warrant of the English law; but really the word must be referred to any document which would authorise arrest in the foreign country. Section 26 defines "warrant" as any judicial document authorising the arrest of a person accused of crime. There was an entry in a book of the decision of the Court. It cannot be that the book is to be carried about after every criminal. The book is not a document which issues at all. The Arrondissement Court (corresponding to our Police Court) did not commit. There was an appeal to the High Court, which, with more evidence before it, ordered commitment. So the certified copy of the judgment of the Court became the document authorising the arrest made, for the purpose of its being used outside the country. It purports to be duly signed and sealed. Recurring then to section 10, read in the interpretation of section 26, and the requirements have here been satisfied, including those of section 15.

Besley, in reply.

POLLOCK, B.—In this case the prisoner Ganz has been brought before the Court on a writ of *habeas corpus*, and certain points have been taken before us on argument by his counsel as reasons why he is

(1) 42 Law J. Rep. Q.B. 217; Law Rep. 8 Q.B. 410.

entitled to his discharge. First, it is said that Ganz is not subject to the extradition law as existing between this country and the Netherlands, because he was not a domiciled subject of the Netherlands. This is put in two ways—first, that there is evidence of his being a naturalised subject of the United States of America; and, second, supported by an affidavit from Ganz, that not only was he so naturalised, but that there was no reason to believe that he was born in the Netherlands, but in Hungary. So it is said the treaty cannot apply. This depends on the treaty as well as English law. The leading principle underlying all treaties is this—whatever rights, civil or otherwise, a man may have affected by domicile, it is clear that each person is subject to the jurisdiction of the country in which he commits a crime. That has always been law. Then a treaty is made, and it is of course subject to the general rule. The Attorney-General called attention to the very general terms in which the first clause of the treaty is couched: "It is agreed that Her Britannic Majesty and His Majesty the King of the Netherlands shall, on requisition made in their name by their respective diplomatic agents, deliver up to each other reciprocally any persons who, being accused or convicted of any of the crimes hereinafter specified, committed within the jurisdiction of the requiring party, shall be found within the territory of the other party." Here it is that you would expect to find any limitation limiting the *status* of the person required, but there is not any; it is a person committing a crime within the jurisdiction of the requiring power. Then there is the express definition of "subject"—that it is to include "not only naturalised citizens of the country, but also such foreigners as, according to the laws of either of the contracting parties, are assimilated to subjects, as well as such foreigners who, being domiciled in the country, and having married a citizen thereof, have one or more children by that marriage born there." The only other section is Article II., and the only single word in it helping Mr. Besley's argument is "diplomatic agent of his country."

I think "his" means his for the purpose of this criminal law; that is the

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requiring country, it is the country in which he committed the crime.

The next point is more technical, but it is an important one.

It depends on the true construction of the domestic statute under which we act while the prisoner is in England.

It is said there was no proper warrant of arrest produced to the magistrate before whom Ganz was brought. It is most necessary and proper that he should know how and why he had been arrested. I think a little confusion has arisen here from thinking that there was any intention that a warrant drawn in a foreign country should run in this country. What was intended was to establish machinery whereby, if it could be shewn to any tribunal in this country that a person had committed a crime elsewhere, the magistrate should on evidence hold him till he could be sent back. There are many cases in our own country where there is irregularity in process, yet when the man is before the Court, he can be dealt with. It is, however, unnecessary here to go into this question. Everything here has been done in a regular way.

All depends on the meaning of "warrant" in section 10 of the Act of 1870. Foreign warrant means, looking at the interpretation clause, "a judicial document authorising the arrest of a person accused or convicted of crime." We have the document before us in a copy of the decree of the foreign Court. It begins by reviewing what has been done by the inferior tribunal, which concluded that there was not sufficient evidence against Ganz. It sets out the names of the persons alleged to be defrauded, and the amounts, and then proceeds: "Taking into consideration that these acts are punishable by article 405 of the Penal Code, and having seen articles 88 and 89 of the Law Book of Demands for Punishment, the report will not be accepted. Authorised proceedings, with an order for arrest, against Ganz, late living at Rotterdam, thence absconded." To this are appended the signatures of the vice-presidents, and of several persons described as councillors of the Court.

It is impossible to say that this is not a judicial document authorising arrest.

Then comes the question, What evidence of it have we here in England? We have a copy of this decree, indorsed "Delivered on demand of the O. M., the actuary of the Court of Justice at the Hague." This is signed by the secretary-general for the minister of justice, and it bears the seal of the ministry of justice. Could this document, so attested and signed, be received? I think that it could. We cannot expect that all the original documents, being judgments of foreign Courts, could be produced in London, so provision is made in section 15 for the reception of authenticated copies; and where the word "foreign warrant" occurs in that section, we may again read it by the light of the interpretation clause as a judicial document authorising arrest.

For my part, I think that we have not, in the least degree, extended the provisions of this Act in refusing to grant this application.

MANISTY, J.—I am of the same opinion. It seems to me, looking at the Act of 1870, and the treaty of 1874, that there are two essential requisites to be fulfilled before a fugitive criminal can be extradited. First, there must be a requisition from the diplomatic representative of the foreign State. That may follow instead of precede the steps for the arrest; but it is essential to be made. Another requisite is that the magistrate should be satisfied that the crime has been committed, that it is one specified in the treaty, and that evidence such as would convict the criminal in this country is forthcoming. No doubt it is said in article VIII. that the requisition must be accompanied by a warrant of arrest; but if the information is laid before the magistrate that the person is a fugitive criminal, he may issue his warrant, and arrest him before any requisition is produced. The magistrate's jurisdiction depends on the Act of Parliament, and it is not necessary to shew that the Secretary of State has insisted before making his order on the preliminaries which are of treaty obligation merely, having been fulfilled. This throws great light on the subject, and shews the soundness of the judgment of the Court in the case I will refer to presently.

By section 13 it is enacted that the

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warrant of the police magistrate may be executed in any part of the United Kingdom, in the same manner as if the same had been originally issued by a Justice of the peace having jurisdiction in the place where the same is executed. Section 6 provides that any fugitive criminal shall be liable to be apprehended and surrendered in manner provided by this Act, and the manner provided will be found in section 8. By this it appears that the warrant may be issued by any Justice in any part of the kingdom, without any intimation from the Secretary of State or any requisition. But there is this safeguard, that he shall forthwith send notice to the Secretary of State. Then the prisoner is to be discharged unless the police magistrate receives a requisition within fourteen days.

The decision in *In re Counhaye* (1) is thus perfectly intelligible, and we do not conflict with it in any degree.

On the other point, we have here an official document under the seal of the Court of Justice at the Hague in council assembled. It is, in my opinion, an original document, not a copy at all. It certainly comes within the meaning of "foreign warrant" in the Act of Parliament; it is properly authenticated, and all forms have been complied with. The rule will therefore be discharged.

Solicitors—Greenfield & Abbott, for applicant;
J. W. May, for the Netherlands Government.

1881. }
Nov. 30. } GALLOWAY v. MARIES.

Betting Act (16 & 17 Vict. c. 119), ss. 1 and 3—"House, Office, Room or other place"—*Movable Box within Ring at Races.*

[For the report of the above case, see 51 Law J. Rep. M.C. 53.]

1882. }
June 7. } *In re* ARBITRATION BETWEEN
WALKER AND BROWN.

Arbitration—"Costs of Reference"—Costs of Award.

An arbitrator having authority under the submission to deal with the "costs of the reference" has authority to deal with the costs of the award.

Rule to shew cause why the award made between the parties should not be set aside on the ground, among others, that the umpire exceeded his jurisdiction in awarding to William Henry Brown the costs of and incidental to the reference and the costs of the award.

By an agreement dated the 9th of July, 1881, and made between William Walker and Edward William Walker and William Henry Brown, certain disputes between the two first-named persons and the third were referred to two arbitrators, and in case of their disagreement to an umpire, with power to "determine by and to whom the costs of this reference shall be paid, or to apportion such costs between the parties."

By his award, dated the 23rd of March, 1882, the umpire awarded a sum of money to be paid to Brown by Walker & Son, and also that Walker & Son should pay to Brown "the costs incurred by Brown of and incidental to the reference and award, and the costs of this award."

Lumley Smith, Q.C., shewed cause, and cited *Galatti v. Wakefield* (1), in which the submission included the costs of the award, which was assumed to include the costs of the reference.

B. Firth supported the rule.

FIELD, J.—I think that good cause has been shewn against this rule to set aside the award. The main ground of objection to it is that the costs of the award are given. That is said to be outside the jurisdiction of the arbitrator. In an arbitration by consent, the arbitrator has of course no authority but such as is given him by the parties. It is quite true that in every order of reference which I ever

(1) 48 Law J. Rep. Exch. 70; Law Rep. 4 Ex. D. 249.

In re Arbitration between Walker and Brown.

saw the words "costs of reference and award" are inserted, and generally in all submissions. It is, therefore, not unnatural that there should be an impression that the words "costs of reference" do not include the costs of the award. There is no authority to the contrary, but there is no difficulty in making one. If no award is made the reference is not finished, therefore the reference must include the award. This, I think, is the decision in accordance with justice and law.

CAVE, J.—I am of the same opinion for the same reasons.

Rule discharged.

Solicitors—Field, Roscoe & Co., agents for Partridge & Co., Lynn, for Brown; W. B. Brook, agent for E. M. Beloe, Lynn, for Walker & Son.

LORD COLERIDGE, C.J.—In *Jupp v. Cooper* (1) the Court had not the matter brought before them. The only question there was, whether the rule should be absolute in the first instance. Order XLIV. rule 2, makes it plain that this application can only be made on notice. To hold otherwise would be to read "no writ," as if it were "every writ."

Application refused.

Solicitors—Bell, Brodrick & Gray, agents for Leak, Till and Stephenson, Hull, for the sheriff.

1882. } *Ex parte* THE SHERIFF OF YORK-
May 1. } SHIRE; *in re* EYNDE v. GOULD.

Practice—Order XLIV. rule 2—Attachment—Notice to Party sought to be attached.

A writ of attachment must be moved for on notice of motion to the party sought to be attached. The Court will not hear an ex parte application for a rule nisi.

In this case *T. W. Chitty* moved for a rule *nisi* for a writ of attachment, on behalf of the Sheriff of Yorkshire, against two persons for removing out of his hands goods which had been seized by him in execution.

[LORD COLERIDGE, C.J.—Have you given notice of motion?]

No. I submit that it is not necessary. If the Court grant me a rule *nisi*, I shall serve it as notice under Order XLIV. rule 2, as was allowed in *Jupp v. Cooper* (1). This is not in an action, so as to fall within Order LIII. rule 2. Order I. rule 3, is in favour of this course—*Phillips v. Gill* (2).

(1) Law Rep. 5 C.P. D. 26.

(2) 45 Law J. Rep. Q.B. 136.

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1882. }
Jan. 12. } DUBRANT v. RICKETTS AND WIFE.

Practice—Order XIV. rule 1—Action against Married Woman—Form of Order.

Judgment cannot be signed against a married woman personally for the price of goods supplied to her during coverture. An order for leave so to sign judgment under Order XIV. rule 1 is therefore wrong in form. The order should be for an enquiry as to the existence of separate estate chargeable with the debt sued for, and a declaration that such separate estate (if any) is chargeable therewith.

This was an appeal from the Judge at chambers giving leave to the plaintiff, which had been refused by the Master, to sign final judgment against a married woman living apart from her husband, in an action for goods sold and delivered originally brought against her alone, but in which subsequently the husband was joined as co-defendant, but had not appeared.

Lumley Smith, Q.C., contended that the form of the order was wrong, as there never was in equity, and is not now in law, any judgment against a married woman personally in respect of a liability contracted during coverture. The usual practice is to order an enquiry as to whether the woman has any separate property, and declare that, if any there be, it is chargeable to the amount of the debt sued for—

Durrant v. Ricketts.

Picard v. Hine (1) and *Pike v. Fitzgibbon* (2).

Brynmôr Jones, contra.—It is clear that the separate estate (if any) is chargeable, and the error in the order is only formal, and can be amended—*Collett v. Richardson* (3).

FIELD, J.—We think the order should be in the form of *Pike v. Fitzgibbon* (2), there being no dispute about the claim; but the costs of this application must be the defendants'.

HUDDLESTON, B., concurred.

Order varied accordingly.

Solicitors—W. F. Fraser, for plaintiff; G. S. & H. Brandon, for defendant.

[IN THE COURT OF APPEAL.]

1882. } THE WHITECROSS WIRE AND
March 24, } IRON COMPANY (LIM.) v.
27, 28. } SAVILL AND OTHERS.*

Ship and Shipping—General Average—Damage to Goods not on Fire by Water used to extinguish Fire.

The act of pouring water into a ship in order to extinguish a fire in the hold, and so save both ship and cargo from destruction, is a general average act, which entitles the owner of cargo which has been damaged by the water to a general average contribution.

Appeal of defendants from the judgment of Pollock, B., at the trial without a jury.

The action was brought by the consignee of goods to recover a general average contribution. The defendants, the owners of an iron steamship called the *Himalaya*, carried, amongst other goods, some iron wire for the plaintiffs from London to Wellington, New Zealand.

(1) Law Rep. 5 Ch. App. 274.

(2) 49 Law J. Rep. Chanc. 493; 50 *ibid.* 394; Law Rep. 14 Ch. D. 837.

(3) Law Rep. 11 Ch. D. 687.

* *Coram* Lord Coleridge, C.J.; Brett, L.J.; and Holker, L.J.

The ship sailed on the 7th of October, 1876, and arrived at Wellington on the 25th of January, 1877; she was hauled into her berth for discharging on the 30th of January, and had discharged the whole of her cargo with the exception of about 100 tons, when, on the 16th of February, a fire broke out on board, and water was pumped into the hold to extinguish it, and some of the wire belonging to the plaintiffs was twisted by the action of the water. The plaintiffs claimed to recover 50*l.* as a general average contribution, and Pollock, B., gave judgment for that amount.

The defendants appealed.

Sir H. Giffard, Q.C., and Pollard, for the defendants.—The plaintiffs cannot claim for a general average contribution in respect of the goods alleged to be injured, for there has been no sacrifice, neither was there any peril of destruction, and, moreover, the voyage had ended. The circumstances of this case do not satisfy the definition given in *Arnould on Insurance* (1). There was no sacrifice of part for the whole, and there was no imminency of a total loss of the whole adventure. The ship being an iron ship was in no danger of being destroyed as a ship; she might have been scuttled, sunk in the harbour and then raised; moreover, the ship had been in harbour since the 25th of January, and had discharged all the cargo except about 100 tons, and as the fire did not occur till the morning of the 16th of February, the common adventure was at an end. *Stewart v. The West India and Pacific Steamship Company* (2) and *Achard v. Ring* (3) can both be distinguished on the facts; but even if the judgment in the Court of Queen's Bench in the former case is adverse to the contention of the appellants, still that case was decided in the Exchequer Chamber only on the particular words of the bill of lading, and *Achard v. Ring* (3) was at *Nisi Prius*; moreover, what took place in those cases occurred during the voyage, while here the voyage was at an end. If necessary this Court will reconsider that part

(1) Vol. ii. ed. 5. c. 4. pp. 812-822.

(2) 42 Law J. Rep. Q.B. 84, 191; Law Rep. 8 Q.B. 88, 362.

(3) 31 Law Times, N.S. 647.

Whitecross Wire and Iron Co. v. Savill, App.

of the judgment of the Court of Queen's Bench in *Stewart v. The West India and Pacific Steamship Company* (2), which decides that this is the subject of general average contribution; and the judgment of Brett, L.J., in *Shepherd v. Kottgen* (4), supports the contention that this question has never yet been decided adversely to the contention of the appellants. *Schmidt v. The Royal Mail Steamship Company* (5) does not affect this case, for the question there turned on the construction of the bill of lading, and was whether the shipowner was within the exception inserted in that document. The American Courts have taken a different view of the law, and although there is no authority against the appellants in English law, the cases and text writers in America do extend the liability of the shipowner; but, as is clear from the judgment of Cleasby, B., in *Harrison v. The Bank of Australia* (6), the American law does not agree with the English law on the subject of general average, and that case enforces the principle that the danger sought to be averted must be one which touches the whole adventure.

Cohen, Q.C. (with him *Hollams*).—The American law as to contribution where goods are damaged by fire is stated thus in *Parsons on Insurance* (7): "If goods of great value were brought on deck, and left there for the purpose of getting out for jettison other less valuable goods which had been stowed beneath them, and the goods first taken out were washed overboard or damaged by the sea, this would be, we think, a general average loss. Or if water thrown into a ship's hold to extinguish fire damaged goods there, this damage would also be a general average loss." In a note to this last passage it is said that only that part of the cargo should be contributed for which can be shewn to have been damaged exclusively by the water; and that the rest of the cargo is to be assumed to have been damaged by the fire, if not proved to have been damaged

by the water, and is not to be allowed for —*Nelson v. Belmont* (8). The facts in *Nimick v. Holmes* (9), which is cited in *Stewart v. The West India and Pacific Steamship Company* (2), are similar to those in the present case, and Lowrie, J., in delivering judgment, said that though the Rhodian law *de jactu* provided for contribution only in the case of goods cast overboard in times of peril, yet the spirit of the regulation is in its reason, which is because the act was done for the benefit of all; and it was this reason, rather than the limited expression of it, that was applied in the Roman jurisprudence. In order to constitute a case of general average there must be a common danger, imminent and apparently inevitable; a voluntary *jactus* of some portion of the joint concern, for the purpose of avoiding this peril; and lastly, the attempt to avoid this imminent common peril must be successful. If, therefore, any act is done deliberately and judiciously for the protection and preservation of all interests from a common peril and a common destruction, it gives a just claim to compensation. No principles are laid down in *Nimick v. Holmes* (9) which have not been enunciated in the English cases, and the principles laid down by Thesiger, L.J., in *Attwood v. Sellar* (10) lead certainly to the same conclusions as those laid down in the American cases. The principle which underlies the doctrine of general average contribution is, that whatever loss necessarily follows from the sacrifice, although it does not follow *eo instanti*, is general average. The question here is, whether pouring water down a hold under these circumstances is a general average act, which is defined as an intentional act done to avert a danger which is common to both ship and cargo. The test is whether the act was a prudent one for the master of the ship to do, the great principle being that he must do the best for all parties. It has been laid down in some passages that the act must be done to avert a total loss, but that is not correct —*Arnould on Insurance* (11), *Baily on*

(4) 47 Law J. Rep. C.P. 67; Law Rep. 2 C.P. D. 585.

(5) 45 Law J. Rep. Q.B. 646.

(6) 41 Law J. Rep. Exch. 36; Law Rep. 7 Exch. 39.

(7) Vol. ii. pp. 233-234.

(8) 5 Duer. 310.

(9) 25 Pennsylv. Rep. 366.

(10) 49 Law J. Rep. Q.B. 515; Law Rep. 5 Q.B. D. 286.

(11) Vol. ii. ed. 5. pp. 816-s 8, 831, 834.

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General Average (12) and *Stevens on Average* (13). If damage is done to a ship for the purpose of saving the whole adventure, the loss is one for which the owners of both ship and cargo contribute. *Attwood v. Sellar* (10) only decides that general average is the natural result of a general average act. It can be shewn that pouring water down the hold to extinguish fire is on general principles a general average act. The evidence here shews beyond doubt that there was a danger common to both ship and cargo.

[He was stopped by the Court.]

Pollard, in reply.—*Attwood v. Sellar* (10) shews that it is not the practice of the average adjusters to treat this as a general average loss, and that the practice professes to follow the law.

LORD COLERIDGE, C.J.—I am of opinion that our judgment must be for the respondents. The question is one which, it has been said, comes before the Court of Appeal for the first time; and, in a certain sense, that may be true, for this is the first time that the principle comes to be applied to this particular state of circumstances.

It seems to me that the facts, which are not in dispute, would bring the case within the application of the well-understood principles of general average—that where the master, acting for the whole adventure, deliberately and intentionally sacrifices a part of the adventure of the ship and cargo for the purpose of preserving the whole, that act must be done when the peril is sufficient to endanger the whole adventure, and the sacrifice must be made for the purpose of preserving the adventure. In this case the ship had reached her port of destination, and in a certain sense, no doubt, the voyage was over, for the ship was in port, and moored close to the shore. A great deal of her cargo had already been unloaded, leaving, however, a considerable portion still on board. That being the state of things, a fire took place in the hold, and in that part of the ship where the cargo in respect of which the present question has arisen was stowed.

In order to save the ship and the rest of the cargo, water was poured down into the hold, but part of the cargo was burned. In the course of extinguishing the fire, which might have destroyed the rest of the cargo and the ship, the ship and what was left in her were saved. Part of the cargo was damaged by the water, and the question now arises whether the plaintiffs are entitled to general average contribution in respect of that part of the cargo. I confess that, unless there are any authorities to the contrary which are binding on the Court, I do not understand why this was not a case of general average, or on what grounds contribution to general average of that portion of the cargo could be disputed. Now the present case, if I have stated the facts correctly, clearly comes within every definition of a general average loss which is to be found in the text-books, whether English or American. It has been truly said that up to 1872 it had been the practice of English average adjusters to exclude goods damaged under circumstances similar to the present, and that English writers—Baily and Stevens—have laid it down in their treatises that the principles of general average contribution do not apply in such a case. Baily lays it down that “damage done to cargo by pouring water upon it to extinguish a fire, or by water admitted into a vessel’s hold, when she is scuttled, to extinguish fire, is excluded from general average. In defence of this practice no valid reason can be urged. It is based on an erroneous idea that a general average cannot arise when the degree of danger is so great that it amounts to a moral certainty of total loss, and on a fanciful distinction between the degree of danger existing in cases of fire and the degree existing when a vessel is on her beam-ends, or on the point of foundering—a distinction which the ingenuity of argument may draw, but which will not bear the test of common sense” (12). Therefore, although he lays it down that such is the practice of the average adjusters, yet he expressly gives his own opinion that on grounds of reason it could not be justified. It seems to me that, although that is the practice of English average adjusters, it certainly has not been the

(12) 2nd ed. pp. 81, 82.

(13) 5th ed. p. 41.

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practice for a very long time past in America; and it is in terms laid down by Parsons and Phillips in their text-books, that goods sacrificed under circumstances such as these become the subject of general average. Now, that being the state of the case, and the principle being clear, and with nothing to oppose it but the practice of the English average adjusters, and that practice having been protested against, how stands authority? I am not aware of any authority in the English Courts which conflicts with the decision we are about to pronounce. On the contrary, *Stewart v. The West India and Pacific Steamship Company* (2) is, so far as it goes, an authority directly in favour of the judgment we are now pronouncing. There the circumstances under which the question arose were precisely like the present case. The question was decided, it is true, in favour of the defendants, but on the words of the bill of lading, "average, if any, to be adjusted according to British custom"; and it was pointed out by Mr. Justice Quain that the words were to be taken in their ordinary sense; that British custom meant British practice; and that the parties, whatever the law might be, were bound by the terms of their contract, and were in that particular case bound according to English practice. Mr. Justice Quain, in delivering the judgment of the Court, takes care to lay down that "the loss was, according to the general law, properly the subject of a general average contribution. It was a voluntary and intentional sacrifice of the bark, made under the pressure of imminent danger, and for the benefit and with a view to secure the safety of the whole adventure then at risk. No case has been cited in which the exact point to be decided has arisen in our Courts; but we have been referred to an American case in which the question was considered." *Nimick v. Holmes* (9) was then cited and approved of; and his Lordship also said that if the case before the Court had depended wholly upon the common law applicable to general average losses, the plaintiffs would have been entitled to recover. That case went to appeal, and it is true that Mr. Justice Brett, who delivered the judgment of the Court, it not

being necessary for the decision of that case, used carefully guarded words, and decided the case upon the perfectly clear and safe point that the contract was a contract according to British custom, that the custom was clear and must prevail; but he did not intimate that he dissented from the opinion expressed by the Court below. These were the decisions in 1873. In 1876 this very matter was considered by the Court of Queen's Bench in *Schmidt v. The Royal Mail Steamship Company* (5). It was said that the question there was very much like that which was decided in *Stewart v. The West India and Pacific Steamship Company* (2)—namely, whether a particular part of the goods should contribute to a general average loss, where the bill of lading stipulated that "fire on board" should be excepted. The question was, whether the bill of lading could override the general law applicable to the subject, and whether, in spite of the bill of lading, these goods were not liable to contribute to a general average contribution. Mr. Justice Blackburn and Mr. Justice Lush held that the general law applied, and that the goods were liable so to contribute. But the matter does not stand there, for Mr. Justice Blackburn there referred to the case of *Aspinwall v. The Merchant Shipping Company* (14) as having decided this very point rightly, and he concurred in that decision. We have therefore the decisions of five Judges in the Queen's Bench, all of which were pronounced without hesitation, and which laid down, in three cases exceedingly like the present one, that the law is as the respondents here maintain. That is the state of things, so far as the English authorities are concerned, on the first point. There is nothing but the practice of the average adjusters to the contrary; and although *Attwood v. Sellar* (10) has been cited by Mr. Pollard for the expression that the practice of the average adjusters professes to follow the law, yet it is remarkable that in the very sentence of the judgment of Lord Justice Thesiger in which that expression occurs, it is said that it is the more necessary to examine the authorities with attention, seeing that

(14) Not reported.

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the practice of average adjusters professes to follow them; so that the Lord Justice clearly intimated that in his opinion the practice of the average adjusters might differ from the authorities, and that if it did so differ, then the authorities would have to be followed. So the matter stands on authority. The general principle is thus laid down in exactly the same terms in all the reports, but not in all the text-books. The question, when it arose in the English Courts, was decided in favour of the respondents — namely, that the average adjusters have been in the habit of acting on a different principle, but that their practice could not be maintained. Upon general principles it seems to me that there is nothing to make us hesitate to say that this case is within the general law which has been so long established.

Then a second important question was raised, which was this: that although that might be true, these principles are principles of mercantile law, and as in this case the voyage was at an end, so also these principles no longer applied, and that whatever might have been the rule supposing the fire had happened in mid-ocean, yet a different principle applied because the voyage was at an end and the ship was moored to the wharf. Mr. Pollard was probably right when he said that the voyage had come to an end, and, although it is not necessary to decide the question, I take it for granted that the liability of the underwriters under a voyage policy, if any existed, had also ceased. But it is plain that the mercantile adventure had not ceased, because the liabilities under the bill of lading had not been exhausted, and the relations of the parties to the adventure still remained in force. That would be plain from a consideration of the facts of the case; but if any authority is wanted, the case of *Achard v. King* (3) is a direct authority for that purpose, because the circumstances were very similar to the present case. There the voyage was at an end; the loss happened in port; and because it happened during the currency of the bill of lading it was expressly held by the Court that this liability attached, and that the loss was a general average loss. Therefore, both upon principle and upon authority, this

second point must equally be decided in favour of the respondents.

There is one other point, in determining which I think it right to say that, in my judgment, this rule must be applied to so much only of the cargo as was damaged by water. I agree that a distinction must be made between cargo which has been destroyed by fire and cargo which merely being on fire is damaged by putting the fire out, and that it is only to cargo not on fire, and as to which there was a real sacrifice, that these principles must be applied. The question whether or not the whole of this cargo is subject to the principle cannot now be raised, because no such point was taken at the trial.

BRETT, L.J.—In this case the action was brought by the consignees of certain goods to recover a general average contribution. The action was tried before Mr. Baron Pollock without a jury, and from his decision there is an appeal; and there is, under these circumstances, an appeal therefore both as to the facts and as to the law. The first thing, in order to make my judgment clear, is to say how I apprehend that the facts really existed. It seems to me that the ship was being used in the ordinary way as a means of carrying goods from port to port; that she had arrived at her port of discharge, where she had been for some days; and that when her cargo was to a considerable extent, although not entirely, unloaded, a fire occurred in the hold of the ship, and that the fire had got so far ahead that if nothing had been done there would have been a practical destruction of the ship as a ship and of the cargo. A part of the cargo as well as part of the ship, as I apprehend it, was on fire. The ship nevertheless was in such a position that if she had been scuttled at once it is most probable that she would not have been totally destroyed; but even if she had been scuttled it would have been a great expense to set her right, and the cargo also would have been injured in the same way. The captain, under these circumstances, poured water into the hold for the purpose of putting out the fire, and the necessary consequence of so doing was to damage the ship to a certain extent and also the

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cargo, which is the subject-matter of this suit. That the facts existing at the time did cause such a danger as to make it a reasonable thing for the captain to do what he did; that the fire was subdued by what he did; and that injury was done by the water to the goods which at that time had not been injured by the fire, is not disputed. I do not think that the general law as to what will give rise to a general average contribution is much disputed. The question whether the general average loss has been caused by pouring water into the ship is subject to the ordinary rules. There must be danger, and there must be an attempt to avert that danger, and that must be proved. But if there is a danger actually existing, and if the captain has the intention, which must be inferred or proved, to sacrifice goods which are not in the act of perishing—so that he has the intention to injure goods which might or might not perish—for the purpose of saving the whole adventure, it seems to me that there is a general average loss, and that there ought to be a general average contribution if the whole adventure was in sufficient danger. It was argued for the appellants that the danger must be one of imminent total loss, and that unless both the ship and cargo were in danger of imminent total loss there cannot be a sacrifice, and therefore no general average contribution. I know that there are some phrases in *Arnould on Insurance* (1) which seem to justify the argument that there must be an immediate total loss, but I am unable to find any statement in the authorities to that effect, and I do not think it is correct. I think it is clear that the mere *bona fides* of the captain is not sufficient, and a person, in order that he may claim a general average contribution, must shew that the danger existed in fact, and not merely in the mind of the captain. The rule is that if the circumstances shew that a danger did exist in fact so as to make it reasonable to sacrifice a part for the whole, and if the sacrifice is made with that intention, then there is a general average loss and a general average contribution. That rule cannot be done away with by shewing that there was not an imminent total loss.

It was said that, even under such a

definition as that, the circumstances did not exist in this case; because, it was said, the ship was in no danger of any absolute loss, and for two reasons—first, because she was an iron ship and fire could not destroy her; and, secondly, because she could have been scuttled, by taking out a plate, and then raised; so that there would have been only a partial damage done to her. Such an argument must be considered with reference to the facts. It is true that the ship could not have been totally destroyed by the fire; but if an iron ship were on fire and nothing had been done to put it out, it seems to me that the fire would have burnt the masts, sails and wood-work, leaving a mere shell of iron. The result, therefore, would be, if not to wholly annihilate the ship, to make her in such a state that it would be reasonable, in order to prevent such a result, to pour water into the hold to put out the fire.

With regard to the choice of scuttling the ship, I think no doubt that she might have been saved by that; but the same question would have been raised as in the present case, whether she had been scuttled for her own sake or to prevent the cargo being damaged; and I cannot see why that would not have entitled her to general average if done for the purpose of saving the cargo. I do not think that because there were alternative means of saving the ship the captain can be said not to have acted reasonably because he adopted an alternative which was equally good. It has been argued that the water was not poured into the ship with the intention of sacrificing the cargo, because it was the duty of the captain to put out the fire; but that raises a considerable fallacy as to the duty of the captain. When extraordinary circumstances arise, the captain is by those circumstances made the agent of all parties to do what is best for all concerned; and he becomes the agent for the owner of the cargo as well as for the ship-owner. If the captain for slight cause were to inundate the ship, when there was no danger, the cargo owner would not claim for a general average contribution, but would sue the ship-owner for damages.

The question here is whether the captain can be said to have sacrificed the goods by

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pouring water upon them in order to put out the fire. Where some of the goods in a ship are on fire, so that there is danger to the whole adventure, it seems to me that the captain necessarily damages the whole cargo by pouring water into the ship; he not only puts out the fire as regards the goods which are on fire, but he intentionally inundates goods which are not and which might not be on fire, in order to do what is best for all concerned, and to save both the goods and the ship. In the same way it would be the duty of the captain for all concerned to jettison part of the cargo to save the whole; and if he did so without such justification, the loss would not be a general average loss, but the owners of the cargo would have a right of action against the ship-owner.

The present case is well within the rule, because the captain, who is the agent of the owner of the cargo, sacrificed part of the goods for the purpose of saving both ship and cargo. If part of the goods is on fire, and the captain pours water upon them with the intention not to sacrifice but to save the goods, and if the goods are not on fire, then the opportunity of sacrificing the goods does not exist. All the circumstances which exist here make this a general average loss, and entitle the plaintiffs to a general average contribution.

It was also asserted that the voyage was at an end, and that therefore the doctrine of the maritime law did not apply; but the maritime adventure was not at an end, although it is true that the voyage was. Now the maritime adventure is the carriage of goods by means of a ship; and the law applies so long as the adventure lasts. The adventure does not end until the goods are delivered out of the ship, and as in this case the maritime adventure was still in existence, the law applies.

The only other point, and one which was disposed of in course of the argument, was, that the wire was so much injured by means of the fire as to become unmerchantable, but that point cannot now be taken, because it was not raised at the trial, when evidence to the contrary might have been given.

Agreeing, as I do, with the decisions in

Stewart v. The West India and Pacific Steamship Company (2), *Aspinwall v. The Merchant Shipping Company* (14), and, so far as it applies, with the decision in *Schmidt v. The Royal Mail Steamship Company* (5), it seems to me that we ought to declare there is a right to a general average contribution. With regard to the observations made in the Court below in *Stewart v. The West India and Pacific Steamship Company* (2), I think that they were only limited by reason of caution, because the Judges knew that this practice of the average adjusters did exist, and therefore this point was not decided, as it was not necessary for the decision in that case.

With regard to the custom itself, it is my clear opinion that the views of the average adjusters cannot and do not make the law of England.

HOLKER, L.J.—I am of the same opinion.

Appeal dismissed.

Solicitors—Hollams, Son & Coward, for plaintiffs; Ingledew & Ince, for defendants.

1882. { POOL AND FORDEN HIGHWAY
March 7, 11. { BOARD v. GUNNING AND
OTHERS.

Highway—Highways and Locomotives Amendment Act, 1878, ss. 23 and 36—Limitation of Summary Proceedings—Certificate of Surveyor.

[For the report of the above case, see 51 Law J. Rep. M.C. 49.]

[IN THE COURT OF APPEAL.]

1882. { THE PRISON COMMISSIONERS v.
May 1. { THE CLERK OF THE PEACE FOR
MIDDLESEX.*

Prison Act, 1877 (40 & 41 Vict. c. 21), ss. 48 and 60—Prison Act, 1865 (28 & 29 Vict. c. 126), ss. 23 and 44—Land purchased for Prison Purposes vesting in Prison Commissioners.

A deed of conveyance stated by way of recital that certain land was purchased and held upon trust by the defendant for the Justices of Middlesex, "for the purposes of the Prison Act, 1865, and upon or for no other trust, intent or purpose whatsoever." In an action by the Prison Commissioners claiming the title-deeds and the rents and profits from a certain date,—Held, that the Justices were bound by the recital in the deed as to the purposes for which the land in question was purchased; and that as the only purposes for which land could be purchased under the Prison Act, 1865, ss. 23 and 44, were prison purposes, the land passed to and vested in the Prison Commissioners under the provisions of sections 48 and 60 of the Prison Act, 1877, without payment.

Appeal from a judgment of Lord Coleridge, C.J., on further consideration.

In 1867 the defendant, acting for the Justices of Middlesex, who were then the prison authority, purchased by deed certain land and premises adjoining the Coldbath Fields Prison, known as Nos. 1 to 10, Oldham Place, and Nos. 1 to 15, Oldham Gardens, Coldbath Fields. The deed of conveyance recited that the vendors, "acting under the powers of the Prison Act, 1865, and of the Acts incorporated therewith, lately contracted and agreed with the said Richard Nicholson, who was duly authorised in that behalf by the Justices of the said county of Middlesex, in Quarter Sessions assembled, acting under the powers vested in them by the said Prison Act, 1865, and the Acts incorporated therewith, for the absolute sale to him" of the land in question. Then there was a recital that the purchase-money had been paid, and that the land was conveyed to

* *Coram* Jessel, M.R.; Brett, L.J.; and Cotton, L.J.

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the clerk of the peace, "to have and to hold the said pieces or parcels of ground, messuages or tenements, buildings and all and singular other the premises hereby granted and conveyed, or intended so to be, with their and every of their rights, members and appurtenances (subject as to part of the hereditaments secondly hereinbefore described to the subsisting tenancies, and to the said several leases thereof specified in the said first schedule hereunder written, but free from all other incumbrances), unto the said Richard Nicholson, his successors and assigns, to the use of the said Richard Nicholson, his successors and assigns, for ever, upon trust for the Justices of the said county of Middlesex, for the purposes of the Prison Act, 1865, and upon or for no other trust, intent or purpose whatsoever." — The action was brought to recover the title-deeds, and also the rents and profits of the land in question from the 1st of April, 1878.

The jury were discharged at the trial, and Lord Coleridge, C.J., on further consideration, gave judgment for the plaintiffs, holding that the land had been purchased by the Justices for the purpose of enlarging the prison.

The defendant appealed.

Webster, Q.C., and *R. S. Wright*, for the defendant.—The question is, whether the land in question passed to the Prison Commissioners under the provisions of the Prison Act, 1877 (1), without payment of

(1) 40 & 41 Vict. c. 21. s. 5: "Subject as in this Act mentioned, the prisons to which this Act applies . . . shall, on and after the commencement of this Act, be transferred to, vested in and exercised by one of Her Majesty's principal Secretaries of State."

Section 48: "The legal estate in every prison to which this Act applies, and in the site and land belonging thereto, . . . shall, on and after the commencement of this Act, be deemed to be vested in the Prison Commissioners, and not in the Secretary of State, but shall from time to time be disposed of by such commissioners in such mode as the Secretary of State, with the consent of the Treasury, may direct."

Section 60: "'Prison,' in addition to the meaning attached to it by the Prison Act, 1865, includes any land or building bought, or contracted to be bought, before the commencement of this Act, by a prison authority for the purpose of enlarging or altering any prison, or adding to the appurtenances of any prison,

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compensation to the Justices of Middlesex. The land here was not purchased for the purpose of enlarging the prison, in which case it is admitted that it would have passed to and vested in the commissioners, but it was purchased for the purpose of rendering the prison more commodious and safe, in order that the Justices might have control over the tenants who resided in the houses outside the prison walls. The Justices had power only to purchase in relation to the prison, and land purchased by them for other purposes would not pass either to the Secretary of State or to the Prison Commissioners.

[*The Attorney-General (Sir H. James, Q.C.)*.—It is contended on the part of the plaintiffs that this land passed to them if bought for any purpose in relation to the prison or its management. The land comes within the definition of prison given in section 60 of the Prison Act, 1877 (1), and was bought for the purpose of either enlarging, altering or adding to the appurtenances of the prison.]

The minutes passed by the Justices in quarter sessions shew that they had repeatedly determined not to further enlarge the prison, but had really bought the land for the purpose of rendering it more commodious and safe (2).

Next, as to the statutory powers of the Justices. Under section 4 of the Prison Act, 1865 (3), any grounds which are to

be included in the definition there given of a prison, must be grounds which are used for the prison and are contiguous thereto, and which are also occupied by the prison officers. By section 5, the Justices of the county in quarter sessions assembled are to be the prison authorities. Then sections 8, 17 and 18 contain provisions relating to the proper maintenance and government of prisons. Section 23 (3) empowers any prison authority to alter, enlarge or rebuild any of its prisons, or, if necessary, to build other prisons under certain conditions imposed by sections 24 and 25.

By section 44, sub-section 3 (3), the Justices could compulsorily purchase lands contiguous to the prison which are required for the purposes of enlarging it or rendering it more commodious and safe. The proviso contained in section 44 is a proviso on section 23 (3); and a main provision may sometimes be construed by a proviso. Section 44 gives the Justices power to purchase land for purposes other than those of enlarging the prison. There are no provisions in the Acts of 1865 and 1877 which prevent the Justices from purchasing land by agreement. The Act of 1865 contemplates two things—compulsory purchase and purchase by agreement. It is not illegal for the Justices to buy by agreement what they could compulsorily buy. Section 5 of the Act of 1877 (1)

subject to this proviso, that if the Secretary of State is of opinion that any portion of the lands so bought, or contracted to be bought, whether included or not within the walls of the prison, was not at the time of the passing of this Act necessary for the then subsisting purposes of such prison, he shall either direct that such portion shall be reconveyed to the prison authority, or retain such portion or any part of such portion, on payment out of moneys provided by Parliament of such sum as may be agreed upon, or in the event of difference, may be determined by arbitration in manner provided by this Act, on the transfer of any such prison to him, and the vesting thereof in him as by the Act provided."

(2) The Court subsequently intimated that the minutes could not be referred to, as the deed of conveyance contained a recital of the purposes for which the land was purchased, which was binding on the Justices.

(3) 28 & 29 Vict. c. 126, s. 4: "'Prison' shall mean gaol, house of correction, bridewell or penitentiary; it shall include the airing grounds

or other grounds or buildings occupied by prison officers for the use of the prison and contiguous thereto."

Section 23: "Subject to the conditions hereinafter mentioned, any prison authority may alter, enlarge or rebuild any of its prisons, or may, if necessary, build other prisons in lieu of or in addition to any subsisting prisons. . . ."

Section 44: "Any prison authority may purchase and hold such lands or easements relating to lands as they may require for the purposes of this Act; and to facilitate such purposes the 'Lands Clauses Consolidation Act, 1845,' and the Act amending the same passed 23 & 24 Vict. c. 106, shall be incorporated with this Act, with the exceptions and subject to the conditions hereinafter contained—that is to say,

"Thirdly, the prison authority shall not, except in respect of lands contiguous to a prison, and required for the purpose of enlarging a prison or rendering it more commodious or safe, put in force the provisions of the said incorporated Acts with respect to the purchase of land otherwise than by agreement."

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transfers the prisons to one of the principal Secretaries of State, and by section 48 (1) the legal estate in every prison to which the Act applies, and in the site and land belonging thereto, is vested in the Prison Commissioners. It was never intended that land should pass to the Prison Commissioners, without compensation being paid for it, when it was not land bought, or contracted to be bought, before the commencement of the Act of 1877, for the purposes of enlarging, altering or adding to the appurtenances of any prison within the meaning of section 60 (1).

The land in question was purchased with the view that if necessary it might at some future time be thrown into the prison.

The words "land belonging thereto" in section 48 (1) mean land which has been definitely acquired and appropriated, such as labour land—and there section 60 (1) applies. The Prison Act, 1865, does not create powers of the Justices as regards prisons, and section 23 (3) was not passed with the intention of enumerating and exhausting all the powers which the Justices have. The duty of a county to provide prisons is a common law obligation, and that duty is not merely to build or enlarge a prison in the strict sense in which the words are used in section 23 (3), but to do what is reasonably necessary for a prison. The rule is that a common law authority which is possessed by any body is negatived by a statutory authority conferred on the same body to the same effect, but with restrictions. The power of purchase given by section 44 (3) of the Act of 1865 is co-extensive with all the duties of the prison authorities, and is not confined to the purposes enumerated in the Act. That section gives a general power to purchase any land in connection with the prison, but sections 48 and 60 (1) of the Act of 1877 only apply to cases where the land has been actually appropriated.

The Attorney-General (Sir H. James, Q.C.), The Solicitor-General (Sir F. Herschell, Q.C.) and A. L. Smith, for the plaintiffs, were not called on.

JESSEL, M.R.—The question is one really of construction of the Acts of Parliament. There is a conveyance, which,

in my opinion, is conclusive of the rights of the parties, and renders it improper for us to consider what resolutions were passed by the Justices before the execution of the conveyance. The Justices being parties to that conveyance are bound by it, and it is the only document at which we can look in order to see what the title of the clerk of the peace, the nominal defendant, is to the land in question. The deed in express terms recites that the land was bought for the purposes of the Prison Act, 1865. The land here could not have been bought for rebuilding. If it were bought for the purposes of the Act as additional land, it could only be bought for the purpose of enlarging or altering. One of the three sets of words must catch it if it is bought for any one of the purposes named in section 23—altering, enlarging or rebuilding—and consequently those words would pass the land to the Secretary of State, subject, however, to the land being given back if the Secretary of State does not want it; but that is a matter upon which he must exercise his own discretion.

But even supposing that what I have said is erroneous, and that the Justices might under the Act of 1865 buy the land if it made the prison more commodious or safe, without being required for the purpose of altering, enlarging or rebuilding any prison, it appears to me that the words of section 48 of the Act of 1877 apply, and would comprise this land. The word "prison" in that section means the prison itself, which, under the definition clause of the Act of 1865, includes airing or other grounds occupied by the officers, and also everything which is appropriated and used as part of the prison.

Now the only purpose for which the Justices could purchase land under the provisions of the Prison Act, 1865, is pointed out in section 23 of that Act—namely, to alter, enlarge or rebuild any of its prisons, or, if necessary, to build other prisons in lieu of and in addition to any subsisting prisons; but that is subject to the sanction of the Secretary of State in certain cases. It does not, however, matter, whether the construction which I put upon section 23 be right or wrong, because there is another way of arriving at the same conclusion. Then power is given by sec-

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tion 44 to any prison authorities to purchase and hold such lands, or easements relating to lands, as they may require for the purposes of the Act; and then certain provisions of the Lands Clauses Act are incorporated, and an exception, which has been much argued upon, but which I think immaterial, is also added as to compulsory purchase. Now that section, as I read it, does not affect the power of purchasing land by agreement. That power is simply for the purposes of the Act. But it was said that the words "or render it more commodious or safe," which are contained in the exception, imply a power to buy land for that purpose, although it may not be required—that is, although it may not be necessary to alter, enlarge or rebuild the prison, or even build a new prison under section 23. But I do not think there is any such implied power given by these restrictive words. First of all, power is given to buy compulsorily; but the restriction is only a restriction in favour of the landowner. Land may be bought for any other purposes of the Act by agreement, but where it is bought compulsorily, it must be bought for one of two purposes—either to enlarge the prison, or to render it more commodious and safe. That does not mean that land can be bought for any purpose of the Act; it cannot be bought in order to build a new prison, nor to alter or rebuild a prison, unless it be shewn that such alteration is for the purpose of rendering it more commodious and safe; but it can be bought for the purpose of enlarging a prison. A prison might be altered by being made smaller; and of course in building or rebuilding, a building may be altered very much, but it cannot always be pronounced to be "more commodious and safe." The result, therefore, is that, in my opinion, these words have no bearing upon the question whether any other purpose of the Act can be implied than one of those provided in section 23. In my opinion land cannot be purchased for any other purpose. Mr. Wright has said that there is another purpose of the Act—namely, that there is a common law right in these bodies to erect and maintain prisons, and that section 8 of the Act of 1865 imposes an obligation upon these bodies to provide sufficient prison

accommodation, and that therefore a common law authority is for the purposes of the Act exercised by them. But I think that is not so. The rule is that where there is a common law authority possessed by any body, and statutory authority is conferred upon the same body, but with restrictions, such statutory authority negatives the common law authority. If there was a power to build a prison by common law authority, but the Act made the exercise of the power subject to the approbation of the Secretary of State in writing, there the Act would negative the common law authority. Under section 8 the authority to maintain adequate prison accommodation is not a common law authority, but a new power. No prison can be built except in such a manner as to comply with the requisitions of the Act in respect of prisons; so that there would be an end to the common law authority to build prisons in any other way. In my opinion, therefore, land can only be acquired for one of the four purposes mentioned in section 23. If that be so, it appears to me that section 60 of the Act of 1877 would alone, and without anything more, vest this land in the Secretary of State. The words of section 48, "and in the site and lands belonging thereto," apply to this land because it belongs to the prison. It is vested in the clerk of the peace for prison purposes, and if it was bought for the purpose of making the prison more commodious and safe, which is the chief object to be looked at as regards the prison, it is certainly land belonging to the prison—that is to say, it is land vested in the prison authority for prison purposes, and therefore passes to the Prison Commissioners. In either view the decision of the Court below was correct, and this appeal must therefore be dismissed.

BRETT, L.J.—It is admitted that, if the finding of the Lord Chief Justice that this land was purchased by the clerk of the peace and the Justices for the purpose of enlarging the prison be right in point of fact, the defendant is not entitled to succeed. I am not prepared to say that that finding was not right in point of fact, but it seems to me immaterial for the purposes of this case whether it was or

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not. This land was bought by the clerk of the peace, acting by the authority of the Justices, who, at the time of purchase, were the prison authority; and the deed of conveyance under which they took it declared that it was required for prison purposes, and that it was bought and held in trust for such purposes. Although there may be no estoppel in law as between the Justices and the present plaintiffs in the absence of any contract between them, yet it seems impossible that the Justices, having expended the money of the county in the purchase of this land for an express purpose, can afterwards be heard to say that the land was not purchased for the purposes declared in the deed. It was admitted in argument that the land was bought for prison purposes; but it was said that although it was bought for prison purposes, there were some prison purposes for which the Justices might buy and hold the land, and that, under those circumstances, it would not pass under the Act of 1877 to the Prison Commissioners.

It was argued that there are some purposes for which the Justices could properly buy land and hold it under the Act of 1865, but that the land would not pass to the Prison Commissioners under the Act of 1877. That argument seems to me to be wholly untenable. The decision in this case depends solely upon the construction of the Act of 1877, and not of the Act of 1865. The words of the Act of 1877 seem to me to be large enough for the purpose of transferring to the Commissioners named in the Act of 1877 any land bought for any prison purpose whatever under the Act of 1865. It is not true to say that there are some lands which the Justices could properly buy under the Act of 1865, and which they could keep from the Prison Commissioners. The words of sections 5, 48 and 60 of the Act of 1877 seem to me to have been purposely made larger than those of the Act of 1865 in order to meet any argument such as that which has been urged on behalf of the defendant.

COTTON, L.J.—The only question to be considered is whether this land has been transferred to, and is now vested in, the Prison Commissioners. Section 60 of the

Act of 1877, upon which there has been much argument, does not vest anything in the commissioners, it merely gives a new definition of the word "prison," and enlarges the definition contained in the Act of 1865. Section 48 of the Act of 1877 vests in the Prison Commissioners the prison, site and land belonging thereto. If the construction put upon section 60 and upon the finding of the Lord Chief Justice be right, then land under the term "prison" will vest in the Prison Commissioners; but it is not necessary to decide that question. By section 48 the site of any prison and the land belonging thereto, besides the legal estate in every prison to which the Act applies, is vested in the Commissioners; and, in my opinion, it must be held that this is land which belongs to the prison. If land used as an airing ground and for other purposes would come within the definition of "prison," why should not the site and land belonging thereto equally come within such definition? The land referred to in section 48 must mean land not coming within the definition of prison, but belonging to it for the purposes of the prison. This land was bought and conveyed to the Justices for the purposes of the Act of 1865, in which Act there are no purposes but those connected with the prison. The land, therefore, which has been bought and conveyed to a trustee for the Justices for the purposes of the Act of 1865 must, in my opinion, if it is not land which comes within the description of prison, be land belonging to the prison within the meaning of the Act of 1877, which passes to and vests in the Prison Commissioners.

Appeal dismissed.

Solicitors—Hare & Fell, for plaintiffs; Nicholson & Herbert, for defendant.

[IN THE COURT OF APPEAL.]

1882. }
 May 2, 17. } JENKINS v. JONES.*

Vendor and Purchaser—Pretenced Rights or Titles—Right of Entry, Sale of—Conveyance whether void under 32 Hen. 8. c. 9. s. 2—Effect of 8 & 9 Vict. c. 106. s. 6.

By 32 Hen. 8. c. 9. s. 2, no one may buy or sell "any pretended rights or titles, or take, promise, grant, or covenant to have any right or title of any person," to any lands or hereditaments, unless the grantor or those by whom he claims have been in possession of the same or of the reversion, or taken the rents or profits thereof, "by the space of one whole year next before" the grant made.

By 8 & 9 Vict. c. 106. s. 6, contingent and other like interests in any hereditaments and rights of entry, whether immediate or future, vested or contingent, may be disposed of by deed:—

Held, that both clauses of the section in the statute of Hen. 8 applied to dealings with pretended rights and titles—that is, to fictitious titles or to titles which could not be conveyed at common law—that is, to all dealings with rights of entry; but that 8 & 9 Vict. c. 106 enabled rights of entry to be alienated: so that now a right or title good in fact is not a pretended title within the statute of Hen. 8.

The plaintiff, the heir-at-law of the ultimate remainderman under a will, brought an action of ejectment against A, the person in possession of part of the estate settled by that will. A denied the title of the plaintiff, and alleged that that part of the estate, if not vested in himself, was vested in J as devisee. The plaintiff thereupon bought from J that portion of the estate; the deed of conveyance contained the usual covenants by J for title and quiet enjoyment. Neither J, nor any one through whom he claimed, had been in possession for a year next before this conveyance. The plaintiff then recovered the property from A; but as J had some time previously been adjudicated a bankrupt, the trustees of his bankruptcy, in whom his property had vested, brought an action against the plaintiff, and recovered from him the

* *Coram* Jessel, M.R.; Brett, L.J.; and Cotton, L.J.

portion of the estate conveyed to him by J. The plaintiff now sued J for damages for breach of covenant for title:—Held, that the plaintiff was entitled to recover; that the title which J purported to convey to the plaintiff was not a fictitious or pretended title, and therefore, although it was a right of entry which could not have been conveyed prior to 8 & 9 Vict. c. 106, yet that it was a conveyance authorised by that statute.

Appeal from the judgment of Pollock, B., on further consideration.

Action to recover damages for breach of covenants for title and quiet enjoyment.

David Evans was in 1778 possessed of an estate called Hendre, in the county of Cardigan, which he devised in strict settlement; it afterwards became divided into four shares. In 1877 the plaintiff, being entitled to one of these shares, brought an action to recover another of these shares, which he claimed in right of his wife as heir-at-law of one David Lloyd, who was believed to have died intestate in 1851; but the defendant to that action alleged that the share in question was vested in the present defendant, and it was then discovered that David Lloyd had made a will, and had devised that share in question to the present defendant. That action was also brought to determine whether certain other lands were or were not part of the Hendre estate, and the present plaintiff invited the present defendant to join as plaintiff in that action; the present defendant declined to do so, but agreed to sell his share to the plaintiff for the sum of 10*l*. This was effected by a deed of conveyance on the 4th of July, 1877, whereby the defendant entered into the usual covenants for title and quiet enjoyment. The plaintiff proceeded with, and recovered judgment in, that action.

In 1867 the defendant had been adjudicated bankrupt, and his property, including this share of the Hendre estate, had become vested in his trustees in bankruptcy, who accordingly brought an action against the present plaintiff, and recovered from him the share which he had purchased from the defendant. The plaintiff thereupon sued the defendant for breach of covenant, and claimed 1,000*l*. damages.

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The defendant paid the sum of 10*l.* into Court, and amongst other defences, which are not relevant to this appeal, he alleged as follows :

"The defendant further says that neither he, nor any person through whom he claimed the said lands, or any of them in the statement of claim mentioned, had been in possession of any of the said lands, or of the reversion or remainder thereof, or of any of the profits of the said lands, for the space of one whole year next before the execution of the said deed in the statement of claim mentioned" (that is, the deed of conveyance of July, 1877), "and that at the time of the execution of the said deed the plaintiff well knew all the matters in this paragraph mentioned." The value of the property in dispute was agreed to be 500*l.*, and it was admitted that there had not been any possession by the defendant, or any one through whom he claimed, for the space of one whole year next before the conveyance of the 4th of July, 1877.

Pollock, B., gave judgment for the defendant.

The plaintiff appealed.

McIntyre, Q.C., and *Bosanquet*, for the plaintiff.—The conveyance of 1877 was a valid conveyance; the transaction was not within the mischief of 32 Hen. 8. c. 9. s. 2 (1). And even if it were, then 8 & 9 Vict. c. 106. s. 6 (2) has repealed the statute of

(1) 32 Hen. 8. c. 9. s. 2: "No person or persons, of what estate, degree or condition soever he or they be, shall from henceforth bargain, buy or sell, or by any ways or means obtain, get or have any pretended rights or titles, or take, promise, grant or covenant to have any right or title of any person or persons in or to any manors, lands, tenements or hereditaments (except such person or persons which shall so bargain, sell, give, grant, covenant or promise the same, their ancestors, or they by whom he or they claim the same, have been in possession of the same or of the reversion or remainder thereof, or taken the rents or profits thereof, by the space of one whole year next before the said bargain, covenant, grant or promise made), upon pain to forfeit the whole value of the lands," etc.

(2) 8 & 9 Vict. c. 106. s. 6, enacts, "that after the first day of October, one thousand eight hundred and forty-five, a contingent, an executory and a future interest, and a possibility coupled with an interest, in any tenements or hereditaments of any tenure, whether the object of the gift or limitation of such interest or

Hen. 8. This is not a case of a pretended right or title, and the statute of Hen. 8 was not intended to prevent a person in lawful possession with a good title from selling his right or title, and if the view expressed by Mountague, C.J., in *Partridge v. Strange* (3) be right, then this bargain is not within the Act of Hen. 8.

[BRETT, L.J.—But there was no possession here.]

Then the case is provided for by 8 & 9 Vict. c. 106. s. 6 (2), which, although it does not expressly repeal the earlier statute, must yet be held to repeal it by implication, for it enables a right of entry, whether immediate or future, vested or contingent, to be disposed of by deed. *Doe d. Williams v. Evans* (4) was decided before 8 & 9 Vict. c. 106 was passed, so that it does not affect the question of the construction of that statute. In *Williams on Seisin*, p. 125, it is stated that rights of entry are alienable. *Hunt v. Bishop* (5) supports this view, for it only decides that a right of entry for a condition broken is not affected by 8 & 9 Vict. c. 106; and *Hunt v. Remnant* (6) was merely a decision that a particular deed did not grant a right of entry.

They referred also to *Sugden on Vendors and Purchasers* (14th ed.), p. 473 and 496, and *Dart on Vendors and Purchasers* (5th ed.), p. 243, and on the question of damages, to *Hopkins v. Grazebrook* (7).

Matthews, Q.C., and *K. Digby*, for the defendant.—The statute of Hen. 8 does not apply to all cases, for every lease for years made where the lessor has not been in possession nor received the profits for a year, is not within the danger of the statute, as laid down by Hales, J., in *Partridge v. Strange* (8); the word "pretended" is explained in *Coke on Littleton* (9), but that

possibility be or be not ascertained, also a right of entry, whether immediate or future, and whether vested or contingent, into or upon any tenements or hereditaments in England of any tenure, may be disposed of by deed; but that no such disposition shall, by force only of this Act, defeat or enlarge an estate tail. . . ."

(3) Plowden, 77, at p. 88.

(4) 1 Com. B. Rep. 717; 14 Law J. Rep. C.P. 237.

(5) 8 Exch. Rep. 675; 22 Law J. Rep. Exch. 337.

(6) 9 Ibid. 635; 23 Law J. Rep. Exch. 135.

(7) 6 B. & C. 31.

(8) Plowden, at p. 87*a*.

(9) Co. Litt. 369.

[IN THE COURT OF APPEAL.]

1882. }
May 2, 17. } JENKINS v. JONES.*

Vendor and Purchaser—Pretenced Rights or Titles—Right of Entry, Sale of—Conveyance whether void under 32 Hen. 8. c. 9. s. 2—Effect of 8 & 9 Vict. c. 106. s. 6.

By 32 Hen. 8. c. 9. s. 2, no one may buy or sell "any pretended rights or titles, or take, promise, grant, or covenant to have any right or title of any person," to any lands or hereditaments, unless the grantor or those by whom he claims have been in possession of the same or of the reversion, or taken the rents or profits thereof, "before the space of one whole year next before the grant made."

By 8 & 9 Vict. c. 106. s. 6, contingent other like interests in any hereditaments and rights of entry, whether in the future, vested or contingent, are rendered void by deed:—

Held, that both clauses of the statute of Hen. 8. c. 9. s. 2, with pretended rights or titles, or to be conveyed at common law, or dealings with the same, are void, and that the statute of 8 & 9 Vict. c. 106. s. 6, is not to be alienated.

The defendant claimed one-fourth share of the lands in the county of Warwick. There has been a clear breach of the covenant, and the defence relied upon by the defendant was that the deed was void under the Act of 32 Hen. 8. c. 9 (1).

At the trial of the action the jury were, by agreement, discharged, and the case left to Baron Pollock for his decision. He gave judgment, on the defence above referred to, in favour of the defendant. The principal, if not the only point argued before us was that the statute of 8 & 9 Vict. c. 106. s. 6 (2), had impliedly repealed the statute of Hen. 8.

The facts of the case may be very shortly stated. The estate, one-fourth of which the defendant purported to convey to the

(10) 15 Q.B. Rep. 460; 19 Law J. Rep. Q.B. 441.

(11) 35 Law J. Rep. C.P. 141; Law Rep. 1 C.P. 441.

(12) 3 Q.B. Rep. 105; 11 Law J. Rep. Q.B. 176.

portion of the estate conveyed. The plaintiff now sued for breach of covenant for the title which J. pur-
plaintiff was not title, and the right of entry conveyed that it was statute.

Hen. 8. This is not a case of a pretended right or title, and the statute of Hen. 8. c. 9. s. 2, was not intended to prevent a person from selling his right or title, and if the same is expressed by Montague (1), in *Partridge v. Strange* (3), to be right, then the statute of Hen. 8. c. 9. s. 2, is not to be applied to it.

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determine whether it is necessary to consider the true meaning and effect of the earlier Act. The 2nd section of the Act of Henry 8 (1) is that on which the defendant relies. This section is as follows: [his Lordship read it.]

It will be observed that the first provision against buying or selling speaks of pretended rights or titles, while the second provision against taking any promise or covenant omits the word "pretended." But in our opinion both branches of the section refer to dealings with the same class of rights or titles. There can be no reason why it should be penal to take a covenant for sale of rights and titles generally; but in case of actual sale, penal to sell only when the right and title is pretended. In our opinion the second branch of the enactment should be read as if it was "any such title," and that both should be held to apply to dealings with pretended rights and titles; and this, we think, agrees with the opinion expressed by the Chief Justice in *Partridge v. Strange* (3). The question therefore is—What is

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pretended right or title within the meaning of the statute? This term, in opinion, applies either to a title for in fact, there is no foundation—a title—or to a title which, though it was not, as the law stood at this enactment, capable of being made by Coke in dealing with land by Chief Justice Tindal in *Jones v. Evans* (4). The judge says: "For the better meaning of this statute you must consider the right may be proved in three ways: first, by pretence or supposition; secondly, by title in verity, or by the act of the defendant within the said

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He says: I take the statute that if he who is out of possession bargains or sells or makes any covenant or promise to part with the land after he shall have obtained the possession of it, this shall be within the danger of the statute, whether he who so bargains, sells or promises, have a good and true right or title or not; and in this point the statute has not altered the law; for the common law before this statute was, that he who was out of possession might not bargain, grant or let his right or title, and if he had done it it should have been void. Then this statute was made in affirmance of the common law, and not in alteration of it; and all that the statute has done is, it has added a greater penalty to that which was contrary to the common law before—namely, that a man shall forfeit the value of the thing bargained or promised, &c., and to avoid such bargains or promises where a man is out of possession is the only point which the statute here remedies." All dealings with

rights of entry except by release to the person in possession were therefore, previously to the statute of 8 & 9 Vict., dealings with pretended rights and titles within the meaning of the Act of Henry 8. But the Act of the Queen has enabled rights of entry to be conveyed, and since that Act a right or title good in fact, that is, not fictitious, is not a pretended title within the statute simply because it is a right of entry. In the present case there is no ground for saying that the title which the defendant purported to convey was fictitious; it was a title existing in fact. It was, however, a right of entry, of which a sale would, before the Act of 8 & 9 Vict., have been a dealing with a pretended title—one that at common law could not be conveyed. This has been altered by the last-mentioned statute; and although in our opinion it is incorrect to say that the 8 & 9 Vict. c. 106 has repealed the 2nd section of the Act of Henry 8, it has this effect—that the deed of July, 1877, cannot be considered as a dealing with a pretended right or title within the meaning of that Act. We are of opinion, therefore, that the deed of July, 1877, is not rendered void by the Act of Henry 8, and that the plaintiff is entitled to judgment.

A question was raised as to the amount of damages which the plaintiff is entitled to recover. The defendant had been bankrupt before the time when the one-fourth of the estate became vested in him, and before the date of the deed of 1877, and the trustee in bankruptcy was therefore entitled to, and has claimed, the one-fourth of the estate which the defendant conveyed to the plaintiff. That which the plaintiff lost by the breach of covenant was the one-fourth of the estate. It has been agreed that the value of this is 500*l.*, and this, in our opinion, the plaintiff is entitled to recover.

Appeal allowed.

Solicitors—J. B. Barrett, agent for G. Jones, Aberystwith, for plaintiff; Jones, Blaxland & Son, agents for Hughes & Sons, Aberystwith, for defendant.

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word does not apply to the whole section, so that whether the right or title be pretended or not does not matter, and the sale of a right or title is in any case void. Tindal, C.J., held in *Doe d. Williams v. Evans* (4) that such a bargain was void at common law, and that a right of entry in dispute was aimed at by the statute of Hen. 8. The statute 8 & 9 Vict. c. 106 applies to non-contested rights, and enables those to be conveyed by deed, so that it does not affect the earlier statute. In *Cooke v. Field* (10), which was decided in 1850, the statute of Hen. 8 was treated as being in force. In the present case litigation was pending, and there was a sale of a lawsuit by a person not in possession, whereas to escape the provisions of the statute the person must be in possession. In any case the damages should only be 10*l.*, the price given by the plaintiff—*Lock v. Furze* (11) and *Stanley v. Hayes* (12).

McIntyre, Q.C., in reply.

Cur. adv. vult.

CORROD, L.J. (on May 17), read the judgment of the Court:—

This is an action to recover damages for breach of covenants for title and quiet enjoyment contained in a deed of the 4th of July, 1877, whereby the defendant granted to the plaintiff one-fourth share of a farm and lands in the county of Cardigan. There has been a clear breach of the covenant, and the defence relied upon by the defendant was that the deed and the covenant therein contained was void under the Act of 32 Hen. 8. c. 9 (1). At the trial of the action the jury were, by agreement, discharged, and the case left to Baron Pollock for his decision. He gave judgment, on the defence above referred to, in favour of the defendant. The principal, if not the only point argued before us was that the statute of 8 & 9 Vict. c. 106. s. 6 (2), had impliedly repealed the statute of Hen. 8.

The facts of the case may be very shortly stated. The estate, one-fourth of which the defendant purported to convey to the

plaintiff, had many years ago been settled. The plaintiff was the heir-at-law, and the defendant the devisee of the person entitled under the ultimate limitations of the settlement. When the previous limitations of the settlement determined, the estate was in possession of a person against whom the plaintiff in the action, as heir-at-law of the ultimate remainder-man under the settlement, brought an action to recover possession of the estate. The defendant in this action of ejectment denied the title of the man as whose heir the plaintiff claimed, and suggested that if he had any title, the one-fourth share was vested not in the plaintiff as heir-at-law but in the defendant as devisee. Thereupon the plaintiff bought and took a conveyance from the defendant of his interest as devisee. He then recovered the estate; but previously to the year 1877 the defendant had been bankrupt, and the trustees under his bankruptcy claimed from the plaintiff and recovered the one-fourth of the estate which the deed of 1877 purported to convey.

The statute of 8 & 9 Vict. c. 106 (2), does not in terms repeal the Act of Henry 8, and to determine whether it does so by implication it is necessary to consider the true meaning and effect of the earlier Act. The 2nd section of the Act of Henry 8 (1) is that on which the defendant relies. This section is as follows: [his Lordship read it.]

It will be observed that the first provision against buying or selling speaks of pretended rights or titles, while the second provision against taking any promise or covenant omits the word "pretended." But in our opinion both branches of the section refer to dealings with the same class of rights or titles. There can be no reason why it should be penal to take a covenant for sale of rights and titles generally; but in case of actual sale, penal to sell only when the right and title is pretended. In our opinion the second branch of the enactment should be read as if it was "any *such* title," and that both should be held to apply to dealings with pretended rights and titles; and this, we think, agrees with the opinion expressed by the Chief Justice in *Partridge v. Strange* (3). The question therefore is—What is

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(12) 3 Q.B. Rep. 105; 11 Law J. Rep. Q.B. 176.

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a pretended right or title within the meaning of the statute? This term, in our opinion, applies either to a title for which, in fact, there is no foundation—a fictitious title—or to a title which, though not fictitious, was not, as the law stood at the date of this enactment, capable of being conveyed. This is, we think, the true result of what is said by Coke in dealing with the statute, and by Chief Justice Tindal in *Doe d. Williams v. Evans* (4). The former (369a) says: "For the better understanding of which statute you must observe that title or right may be pretended in two manners of ways: first, when it is merely in pretence or supposition, and nothing in verity; secondly, when it is a good right or title in verity, and made pretended by the act of the party; and both those are within the said statute."

What is said by Coke as to the second kind of pretended title is not very clear. But Chief Justice Tindal, we think, explains what is at least one of the second class of pretended titles when, at page 724, he says: "The course of the common law was well known at the time, and the statute was not intended to alter it, but merely to superadd a penalty. The authority cited from Plowden seems quite decisive. He says: I take the statute that if he who is out of possession bargains or sells or makes any covenant or promise to part with the land after he shall have obtained the possession of it, this shall be within the danger of the statute, whether he who so bargains, sells or promises, have a good and true right or title or not; and in this point the statute has not altered the law; for the common law before this statute was, that he who was out of possession might not bargain, grant or let his right or title, and if he had done it it should have been void. Then this statute was made in affirmance of the common law, and not in alteration of it; and all that the statute has done is, it has added a greater penalty to that which was contrary to the common law before—namely, that a man shall forfeit the value of the thing bargained or promised, &c., and to avoid such bargains or promises where a man is out of possession is the only point which the statute here remedies." All dealings with

rights of entry except by release to the person in possession were therefore, previously to the statute of 8 & 9 Vict., dealings with pretended rights and titles within the meaning of the Act of Henry 8. But the Act of the Queen has enabled rights of entry to be conveyed, and since that Act a right or title good in fact, that is, not fictitious, is not a pretended title within the statute simply because it is a right of entry. In the present case there is no ground for saying that the title which the defendant purported to convey was fictitious; it was a title existing in fact. It was, however, a right of entry, of which a sale would, before the Act of 8 & 9 Vict., have been a dealing with a pretended title—one that at common law could not be conveyed. This has been altered by the last-mentioned statute; and although in our opinion it is incorrect to say that the 8 & 9 Vict. c. 106 has repealed the 2nd section of the Act of Henry 8, it has this effect—that the deed of July, 1877, cannot be considered as a dealing with a pretended right or title within the meaning of that Act. We are of opinion, therefore, that the deed of July, 1877, is not rendered void by the Act of Henry 8, and that the plaintiff is entitled to judgment.

A question was raised as to the amount of damages which the plaintiff is entitled to recover. The defendant had been bankrupt before the time when the one-fourth of the estate became vested in him, and before the date of the deed of 1877, and the trustee in bankruptcy was therefore entitled to, and has claimed, the one-fourth of the estate which the defendant conveyed to the plaintiff. That which the plaintiff lost by the breach of covenant was the one-fourth of the estate. It has been agreed that the value of this is 500*l.*, and this, in our opinion, the plaintiff is entitled to recover.

Appeal allowed.

Solicitors—J. B. Barrett, agent for G. Jones, Aberystwith, for plaintiff; Jones, Blaxland & Son, agents for Hughes & Sons, Aberystwith, for defendant.

[IN THE COURT OF APPEAL.]

1882. }
 Feb. 15. } [CHARD v. JERVIS.*

*Debtors Act, 1869 (32 & 33 Vict. c. 62),
 s. 5—Order of Commitment—Means of
 Judgment Debtor—Wife's Separate Estate.*

The defendant had allowed judgment for 29l., due for hay and oats supplied by the plaintiffs, to go by default. An affidavit was filed by the plaintiffs that the goods were supplied to the defendant for horses kept at his residence, Cherrington Park, where he kept up a large establishment, and was to all appearances a man of means, though the furniture, carriages and effects at Cherrington Park were claimed by the defendant's wife or her trustees. The defendant filed an affidavit in answer, stating that he was an undischarged bankrupt and quite unable to pay the plaintiffs' claim, though his wife had an income settled to her separate use.

Upon this evidence a Divisional Court refused to discharge an order made at chambers for the committal of the defendant to prison for six weeks in default of payment.

On appeal the defendant filed a further affidavit, in which he entered more fully into the details of the establishment kept up by his wife at Cherrington Park:—

Held, that the defendant had displaced the prima facie case made by the plaintiffs as to his means, and that the order for committal ought to be discharged.

Harper v. Scrimgeour (Law Rep. 5 C.P. D. 366) not followed.

Esdaile v. Visser (Law Rep. 13 Ch. D. 421) commented upon.

This was an appeal by the defendant, Captain Scott Jervis, from the refusal of a Divisional Court (Field, J., and Huddleston, B.) to discharge an order made by Stephen, J., at chambers, for the committal of the defendant to prison for six weeks, for non-payment of a judgment debt of 29l. due to the plaintiffs.

The plaintiffs were corn-merchants, carrying on business at Bristol, and sued to recover the price of hay, straw and oats supplied to defendant at his residence,

Cherrington Park, near Stroud, in Gloucestershire. The defendant allowed judgment to go by default, and judgment was signed on the 28th of December, 1881. The order for committal, dated the 23rd of January, 1882, was made upon an affidavit sworn by one of the plaintiffs in the following terms:—

"Most of the goods the subject of the action were supplied to the defendant for horses kept at his residence. The defendant resides at Cherrington Park, and keeps up a large establishment there, and to all appearances he is a man of means. I am informed and believe that the defendant is continually in the hunting-field, and that he keeps several horses, some of them hunters, at his residence, but that they are, together with the furniture, carriages and effects at Cherrington Park, claimed by the defendant's wife or her trustees. On the 5th of December last I and my co-partner received from the defendant a letter (ordering goods), but the goods therein named were not delivered to the defendant, he having failed to pay for the former goods supplied to him. From the defendant's mode and style of living, I believe he is in a position to pay the amount due in the action."

The defendant filed an affidavit in answer, in which he said:—

"In the year 1874, I was duly adjudicated a bankrupt, and have not obtained my discharge. Since the date of my bankruptcy I have not earned or otherwise acquired, and I am not now possessed of any money or property of any description whatever, and I am quite unable to pay the plaintiff's claim in this action or any part thereof. My wife has an income settled to her separate use, but I have no interest whatever either in the capital or income of the funds from which she derives such income. It is not true that I am continually in the hunting-field. In fact, I have never ridden to hounds while I have resided in the county of Gloucester."

In the Divisional Court the Judges animadverted strongly upon the conduct of the appellant, saying that it was a very common thing for persons in his position to belong to several clubs and keep up a considerable stud of hunters. The defendant now appealed, and in support of

* *Coram* Jessel, M.B.; and Holker, L.J.

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his appeal filed a further affidavit, in which he said :—

"The house in which I live is an old farmhouse, converted into a residence, which is rented furnished, with a garden, at a rental of 100*l.* per annum. The rates and taxes amount to between 8*l.* and 10*l.* per annum. My wife has two maid-servants, whose wages amount to 15*l.* per annum and no more, and a boy, who works outside, at wages amounting to 12*l.* per annum and no more, and these are all the servants that are kept, and the rent, rates, taxes and wages are all paid by my wife. I have no horse at all. My wife has one horse and no more, the value of which does not exceed 10*l.* The premises are situated four miles from a railway station, and the same distance from the nearest town, Tetbury, and there are no shops in the neighbourhood of Cherrington Park, and it is necessary to keep a horse in order to supply the house with provisions and necessaries. I did not make any gift, settlement or other disposition of any money or property whatsoever, before or at the time of our marriage, nor have I since made any gift, settlement or other disposition of any money or other property whatsoever. My wife's property comes entirely from her own family, and is settled on her and our children, and I have no estate or interest whatsoever under such settlement, nor has my wife any power to give me any estate or interest whatsoever, except in the event of there being no children of our marriage, of whom there are already three. I have not ridden to hounds or hunted anywhere for the last eight years. My bankruptcy has never been closed."

Matthews, Q.C., and *W. F. A. Archibald*, for the appellant, contended that the defendant had never had the means of satisfying the judgment debt.

H. Tindal Atkinson, for the plaintiffs.—I rely upon *Harper v. Scrimgeour* (1), with which the present case is on all fours. If the Judges below were satisfied as a matter of fact that the defendant had had the means of paying, it requires an "overwhelming" case to induce the Court of

Appeal to differ—*Esdale v. Visser* (2). Here there is only the evidence of the defendant.

[JESSEL, M.R.—I see no reason for disbelieving him.]

Although the defendant is an undischarged bankrupt he may acquire property and deal with it unless the trustee interferes—*Ex parte Dewhurst; in re Vanlohe* (3). If your Lordships are inclined to believe that the debtor has not had the means, I ask that the matter may be referred back to chambers for further investigation, under rule 3 of the Rules under the Debtors Act of 1869.

No reply was called for.

JESSEL, M.R.—What happened in the Court below I cannot say, but the question is merely one of fact, and no doubt if the defendant's second affidavit had been before the Divisional Court, they would have come to a different conclusion. The words of the Debtors Act, 1869, are distinct, that a debtor is only to be sent to prison "where it is proved to the satisfaction of the Court that the person making default either has or has had, since the date of the order or judgment, the means to pay the sum in respect of which he has made default, and has refused or neglected to pay the same." Mr. Atkinson has referred to the case of *Esdale v. Visser* (2), in which Lord Justice James said, that an "overwhelming" case was necessary to induce the Court of Appeal to come to a conclusion different from that come to in the Court below. Now I distrust adjectives: and it seems to me that "overwhelming" was a very strong word to use, indeed too strong. To my mind it is time for the Court of Appeal to interfere when they are clear, upon the evidence, that the order appealed from is wrong; and I do not think that the authority of the case goes beyond that. Even then the Lord Justice James said, "when all the materials for coming to a decision upon the point have been before the Judge." But here we have materials which were not before the Court below. It must not be supposed that I approve of the conduct of

(2) Law Rep. 13 Ch. D. 421.

(3) 41 Law J. Rep. Bankr. 18; Law Rep. 7 Chanc. 185.

(1) Law Rep. 5 C.P. D. 366.

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Captain Jervis, for I think it is highly reprehensible. He lives on his wife's means, deals with a corn-merchant, and allows judgment to go by default. It is his duty either not to deal in his own name, or to tell the tradesmen with whom he deals that he is ordering goods only as the agent of his wife. But, judging from the plaintiff's affidavit, I must say that he seems to have been aware that the means were the wife's; and that distinguishes the case to some extent from *Harper v. Scrimgeour* (1), where the plea that the means were the means of the wife was first put forward in the defendant's affidavit. The Judges there came to the conclusion, as a fact, that the defendant had ample means to satisfy the debt. Even if the affidavits before us were in identically the same terms as the affidavits in that case, we should not be bound to come to the same conclusion of fact. That case is only a decision of fact and can be no authority for anything; there is no rule of law in it, and no principle. The Judges in the Court below came to the conclusion that the defendant had the means; but before us a further affidavit has been filed, which shews that the luxury in which the defendant lives is not so great after all. It has been suggested that because the defendant behaves badly his evidence is not to be believed; but I cannot adopt that. A man may incur debts without having the means to pay them, but that does not appear to me sufficient reason for disbelieving his evidence. I think, therefore, that if the Court were to commit the defendant to prison, it would not be exercising the jurisdiction given to it by the Act, but would be inventing a new jurisdiction, which might be summed up thus: whenever a wife has money you may send her husband to prison in order to compel her to pay his debts. For these reasons I think the appeal ought to be allowed.

HOLKER, L.J.—I very much sympathise with the plaintiffs in this case, and would condemn as strongly as I possibly can the conduct of Captain Jervis. It is simply dishonest conduct; but it does not follow that he is to be sent to prison unless the Act of Parliament is complied with. In order to bring the defendant within the

operation of the Debtors Act, it is necessary to shew that since the date of the judgment the debtor has had the means of paying. The plaintiff's affidavit was, no doubt, *prima facie* sufficient; but from the affidavits filed in answer it is clear that the appellant has not, and has not had the means of payment, unless his evidence is to be disbelieved. But I agree with the Master of the Rolls that there is no ground for disbelieving it. As to the *dictum* of Lord Justice James in *Esdaile v. Visser* (2), I think that it is a *dictum* which ought to be received with considerable hesitation. If the evidence is sufficient to shew that the Court below was wrong, it appears to me that that is enough for us to act upon, and that it is not necessary that the evidence should be absolutely overwhelming.

JESSEL, M.R., added that no costs of the appeal would be allowed to the appellant—first, because the Court would in that way mark their disapproval of his conduct; and secondly, because the appeal had succeeded upon new evidence.

HOLKER, L.J., concurred.

Solicitors—W. E. Ruddle, for appellant; Clarke, Woodcock & Ryland, agents for Joseph Crook, Bristol, for respondents.

[IN THE COURT OF APPEAL.]

1882. { THE QUEEN (on the prosecution
April 26, { of the Lords Commissioners
28, 29. { of Her Majesty's Treasury)
v. THE MAYOR AND TREASURER OF MAIDENHEAD.*

Corrupt Practices (Municipal Elections) Act, 1872 (35 & 36 Vict. c. 60), s. 14, sub-s. 5 and s. 22—Expenses of Court for Trial of Municipal Election Petition—Court of Record—Power to make Retrospective Rate—Mandamus.

In March, 1875, a petition against the return of certain town councillors was tried before a barrister, pursuant to the provisions of 35 & 36 Vict. c. 60, when he

(*) *Coram* Jessel, M.R.; Brett, L.J.; and Cotton, L.J.

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directed by order that the expenses of the petition and proceedings in Court should be borne by the respondents; but he made no order with respect to the expenses of the Court, although it was alleged that he expressed his intention in his judgment of ordering one of the respondents to pay them. The Treasury paid these expenses, and issued a certificate requiring the borough to repay the amount. A rate was accordingly made in August, 1875; but the Treasury withdrew that certificate and the rate was abandoned. In December, 1875, the Treasury issued another certificate requiring the borough to repay the amount paid for the expenses of the Court; and as the amount was not paid, a mandamus was applied for, and after a return and trial, a Special Case was stated:—Held (affirming the judgment of the Queen's Bench Division), that the Court of a barrister appointed to try a municipal election petition is made, by 35 & 36 Vict. c. 60. s. 14. sub-s. 5, a Court of record, and that its judgment can only be proved by the record; that the issuing the certificate by the Commissioners of the Treasury was a ministerial and not a judicial act, so that it was competent for them to cancel the first and to issue the second certificate; that section 22 of 35 & 36 Vict. c. 60 gives power to a borough to raise in such circumstances a retrospective rate; that there had been no undue delay on the part of the Commissioners, and that they were entitled to a peremptory mandamus.

Appeal from a judgment of the Queen's Bench Division on a Special Case, ordering a peremptory mandamus to issue to the Corporation of Maidenhead to compel them to repay to the Commissioners of the Treasury certain sums paid by them.

The case is reported *Ante*, p. 209.

The Special Case stated the following facts:—

A petition being presented against the return of certain town councillors of Maidenhead, Mr. Coleman, a barrister, was duly appointed to try the petition. On the 11th of March, 1875, he having heard the petition gave judgment, and made an order that the costs of the petition and proceedings in Court should be paid by the three respondents in equal shares.

This order did not contain any direction as to the expenses of Court, although, in September, 1875, he wrote a letter saying that he intended to order Dawson, one of the respondents, to pay these costs, and that he had said so in giving judgment; and on the 4th of October he drew up a formal order directing that Dawson should pay these costs. In the meantime the Commissioners of the Treasury had paid the expenses in question, and by certificates, dated August, 1875, they required the treasurer to repay the amount to them; but on being informed of the letter of Mr. Coleman expressing what his intention was, they withdrew those certificates, and the town council abandoned a rate which had been made to meet the expenses in question.

In June, 1876, the Commissioners of the Treasury issued a fresh certificate requiring the corporation to repay the sums paid by them for the expenses in question, and as they were not paid they applied for and obtained a mandamus. A return was made, issue was joined and a trial had, when evidence was tendered as to what the barrister had said in delivering judgment, and his letter of September, 1875, was also tendered. The admissibility of this evidence was by the Special Case reserved for the consideration of the Court. The jury found that there was evidence that Dawson was ordered to pay the costs in question. Judgment was entered for the Crown subject to a Special Case. On the argument of the Special Case in the Queen's Bench Division, Lord Coleridge, C.J., and Pollock, B., *dissentiente* Manisty, J., gave judgment for the Crown.

The Corporation of Maidenhead appealed.

Matthews, Q.C., and *Greene*, for the appellants.

The arguments were the same as those in the Court below, and the following cases were cited in addition to those cited there:—*The Queen v. All Saints, Wigan* (1), *Mellish v. Richardson* (2), *The Queen v. Fall* (3), *The Queen v. Garland* (4),

(1) Law Rep. 1 App. Cas. 611.

(2) 7 B. & C. 819.

(3) 1 Q.B. Rep. 636; 13 Law J. Rep. Q.B. 187.

(4) 39 Law J. Rep. Q.B. 86; Law Rep. 5 Q.B. 269.

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Worthington v. Hulton (5), *Williams v. Lord Bagot* (6), *The Queen v. Allen* (7) and *Nicholl v. Allen* (8).

31 & 32 Vict. c. 125. s. 29 (9) and 35 & 36 Vict. c. 60. ss. 14, 19 and 22 (10), were also referred to.

(5) 35 Law J. Rep. Q.B. 51; Law Rep. 1 Q.B. 63.

(6) 4 Dowl. & Ry. 315.

(7) 5 B. & Ad. 984.

(8) 31 Law J. Rep. Q.B. 283,

(9) 31 & 32 Vict. c. 125. s. 29: "On the trial of an election petition under this Act the Judge shall, subject to the provisions of this Act, have the same powers, jurisdiction and authority as a Judge of one of the Superior Courts, and as a Judge of Assize and Nisi Prius, and the Court held by him shall be a Court of record."

(10) 35 & 36 Vict. c. 60. s. 14: "An Election Court for the trial of petitions under this Act shall be constituted as follows:—(1) A petition shall be tried by a barrister, qualified and appointed as hereinafter provided, without a jury. (5) The Court shall, for the purposes of the trial of a petition, have all the same powers and privileges which a Judge may have on the trial of an election petition under the provisions of the Parliamentary Elections Act, 1868, with this modification, that any fine or order of committal by the Court may, upon motion by the person aggrieved, be discharged or varied by the Superior Court, or, in vacation, by a Judge thereof, upon such terms (if any) as such Superior Court or Judge thinks fit."

Section 19: "The following provisions shall have effect with respect to costs on the trial of a petition:—(1) All costs, charges and expenses of and incidental to the presentation of a petition, and to the proceedings consequent thereon, with the exception of such costs, charges and expenses as are by this Act otherwise provided for, shall be defrayed by the parties to the petition, in such manner and in such proportions as the Court by which the petition is tried may determine; and in particular any costs, charges or expenses which, in the opinion of the Court by which the petition is tried, have been caused by vexatious conduct, unfounded allegations or unfounded objections on the part either of the petitioner or the respondent, and any needless expense incurred or caused on the part of petitioner or respondent, may be ordered to be defrayed by the parties by whom it has been incurred or caused, whether such parties are or not on the whole successful."

Section 22: "The remuneration and allowances to be paid to a barrister for his services in respect of the trial of a petition, and to any officers, clerks or shorthand writers employed under the provisions of this Act, shall be fixed by a scale which shall be made, and may be varied from time to time, by the election Judges on the rota for the trial of election petitions under the provisions of the Parliamentary Elections Act,

The Attorney-General (Sir H. James, Q.C.), and A. L. Smith, for the Commissioners of the Treasury, were not called on.

JESSEL, M.R.—I have carefully read twice over the judgment of Baron Pollock, in which Lord Coleridge concurred, and in which Mr. Justice Manisty also agreed save as to one point, and I am of opinion that it ought to be affirmed.

The first point, which is one of importance, depends upon two short sections of two statutes, which do not seem to me to present much difficulty, and I agree on this point with the judgment of the Court below. The question is, whether the Court of a barrister appointed to try petitions under the Corrupt Practices (Municipal Elections) Act, 1872, is a Court of record. That depends upon sub-section 5 of section 14 (10) of the Corrupt Practices (Municipal Elections) Act, 1872, which provides that "the Court shall, for the purposes of the trial of the petition, have all the same powers and privileges which a Judge may have on the trial of election petitions under the provisions of the Parliamentary Elections Act, 1868." Now section 29 (9)

1868, with the approval of the Commissioners of Her Majesty's Treasury or any two or more of them, and the amount of any such remuneration and allowances shall be paid by the said commissioners, and shall be repaid to the said commissioners on their certificate, by the treasurer of the borough to which the petition relates, out of the borough fund or rate. Provided that the Court at its discretion may order that the whole or any part of such remuneration and allowances, or the whole or any part of the expenses incurred by a town clerk for receiving the Court under the provisions of this Act, shall be repaid to the said commissioners or to the town clerk, as the case may be, in the cases, by the persons, in the manner following—namely, (a) when, in the opinion of the Court, a petition is frivolous and vexatious, then by the petitioner; (b) when, in the opinion of the Court, a respondent has been personally guilty of corrupt practices at the election, then by such respondent. And any order so made for the repayment of any sum by a petitioner or respondent may be enforced in the same way as an order for payment of costs; but any other costs or expenses payable by such petitioner or respondent to any party to the petition, shall be satisfied out of any deposit or security made or given under the provisions of this Act, before such deposit or security is applied for the repayment of any sum under an order made in pursuance of this section."

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of the Parliamentary Elections Act, 1868, provides that "on the trial of an election petition under this Act, the Judge shall, subject to the provisions of this Act, have the same powers, jurisdiction and authority as a Judge of one of the Superior Courts, and as a Judge of Assize and Nisi Prius, and the Court held by him shall be a Court of record." There is, therefore, no doubt but that the Court of a Judge who tries an election petition is a Court of record; and the question is, whether the words "all the same powers and privileges" constitute the Court of the barrister appointed to try municipal election petitions a Court of record.

It is certain that it is a privilege for a Court to be a Court of record; on such a Court there are conferred powers for committal for contempt more extensive than those possessed by a Court not of record; such a Court also possesses power to fine and imprison, and it has been held that where the power to fine and imprison was given, the Court to which that power was given in general terms was thereby made a Court of record. It follows then, in my opinion, that the Court of a barrister so appointed under 35 & 36 Vict. c. 60, is a Court of record. This being so, it follows that we have no record which orders that Dawson is to pay the costs of the enquiry; and it then follows that the Commissioners of the Treasury are entitled, if there is no other objection, to recover those costs from the borough of Maidenhead. There were issues in fact and a trial, in which the jury found as follows: "The jury is of opinion that there is sufficient evidence that Mr. Coleman did order the whole of the costs to be paid by Mr. Dawson, and not by the borough of Maidenhead." Now if that verdict were unchallenged it would mean that the jury thought that Mr. Coleman, the barrister, did so order; but is there any power to take evidence to shew that the barrister did say more than the order signed by himself discloses? I am of opinion that there is no such power, and that any such evidence must be excluded. It has been urged that we can amend the record. Now the power of a Court to amend a record in the case of a mistake was not originally incidental to a Court of record, it was

conferred by certain ancient statutes, and the particular Court in question, the Court of the barrister, ceases to exist when the barrister has given his judgment, so that he can have no further power over the record. Possibly some other Court may have power so to amend the record, perhaps the Common Pleas, or the Court which has succeeded to the powers of that Court, could do so, and I incline to think that it could; but it is not necessary to give a decision upon that point now. It seems, indeed, reasonably necessary that some one should have power so to amend the record, and I think that the words of sub-section 5 of section 14, 35 & 36 Vict. c. 60 (10), seem sufficient to confer that power upon the Superior Court, although upon the present occasion I do not give a final decision to that effect. But whether the suitor has or has not a remedy by way of application to the High Court, he certainly has no such remedy in the Court of Appeal, for Dawson would be a necessary party, and it would be impossible for such an application to be entertained in the absence of notice to him, so that the Divisional Court was not wrong in refusing, if it did refuse, such an application; and if there was no application made to the Divisional Court, then there can be no such application made here, for this is a Court of Appeal, and not a Court of original jurisdiction.

If, however, the suitor did make an application to the Divisional Court, and that application was refused, then I am not at all sure that the judgment of the Court below is not right. I find that Baron Pollock says:—"For us to amend by this mere expression of intention, which is contrary to the two written orders signed by the barrister, appears to me to be not only without precedent, but it goes to destroy the very wholesome rule that the judgment and proceedings of a Court of record must be proved by the record. For a Judge to amend his own record, or for a Court before which that record comes to amend it so as to be in accordance with the Judge's notes, is reasonable and intelligible, but for another Court to amend a record upon the suggestion of a Judge's intention expressed by a mere letter, which is not written in consequence of an application

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made by one of the parties to the proceedings, nor indeed written to either of the parties or those who represent them, would lead to consequences tending to produce the greatest uncertainty and inconvenience." I am unable to dissent from that. I think that this case was tried in a manner open to observation, and that we cannot act on the words of the jury alone without some amendment. The action was tried in order to determine what the barrister who heard the petition said in giving judgment at a time long since passed. Now there were two records—I am using this word not in its technical but in a popular sense—of what the barrister said at the time when he gave judgment; there was the note of the shorthand writer, whose duty it was to make an accurate note, and that note does not contain the words in question; then the Registrar of the Court drew up an order, which was signed by the barrister, and that order does not contain the words in question. Against this it is true that several persons were called who believed that the barrister had given the direction that Dawson should pay the costs, but none of these persons had made any note in writing at the time; a letter was also read which the barrister who tried the petition had written; but he himself was not called, and I am of opinion that we cannot regard that letter. If an application had been made to me to make an amendment on such materials, I should be inclined to direct further enquiry. But if there has been no application to amend, and there is no other valid objection, then it follows that the borough of Maidenhead must pay to the Treasury the sum demanded. It has, however, been urged on behalf of the appellants that they have no authority to make a retrospective rate. I agree that it has been decided that there is no such authority given by the terms of the Municipal Corporations Act; but I am of opinion that such an authority is given by the Corrupt Practices Municipal Elections Act, when considered in connection with the Municipal Corporations Act. Parliament has directed that a rate shall be levied to meet expenses which must be incurred in an enquiry held under the Corrupt Practices Act; these expenses cannot be ascertained until the enquiry is closed,

and it appears to me that the Legislature has by implication given all the power necessary to secure the payment of these expenses by a rate—that is, it has given power to the corporation to levy a retrospective rate.

It was further urged by the counsel for the appellants that as a matter of discretion this *mandamus* ought not to be granted, for that the Treasury had no power to cancel the first order, so that the second order ought not to be acted upon; but I am not convinced that the Treasury could not cancel the first order or certificate. I think that it could be recalled; it was not a judicial proceeding, and it seems to me that the Treasury could withdraw it, and that that withdrawal would not prevent the issue of a fresh certificate. For the same reason, the mere alteration of dates would not substantially affect the question, so that if it was in substance a certificate for a sum, the necessary result of the enquiry, then that sum would be a sum due from and payable by the borough. Then it was said that the Treasury had acted in such a way as to disentitle them from applying for a *mandamus*; it was said that, owing to the delay, there must have been a considerable change in the body of ratepayers since the expenses were incurred. I suppose that may be so, but I do not consider the fact affords any argument against the *mandamus*: it is a mere accident that ratepayers do change; the rate is an incident attached to property situated in the borough, the borough must pay, and the ratepayers take their chance as to what rates fall on their property; there is no injustice in this, nor is there anything like an equity between the former and the present ratepayers by which the present ratepayers can claim to be entitled to throw this burden on former ratepayers. Since the Judicature Act it is clear that the way in which a Court exercises its discretion is subject to appeal; no doubt the rule applies that it is not so easy to succeed on an appeal as to a matter of discretion as on one as to a matter of mere right; for the Court of Appeal requires strong reasons to induce it to overrule the decision on matters of discretion of the Court below. In the present case, I am of opinion that the Queen's Bench Division rightly ex-

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exercised its discretion; but if I had been of a contrary opinion, still I should say that the Court of Appeal ought to be satisfied that the discretion had been so wrongly exercised as to call for interference. I am of opinion that no such case is made out here, that the judgment of Baron Pollock in which Lord Coleridge agreed was right, and that this appeal fails.

BRETT, L.J.—This appeal comes before us on facts which are undisputed. The jury found in effect that there was sufficient evidence that the barrister ordered Dawson to pay the costs. There has been no motion to set aside this finding, so that we are bound to hold it to be a correct finding of the fact.

The appellants contend that if it be assumed that the barrister ordered Dawson to pay the costs of the enquiry, it must then follow that the borough is not bound to pay them. I am willing for the purpose of this discussion to assume that position to be true, and to assume that the borough would not be liable if Dawson were ordered to pay the costs, but it is not necessary to decide that question now. The objection is taken that, notwithstanding that the jury found that the barrister who tried the petition did order that Dawson should pay the costs, yet that we cannot hold as a matter of law that he did so order, for that as his Court was a Court of record, his judgment or order must be in writing. I am of opinion that his Court was a Court of record, for section 14, subsection 5, of 35 & 36 Vict. c. 60 (10), makes the Court a Court of the same kind as the Court of an election Judge; and the Court of a Judge who tries parliamentary election petitions is a Court of record; so that the Court of a barrister who tries municipal election petitions is also a Court of record, and if so, then the judgment must be in writing. Notwithstanding, therefore, the finding of the jury, the order must be looked for in a writing or record, and the jury could not rightly find contrary to that document. The finding of the jury then is only admissible to amend the record; but that record cannot be amended on this trial. The record was signed by the barrister, but it seems to me clear that he

could not amend the record when he had closed the enquiry, for he was *functus officio*, he was no longer a Court, so that no order of his made later on could avail. It may be that if that record were brought by way of appeal or on motion before the High Court, then the record could be treated as the record of the High Court, and then the Court could amend it; but that has not been done, and on the present trial neither the High Court nor this Court can amend the record. These proceedings are brought to enforce the record, and are not proceedings in which it can be questioned. If the High Court could amend the record, then we also could do so, if it came before this Court by way of appeal from an order of the High Court.

If then the record cannot be amended, and if it does not order Dawson to pay the costs in dispute, then the borough must pay them. In opposition to this it is urged that the borough cannot now be made to pay them, because the certificate or order issued by the Treasury was assumed to be cancelled and a second issued; and it is urged that the Treasury could not cancel that order or certificate, and could not issue the second order or certificate, and that this *mandamus* cannot be held to apply to the first certificate, which is, it is said, the only valid certificate, for that the Court has been asked for a *mandamus* with respect to the second certificate. The argument is that the certificate is an award or a judicial order, and that this being so, it cannot be cancelled. If it was an award or a judgment that is obvious, but it seems to me that it was not an award or a judgment, and I agree with the Queen's Bench Division that it was only a ministerial act. I am therefore of opinion that the Treasury could cancel the first, and could issue the second certificate, and that there is nothing to prevent the Treasury, when there has been mistake on the part either of themselves or others, from cancelling one order and issuing a second. The second certificate was therefore valid.

Then it is said that the Court ought not to let the *mandamus* go on account of the injustice and hardship which it will inflict on certain individuals, and further because

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it will order the officers of the borough to commit an illegal act. With regard to this second reason, the illegality alleged is that what is called a retrospective rate must be made, and it is said that would be illegal. I apprehend that, as a general rule, a retrospective rate cannot be made by a corporation such as this; but the question is, whether the statute under which these enquiries into corrupt practices at municipal elections are held does not give a corporation power to make a retrospective rate. It seems to me the provisions of section 22 of 35 & 36 Vict. c. 60 (10) do give that power. It directs that the money paid by the Commissioners of the Treasury "shall be repaid to the said commissioners on their certificate by the treasurer of the borough to which the petition relates out of the borough fund or rate." The true principle in my opinion is, that wherever the Legislature says that a sum is to be paid out of a rate, and where there is a necessary implication that that rate must be retrospective, then the direction to pay a sum out of a rate carries with it the power to make a retrospective rate. Now in this case the expenses cannot be ascertained till the end of the enquiry, the amount cannot be paid by the Treasury till the trial is closed; so that the Treasury cannot require its repayment till the enquiry has ended. These facts shew, therefore, that there is given by the statute a power to make a retrospective rate. With regard to the allegation that hardship must arise from the delay of the Treasury, I am of opinion that there has been no unreasonable delay. The truth is that the delay is the result of the mistake made by the barrister; and then a further delay has been caused by the borough, for the Treasury waited for the borough to pay these costs. If there had been on the part of the applicants for the *mandamus* unreasonable delay, then the High Court would have had a discretion, and the Court might have exercised that discretion by declining to grant the *mandamus*. It was further said that there could be no appeal on the question of discretion, but I must repeat what I have said on former occasions, that the Legislature has, by the Judicature Act, given an appeal to this Court on discretionary

orders of the High Court; in this case there has been no error in the exercise of that discretion, so that the question becomes of no importance. I am of opinion that the judgment of the Divisional Court is, on the points on which all the Judges agreed, right, and that on the one point on which Mr. Justice Manisty differed from the other Judges, the opinion of the majority was correct.

COTTON, L.J.—I am of the same opinion; and after the judgments which have been delivered, I do not think it necessary to say much. The main point is as to the order of the barrister who tried the petition in question, assuming and agreeing as I do that his Court is a Court of record, so that the order of the Court must be in writing, whereas the order which it is alleged exists, and which directs Dawson to pay the costs, is not in writing. I am not of opinion that on the facts before us there is any ground for amending the order, and I should not be inclined, if we had the power, to make an order amending a written order of the barrister who tried the petition. This case differs essentially from the case of *Williams v. Lord Bagot* (6). In that case the Court had the order of the inferior Court before it, for the purpose of deciding whether there was error in that order. Of course, when the order was before the Court for that purpose, the Court must have the power to see that the Court below had in fact returned it to the order which had been made. It was therefore right when it was suggested that the order before it was not the actual order made by the Court to send the order back to the inferior Court for the purpose of directing the Judge of that Court to send to the Court above what was in fact his order. But in the present case the order of the barrister does not come before us except incidentally. It is a mere matter of evidence, adduced in order to shew the Court that it ought not to decide that the borough is liable under the statute, because it is said that as a matter of evidence the barrister ordered some one else to pay the costs. I am of opinion that in such a proceeding neither the Court below nor this Court could make any alteration in the order,

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even if the facts authorised an alteration to be made upon an application properly made to a proper tribunal.

Then it is said that the Treasury cancelled the first certificate; but that was merely a certificate of the fact that the Treasury had paid the expenses mentioned in the certificate, and that it considered them proper expenses; it was not a judicial order, it was only a certificate of the amount which has been ascertained, the liability of the corporation to pay which is derived, not from the certificate but from the statute. The Treasury had power to withdraw the first certificate and to issue the second certificate. There is then a legal liability on the corporation of the borough; but it is then urged that the Court will exercise a discretion before it issues a *mandamus*. That is so; and the order made directing the *mandamus* to issue is an order which, by the Judicature Act, is made subject to appeal. No doubt this Court would be slow to interfere with the discretion of the Court below, but that discretion must be exercised on recognised rules. The discretion to be exercised is that kind of discretion which the Court of Chancery exercised, not on interlocutory proceedings, but at the hearing of the cause, when it had to decide whether the plaintiff was entitled to an injunction or any other extraordinary relief—that is, relief given only on equitable principles, and by the old Court of Chancery.

This is a proceeding really for the purpose of giving a person certain relief to which it has been ascertained he is entitled, and yet this Court was asked to deprive him of his rights. The question was raised by a preliminary objection, and proceedings have been taken in order to deal with all the facts. It would, in my opinion, require strong facts to enable the Court to say that the plaintiffs should not have what, on the ascertained facts, are their rights. Further, the Court of Chancery began to exercise its discretion in such a case by considering whether a plaintiff should have, not the payment of a sum of money or something in the nature of damages, but what may be called a legal right to be enforced in the Court of Chancery, that is, something like what we find in *Nicholl v. Allen* (8). In that case

the plaintiff got the damages he was entitled to on the ground that the bridge was out of repair; the question was whether he should have any additional or extraordinary relief. But here it is not a question whether a *mandamus* should be granted for the purpose of giving something other than damages, it is only a proceeding to compel the defendants to put themselves in funds for the purpose of paying damages. It is not a proceeding to give, by way of specific performance or by injunction, something different from damages. It would therefore require strong reasons to prevent this Court from granting a *mandamus*.

Here all that is urged is actual delay. On that point I quite agree with the rest of the Court that there is not sufficient in the conduct of the Commissioners of the Treasury in this case to enable us to say that in our discretion we ought, they being entitled to obtain the money, to abstain from granting a *mandamus* to the corporation to put themselves in funds in order to pay what the Treasury is entitled to receive.

Appeal dismissed.

Solicitors—Hare & Fell, for the Treasury; C. J. Mander, agent for R. A. Ward, Maidenhead, for the Corporation of Maidenhead.

[IN THE COURT OF APPEAL.]

1882.	{	THE BOARD OF WORKS OF
April 20, 21.		THE HACKNEY DISTRICT
		v. THE GREAT EASTERN
		RAILWAY COMPANY.

Metropolitan Management Acts—18 & 19 Vict. c. 120. s. 105—25 & 26 Vict. c. 102. s. 77—*Expenses of Paving New Street on Bridge with Side Walls belonging to Railway Company—Liability of Company as Owner of Land bounding or abutting on a Street.*

[For the report of the above case, see 51 Law J. Rep. M.C. 57.]

1882. }
April 3. } STONE v. HYDE AND OTHERS.

Employer's Liability Act (43 & 44 Vict. c. 42. s. 7)—Invalid or Defective Notice.

A notice under the Employer's Liability Act, 1880, omitted to state the cause of the injury:—Held, that such omission was a "defect" in the notice, which in the absence of evidence of an intent to mislead did not render the notice invalid.

This was an action tried on the 7th of March, 1882, in the Lambeth County Court, before a Judge and a jury, for damages for personal injuries under the Employer's Liability Act (43 & 44 Vict. c. 42).

The plaintiff being called upon to prove that he gave notice of his claim in accordance with section 7 of the Act (1), a letter of the 13th of December, 1881, from the plaintiff's solicitor, was put in, which however did not state the cause of the injury.

Thereupon the learned County Court Judge held that no sufficient notice had been served on the defendant in accordance with section 7 of the Act (1), and that the omission to state the cause of the injury was not such "a defect or inaccuracy" as would come within the meaning of the last clause in that section; and, further, that if this omission could be regarded as a mere defect or inaccuracy, it was such as would prejudice the defendant in his defence, and must have been made for the purpose of misleading.

The plaintiff was therefore non-suited.

The plaintiff moved by way of appeal for a new trial on the ground of misdirection.

(1) 43 & 44 Vict. c. 42. s. 7: "Notice in respect of an injury under this Act shall give the name and address of the person injured, and shall state in ordinary language the cause of the injury, and the date at which it was sustained, and shall be served on the employer, or if there is more than one employer, upon one of such employers. . . . A notice under this section shall not be deemed invalid by reason of any defect or inaccuracy therein unless the Judge who tries the action arising from the injury mentioned in the notice shall be of opinion that the defendant in the action is prejudiced in his defence by such defect or inaccuracy, and that the defect or inaccuracy was for the purpose of misleading."

Atherley Jones, for the defendants, cited *Moyle v. Jenkins* (2) and *Keen v. The Millwall Dock Company* (3).

L. Glyn, for the plaintiff, was not called upon.

MATHEW, J.—I think this non-suit must be set aside. The only notice sent to the defendants was in these words:—

"13 Trafalgar Square, P. P. Road,
December 13, 1881.

"Sir,—Mr. Stone, of 193 St. George's Road, Peckham, has consulted me respecting the injury sustained by him while in your employment on the 19th of November last, and also respecting the improper manner in which he was discharged by you.

"He is now, and has for some time past, been under medical treatment at Guy's Hospital as out-patient, particularly for the injury to his leg, and has been unable to earn anything, and will be so for some time to come.

"I shall be glad to know if you care about your medical man seeing him, and what you propose to do in the matter.

"Yours truly,

"(Signed) Wm. Hy. Matthews.

"Mr. Hyde, 154 Walworth Road, S.E."

"Engaged one month on trial. Paid weekly, 1*l.* 1*s.* Afterwards to be taken on regularly to drive engine."

And the answer thereto ran thus:—

"Memorandum.

"London, December 14, 1881.

"From R. Hyde & Co., sole importers of the Hartz Mountain Bread, 154 Walworth Road.

"To W. H. Matthews, Trafalgar Square, S.E.

"Dear Sir,—In reference to yours of the 13th concerning Mr. Stone, it is an attempt at imposition, and you can do just what you think most judicious.

"Yours, &c.,

"(Signed) R. Hyde."

Then the action was commenced, and on the trial an objection was taken by the learned County Court Judge that there was no sufficient notice, because in the

(2) *Ante*, p. 112.

(3) *Ante*, p. 277.

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letter of the plaintiff's solicitor the "cause of the injury" was not specified as required by section 7. But it is clear to me that there was a notice, and equally clear that that notice was defective as distinguished from invalid. The statute was passed with the object of giving relief and remedy to the working classes, and a sweeping provision was inserted to the effect that mere defect in the notice should not put the plaintiff out of Court unless the Judge should hold that the defect prejudiced the defendant, and that the defective notice was clearly intended so to prejudice him. Now the Judge here has held that the omission of the cause of the injury was not a mere defect, but rendered this no notice; or that if it were a defect only, "it must have been for the express purpose of misleading the defendants." I asked in the course of the argument what evidence there was of this intention, and it was admitted that there was none. The learned Judge did not find as a fact that there was such intention, but that the omission must have been made with such intent. Therefore the judgment in this particular did not contain a finding of fact such as would preclude an appeal; and I am satisfied that the notice was only defective, and not invalid.

CAVE, J.—I am of the same opinion. Section 7 requires that the notice should give the name and address of the person injured, and state the cause of the injury. Now it is said that the letter of the plaintiff's solicitor was no notice, because the cause of injury is not stated. If so there could be no such thing as a defective notice, because any omission—*e.g.*, of the name or address—would render what was intended as a notice of no effect. The Legislature, I think, contemplated the possibility of the notice being given by persons possessed of no great amount of knowledge, and for that reason provided, as enacted at the end of section 7, that a defect should not invalidate the notice unless the Judge finds, that is, upon evidence, that the intention of giving such defective notice was to prejudice the defendant. The County Court Judge has not in this case applied his mind to that question, but seems to have held, without hearing any evidence on the point, that

such a notice as this must have been misleading. Why he so held I cannot see. Nor can I see why he held that it must have been intended to prejudice the defendants, for there does not appear to have been any evidence given on the point. I therefore do not understand him to have found it as a matter of fact, but to have decided it as a question of law, deducible from the form and nature of the notice. From such a ruling there is, therefore, an appeal, and I think that appeal should succeed.

Appeal allowed with costs.

Solicitors—E. A. Swan, for plaintiff; E. Kimber, for defendants.

1882. } PULLING v. THE GREAT EASTERN
June 7. } RAILWAY COMPANY.

Administration—Personal Injury to Intestate occasioning Expense—Action of Tort for Damage to Intestate's Estate—Loss of Intestate's Wages—Medical Expenses.

An action of tort against a railway company was commenced by the deceased intestate in his lifetime to recover by way of damages the expenses of medical attendance and nursing and loss of wages, and on his death his administratrix was substituted as plaintiff:—Held, that the action was not maintainable, being, in fact, a personal action which did not survive.

The statement of claim alleged that the plaintiff was the administratrix of Edward Pulling, deceased, her husband, and that he had commenced the action in his lifetime against the defendants; and that the plaintiff had, upon his death, been by an order of the Court substituted as plaintiff.

The said Edward Pulling, while crossing the defendants' railway, was, by the negligence of the defendants' servants, knocked down and run over by an engine, and sustained personal injuries.

In consequence of such injuries he was compelled to leave his employment, and from that time until his death he was prevented from following his occupation, and

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from earning the wages and profits which he otherwise would have earned, and he also incurred expenses in medical attendance and nursing during his illness; and at the time of his death his personal estate and effects were much diminished in value by reason of the aforesaid circumstances.

Demurrer.

Lush Wilson, in support of the demurrer, was stopped.

W. H. Clay, for the plaintiff.—The testator's estate was during his lifetime damaged; the injuries occasioned by the defendants' negligence necessarily caused expense and loss. He had a right of action when he issued the writ, and as the injury to the estate had then occurred, his administratrix might continue the action under 4 Edw. 3. c. 7.—*Bradshaw v. The Lancashire and Yorkshire Railway Company* (1), *Leggott v. The Great Northern Railway Company* (2) and *Twycross v. Grant* (3).

DENMAN, J.—I think that, notwithstanding the argument of Mr. Clay, we ought to decide in favour of this demurrer. The action is a peculiar one. It was brought by or rather continued by the administratrix of a deceased person. Deceased himself had brought an action against the railway company for injuries received by him, not as a passenger, but as one of the public, who, in crossing the defendants' line was knocked down and injured, owing, as he alleged, to the defendants' negligence. The action, as now before us, is undoubtedly one of *tort*; but the present plaintiff says that the effect of the *tort* was to occasion the deceased to incur medical and other expenses before his death, and it is to recover these that she sues. I think that this cannot be done without repealing the rule, which says, "*actio personalis moritur cum persona*." It is true that to a certain extent the doctrine has been qualified so far as that, under the statute of Edw. 3, it has been

held that if an action be brought substantially for the impairment of the estate, it may be supported though in form personal.

But no case has gone so far as to hold that when the original tortious act was the personal injury caused to the plaintiff, so as to give rise to a strictly personal action, such action can be maintained after death by the executor or administrator, merely because some expenditure of money was incurred in consequence of the injury before death.

In *Bradshaw v. The Lancashire and Yorkshire Railway Company* (1), the judgment of the Court did not go that length: we decided expressly on the ground that it was an action of contract. In *Leggott v. The Great Northern Railway Company* (2), the Court expressed some doubt as to the decision in *Bradshaw v. The Lancashire and Yorkshire Railway Company* (1), but felt bound by it; and Mr. Justice Mellor treated the case before him as being an action of contract; while Mr. Justice Quain held that it fell within the statute 4 Edw. 3. c. 7, which enables an executor to bring an action for damages to the personal estate. There is, however, no language in either judgment to support the proposition of the survival of personal actions.

As to the *dicta* in *Twycross v. Grant* (3), they do seem to go further in the direction of Mr. Clay's contention; but it must be observed that the *tort* there sued for was one consisting purely of an injury to property by deceit; and it was in no sense an injury to the person. It was a case of damage to the estate, which makes it a very different case to this. This is misconduct in the management of a train injuring a man so that he has to call in a doctor. There is nothing to bring the case within the category of matters included in the Act of Edw. 3; and so there is nothing that I can see to do away with the rule that a personal action does not survive. The demurrer must therefore be allowed.

POLLOCK, B., concurred.

Solicitors—J. F. Terry, for plaintiff; Capel A. Curwood, for defendants.

(1) 44 Law J. Rep. C.P. 148; Law Rep. 10 C.P. 189.

(2) 45 Law J. Rep. Q.B. 557; Law Rep. 1 Q.B. D. 599.

(3) 48 Law J. Rep. Q.B. 1; Law Rep. 4 C.P. D. 40.

[IN THE COURT OF APPEAL.]

1882. } HUNT v. AUSTIN.
May 17. } *Ex parte* MASON.*

Practice—Solicitor—Charging Order on Money in Court—Substituted Service of Summons to pay out Money in Court to Solicitor.

M. having obtained a charging order, under 23 & 24 Vict. c. 127. s. 28, on a sum in Court belonging to the defendant, in respect of his taxed costs as solicitor for the defendant, took out a summons calling on the defendant to shew cause why the money should not be paid out of Court to him, in part satisfaction of his costs. The defendant successfully evaded service of the summons. The Court of Appeal ordered a notice to be put up in the Master's office, to the effect that the summons had been issued, and would be taken to have been duly served upon the defendant if he did not appear within one month from the date of such notice; that a similar notice should be inserted in the "Times" newspaper; and should also be sent to one L., who was the last person who acted as the defendant's solicitor; and to one H., who was one of the defendant's friends.

This was an application for leave to substitute service of a summons under the following circumstances:—

It appeared from the affidavits that Mason had acted as solicitor to the defendant in the action of *Hunt v. Austin*, but solicitors were changed before the action came on for trial, and one Lamb acted on behalf of the defendant. The documents and papers in the action were handed over to Lamb by Mason for the purposes of the trial, subject to a lien which Mason had upon them for his costs, damages and expenses incurred by him up to the time of changing solicitors. A sum of 718*l.* 17*s.* 1*d.*, which one Bucknall owed to the defendant, had been paid into Court to abide the result of the action, and at the trial a verdict was taken by consent for the plaintiff for 600*l.*, the balance to be paid to the defendant. Mason having obtained a charging order, under 23 & 24 Vict. c. 127. s. 28, upon the balance still in Court for his costs, damages and expenses, which were

* *Coram* Brett, L.J.; and Cotton, L.J.

taxed *ex parte* at 195*l.* odd, took out a summons calling upon the defendant to shew cause why the balance 118*l.* 17*s.* 1*d.* should not be paid to him in part satisfaction of his taxed costs. The defendant evaded service of the summons. Affidavits were filed, in which it was stated that Lamb had ceased to act as the defendant's solicitor, and did not know his address, and that one Hogarth, who had introduced the defendant to Mason, was one of the defendant's friends. The Master at chambers and the Divisional Court refused to make any order upon the summons in the absence of an affidavit of service upon the defendant.

Mason appealed.

Brooke Little, in support of the application.

BRETT, L.J.—It must be taken that the sum of money which is in Court was obtained for the defendant by the efforts of his solicitor, and an order has been made under the Solicitors Act, and is still in existence, charging that sum with the payment of the amount due from the defendant to the solicitor. It is desired to carry this charging order into effect by means of an order upon an officer of the Court to pay this money out of Court to the solicitor. According to the practice of the Court, which must be taken to have originated in an order of the Court, this can only be done by a summons, calling on the person against whom the charging order has been made to shew cause why the money so charged should not be paid to the solicitor. The order is one which arises from a consideration of the first principles of justice. It is made out by the affidavits that the defendant, who knew of the existence of the charging order, and that such a summons as this would be served upon him, has gone away, leaving no person to represent him, for the express purpose of concealing himself where no notice might be sent to him.

The defendant has set the Court at defiance, and it has been said that he can do so with impunity, and can prevent the Court from carrying one of its orders into legitimate effect. It follows, from the very constitution of the Court, that if no Act of Parliament stands in the way, or if there

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be no authority on the subject, so that no practice can have sprung up, the Court can make a rule of practice to prevent its own orders being thrown in its face where a person purposely keeps out of the way in order to evade that which he knows would be the certain result of the order. I am of opinion that we can assume power to make a rule in order to meet such an attempt to evade the order of the Court, and that we can meet the case by substituting some rule in place of the ordinary rule of practice, which is that a summons must be served upon the party or his solicitor. The proper way will be to declare some substituted mode which will be equivalent to service upon the defendant in this case. The order of this Court will therefore be, that a notice be put up in the Master's office of the High Court, to the effect that a summons has been issued against the defendant, and that if he does not appear within one month from the date of such notice, the summons is to be taken to have been duly served upon him; and that similar notices be sent to Lamb, who was the person who acted last as the defendant's solicitor; and also to a person of the name of Hogarth, who was said to be one of the defendant's friends; and also that a notice to the same effect be inserted in the *Times* newspaper.

COTTON, L.J.—In my opinion the Court ought not to allow this charging order to become ineffectual because service of the summons cannot be effected on the defendant, but care should be taken that reasonable efforts have been made to effect service upon him. I think that what Lord Justice Brett has suggested are the only steps to be taken so that the defendant shall have notice of what has been done.

Solicitor—J. N. Mason, for applicant.

1882. { THE LOCAL BOARD OF BEXLEY v.
May 22. { THE WEST KENT MAIN SEWER-
AGE BOARD.

Local Government Board — Power to state a Special Case—Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), s. 5 —“Arbitration by Consent”—38 & 39 Vict. c. clxiii. s. 93.

The reference of disputes between a local board and any constituent authority or parish to the Local Government Board for decision, which decision, it is declared by 38 & 39 Vict. c. clxiii. s. 93, shall be final and conclusive, is not a “reference by consent” within the meaning of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), s. 5, and the Court will refuse to hear a Special Case stated by the Local Government Board for its opinion upon such reference.

In this case a claim was made for compensation for injuries alleged to have been sustained by the plaintiffs by reason of the mode in which the defendants carried on their works. The defendants denied their liability, and the facts were embodied in the form of a Special Case under the seal of the Local Government Board.

H. Tindal Atkinson, for the plaintiffs.

R. Bray, for the defendants.

Upon counsel proceeding to open the plaintiffs' case, the Court called upon him to shew what power the board had to state a case—*Manisty, J.*, referring to section 93 of 38 & 39 Vict. c. clxiii. (1).

H. Tindal Atkinson.—It has been held that the provisions of the Common Law Procedure Act, 1854, with regard to re-

(1) 38 & 39 Vict. c. clxiii. s. 93: “Except as in this Act expressly provided, if at any time any difference arises between the board on the one hand, and any constituent authority or authorities, or person or persons, on the other hand, or between any two constituent authorities, or between any constituent authority and any parish or part of a parish, or person or persons, respecting any assessment of a main sewer rate, or any injunction, notice, or any determination of the board, or any controversy or other matter under this Act, the same shall, by virtue of this Act, stand referred for decision to the Local Government Board, whose decision thereon, and respecting the costs of the reference, shall be binding and conclusive.”

Local Board of Bealey v. West Kent Main Sewerage Board.

mitting matters to the reconsideration of the arbitrator, and enlarging the time for making the award, apply to references under the Lands Clauses Acts—*In re The Dare Valley Railway Company* (2). Those references are by consent of the parties; all that is prohibited is a reference to any other arbitrator than the one fixed by that Act. So here the arbitrator only is fixed, and the arbitration is "by consent" within section 5 of the Common Law Procedure Act, 1854 (3).

[WILLIAMS, J.—But there is no submission here.]

Under the Lands Clauses Act a man is compelled to go to arbitration, yet such arbitration has been held to be a "reference by consent"—*Ex parte Harper* (4). *Rhodes v. The Ayrdale Drainage Company* (5) decided this point, but was overruled in the Court of Appeal in my favour. This is not a tribunal appointed to try the questions, because there is no power of issuing execution.

R. Bray.—It is submitted this is an arbitration by consent. Could not the award be set aside on the ground of some misconduct of the board? The word "referred" is that which is generally used in connection with arbitration. This is a private Act, therefore in the nature of an agreement, and, in fact, constitutes a submission. This is not like the case of the Railway Commissioners—they can be restrained. Could prohibition to the Local Government Board be moved for? There is no power of calling witnesses conferred on the board, which cannot decide questions of law.

(2) 37 Law J. Rep. Chanc. 719; Law Rep. 4 Ch. App. 554.

(3) 17 & 18 Vict. c. 125. s. 5: "It shall be lawful for the arbitrator, upon any compulsory reference under this Act, or upon any reference by consent of the parties, where the submission is or may be made a rule of any of the Superior Courts of Law or Equity at Westminster, if he shall think fit, and if it is not provided to the contrary, to state his award, as to the whole or any part thereof, in the form of a Special Case, for the opinion of the Court, and when an action is referred, judgment, if so ordered, may be entered according to the opinion of the Court."

(4) Law Rep. 18 Eq. 539.

(5) 43 Law J. Rep. C.P. 323; Law Rep. 9 C.P. 508; 45 Law J. Rep. C.P. 861; Law Rep. 1 C.P. D. 103.

VOL. 51.—Q.B.

MANISTY, J.—There is no power to state this Special Case, which is not in the nature of a case stated by an arbitrator. The 38 & 39 Vict. c. clxiii. s. 93, after giving certain powers to public bodies, enacts that, "if at any time any difference arises between the board on the one hand, and any constituent authority or authorities (as the Sewerage Board and the Local Board for the district) on the other hand, or between any constituent authority and any parish or part of a parish, or person or persons, with respect to any assessment, rate, notice, or any controversy or other matter under the Act, the same shall, by virtue of this Act, stand referred for decision to the Local Government Board, whose decision thereon shall be final and binding." This seems to have been enacted to avoid litigation before the ordinary tribunals of the country, and to transfer all such controversies to the Local Government Board for final and conclusive decision. We should defeat this intention by hearing this Special Case, which is not an arbitration case or in the nature of a submission to arbitration. We are not bound by the decision of the Court of Appeal in the case of *Rhodes v. The Ayrdale Drainage Company* (5), as that case was decided on the words of section 25 of the Common Law Procedure Act, 1854, and in cases under that section the consent is full though the arbitrator is fixed upon. Here there is no consent and no submission.

WILLIAMS, J.—I am of the same opinion. The Local Board for Bealey and the West Kent Sewerage Board have a number of nice questions and controversies between them as to what ought to constitute grounds for compensation for injury done by the Sewerage Board in carrying on their sewerage works. These the two boards desire to have settled by this Court on the hearing of a Special Case, embodying those questions, stated under the seal of the Local Government Board. The only authority the Court could have to entertain and determine those matters is that given by the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), s. 5. That section provides that, "It shall be lawful for the arbitrator, upon any compulsory reference under the Act (which does not cover this case), or upon any reference by consent of

Local Board of Bezley v. West Kent Main Sewerage Board.

parties," to state a case for the opinion of the Court. It appears to me that neither by the words nor in the sense is any authority given us in this instance to hear this Special Case, for this cannot be said to be a "reference by consent of the parties." The statute 38 & 39 Vict. c. clxiii. s. 93 distinctly provides that disputes shall stand referred for decision to the Local Government Board—that is, as it seems to me, appoints a tribunal specially selected for the purposes of determining these differences between two public bodies, and the intention is evident that such disputes shall not be decided by the ordinary Courts of Justice. I should go farther, and say that this Case appears to be stated for the purpose of obtaining the judgment or opinion of the Court, not upon stated facts, but upon a number of speculative and abstract questions. It would, in my opinion, be most objectionable for the Court to have to decide such questions, which indeed would involve a treatise upon an extremely difficult point of law for the guidance of the Local Board in performing their duties. This was not what was contemplated by the Common Law Procedure Act, and therefore we must refuse to hear this case.

The Court refused to hear the case.

Solicitors—Sidney Matthews, for plaintiffs;
May, Sykes & Batten, for defendants.

1882.
March 31.
April 3. { THE OVERSEERS OF THE POOR OF
THE TOWNSHIP OF CHORLTON-
UPON-MEDLOCK (*appellants*) v.
THE GUARDIANS OF THE POOR
OF THE CHORLTON UNION AND
THE OVERSEERS OF THE POOR
OF THE TOWNSHIP OF ARDWICK
(*respondents*).

Poor—Rateable Value—Buildings occupied by Municipal Corporations for Purposes defined by Statute.

The gross estimated rental and rateable value of buildings occupied by municipal corporations and other public bodies are to be ascertained, for the purpose of parochial

assessment, by reference to the amount of rent which a tenant, unfettered as to user and unrestricted as to charges, would give if the premises were in the market, and not by reference to the annual profit, if any, made or capable of being made by those using the premises for public purposes.

This was an appeal, under 25 & 26 Vict. c. 103. s. 32, from a valuation list, made under section 14 of the same Act, and confirmed on appeal by the recorder of Manchester at the quarter sessions holden at Manchester.

By the Special Case it appeared that since 1876 the rateable value of the Mayfield Baths and Laundries, situate in Stove Street, in the city of Manchester, and the board schools, situate in Armitage Street, in the same city, as well as two hundred other tenements of a like character within the said city, had been reduced to a nominal sum, on the ground that they were not rateable for any profit beyond that allowed under the charges fixed by statute, and that as in each and every of such cases profit, in a commercial sense, was impossible if the statutes were obeyed, the profit allowed by statute to be made out of them was *nil*.

The question for the opinion of the Court was, by what process the gross estimated rental and rateable value of such hereditaments are to be ascertained; and the following modes of estimating the rateable value were suggested for the consideration of the Court:—

1. The annual interest actually paid on the money borrowed and expended in the purchase or erection.
2. The annual rent which a contractor would require if he erected the premises as they stood for the purposes for which they were used.
3. The amount of rent which a tenant, unfettered as to user and unrestricted as to charges, would give if the premises were in the market.
4. The annual profit which the corporation or school board makes or can make.

Hopwood, Q.C. (with him *Meadows White, Q.C.*, and *D. H. Coghill*), for the appellants.

Overseers of Choriton-upon-Medlock v. Guardians of Choriton Union.

Addison, Q.C. (with him *C. A. Russell*), for the respondent union.

Smyly, for the respondent township.

In support of the appeal it was contended that the valuation list ought to be amended by assessing the rateable value of the buildings in question, on the basis of what the hypothetical tenant would give for them—that is, calculating the value according to the mode indicated in the third of the alternatives given—as all the exemptions by statute, such as churches, ragged schools, &c., are cases where restriction is put on the use of the lands, and not merely on the charges. This is the distinction between this case and *The Corporation of Worcester v. The Droitwich Union* (1) and *Liverpool v. The Overseers of Wavertree* (2).

On the other hand, it was contended that the rateable value should be calculated on the actual profit that the corporation makes or can make by the user of these buildings. A tenant could not take these premises freed from the restrictions on the charges, and therefore the value of them is also restricted. The criterion is the value to the landlord. Rateability, therefore, is only a question for the valuers, who must take into consideration these restrictions on the business and the structural value, and assess its letting value as for such restricted business.

MANISTY, J.—I think the proper mode of ascertaining the assessment of these premises is by the third of the alternatives given—that is to say, by finding what a tenant would give for the premises to be used as baths, laundries or schools—in other words, by ascertaining what a hypothetical tenant would give for the property intended to be assessed.

It was suggested against this view that this property has been deprived of its rateable value, and that under the enactments permitting the structures and lands referred to in the case to be used, they must be taken to have been released from liability to pay rates. This depends on the circumstances of the case; and on the one

hand it is said that the case of *The Corporation of Worcester v. The Droitwich Union* (1) applies, whilst on the other it is contended that that case is clearly distinguishable. Now in that case it was shewn that the Act of Parliament, by the provisions of which the property was allowed to be used as it was used, imposed a fetter on the land itself, and rendered it impossible to employ it for any other purpose than the purpose contemplated by the Act, or for any further profit than that permitted to be taken from it by the Act; but in the case in question the property had a rateable value up to the time when it was acquired by the corporation of Manchester, to be used for the purposes mentioned in the Act. I am unable to see anything in the Act of Parliament which justifies the conclusion that on being so acquired it ceased to have a rateable value. It is true that there is a restriction imposed by the Act on the amount of profit to be derived from the use of the tenement; but the fact that the profits which are to be derived are not such as might be derived by a hypothetical tenant, does not indicate that the assessment should be on a footing different from that upon which assessment takes place with reference to property all over the kingdom. I am supported in this view by the consideration that if the Act under which the corporation uses the property in question had the effect contended for by the respondents, the inhabitants of the township in which that property lies would have an unfair burden cast upon them, because, by electing in what township property should be acquired for these purposes, so as to be deprived of its rateable character, the corporation could throw on the other properties in that township a greater burden of poor-rate. But, on the other hand, by adopting the appellants' contention, it follows that any deficit in the accounts of the baths, washhouses and board schools will have to be made up by the poor-rate of all the townships; and by charging all, the benefit contemplated by the Act would accrue to all. I therefore think the *Droitwich Case* (1) does not apply, except where the effect of the Act is to destroy the rateable value of the particular property, which is not so in

(1) 46 Law J. Rep. M.C. 241; Law Rep. 2 Ex. D. 42.

(2) 1 E. & E. 603; 39 J.P. 101.

Overseers of Chorlton-upon-Medlock v. Guardians of Chorlton Union.

this case. The appeal must therefore be allowed.

CAVE, J.—I am of the same opinion. To ascertain the gross estimated value of the property for the purposes of the poor-rate, the premises must be taken as they stand, and it must be asked what rent they would fetch in the market if the owner wished to let them; and though a restriction on the use of the tenements would have to be taken into consideration, a restriction on the profits in the case of a particular tenant cannot be regarded, unless the assessment be based on the amount of profits made. When there is a substantially regular demand for premises of the kind in question, fairly met by the supply, and the buildings are fit and proper for the uses and purposes for which they are required, the first is not an unfair mode, *prima facie*, of ascertaining the gross rental; but in the present case it is, to my mind, displaced by the third mode, which shows clearly what are the gross estimated rental and rateable value of the premises. The fourth mode, on the other hand, is a right and proper mode of arriving at the rateable value—namely, by taking the actual gross profits actually received—in cases where the premises are of no value except for the restricted purposes to which they are actually applied, or of greater value when so used than if put to any other use, if there be no fair market value of the premises when so used. But here the premises would be of greater value if there were no restrictions on the profits than when put to this restricted use—that is to say, than they are with these restricted purposes to which they are actually applied with these restricted charges. Moreover, the market value to let is ascertainable by the third mode, and I therefore think that the appeal must be allowed.

Appeal allowed. No costs asked for.

Solicitors—Bower & Cotton, agents for W. A. Lyne, Manchester, for appellants; Chester & Co., agents for H. T. Crofton, Manchester, for respondent union; Layton & Jaques, agents for A. Lings, Manchester, for respondent overseers.

1882. }
March 28. } SAUNDERS v. CRAWFORD.

Elementary Education Act, 1876 (39 & 40 Vict. c. 79), s. 11—Order for Attendance—Child between the Ages of Thirteen and Fourteen—"Child Prohibited from being taken into full time Employment."

Justices have no power, under section 11 of the Elementary Education Act, 1876, to order the attendance at school of a child above thirteen and under fourteen years of age, whose parent has neglected to provide for him efficient elementary education, unless such child is found habitually wandering or not under proper control, or in the company of rogues, vagabonds, disorderly persons or reputed criminals.

This was a Case stated by the magistrate of the Clerkenwell Police Court, under 20 & 21 Vict. c. 23. Application was made by the appellant, the officer duly authorised to represent the London School Board, to the magistrate to issue an order, under 39 & 40 Vict. c. 79. s. 11, for the attendance at the board school of the respondent's son, a child of above thirteen and under fourteen years of age.

The magistrate held that he had no power to make the order.

The board appealed.

Faber, for the appellants.

Danckwerts, for the respondent.

GROVE, J.—The only conclusion to which I can come will fortunately only affect a small number of children—namely, those between the ages of thirteen and fourteen. I feel I am bound to decide that the effect of the repeal of section 8 of the Elementary Education Act, 1876 (39 & 40 Vict. c. 79), by the Factory and Workshop Act, 1878, is, that the Court has no power, under section 11 of the Elementary Education Act, 1876 (1), to order the attendance of a child

(1) Elementary Education Act, 1876 (39 & 40 Vict. c. 79), s. 8: "Whereas, by sections 14 and 15 of the Workshops Regulation Act, 1867, provision is made respecting the education of children employed in workshops, and it is expedient to substitute for the said sections the provisions respecting education of the Factory Acts, 1844 and 1874: Be it therefore enacted that sections 31, 38 and 39 of the Factory Act,

Saunders v. Cramford.

between thirteen and fourteen years of age, whose parent habitually neglects to provide for him efficient elementary instruction.

Under the Act of 1870 there is power to make by-laws which can be enforced by fine; but these apply only to children under thirteen. The magistrate therefore refused to inflict a penalty in a case of a boy over thirteen years of age. Now section 11 of the Act of 1876 was enacted for the purpose of meeting cases of neglect by the parent to provide proper instruction for his child, who, being above thirteen and under fourteen years, is allowed by the Factory Acts to be employed for a part of his time. If this Act of 1876 and the Factory Acts therein referred to remained intact, the magistrates ought to have made this order. But we find that 41 Vict. c. 16 (2) repeals the Factory Acts

1844, and sections 12 and 15 of the Factory Act, 1874, shall apply to the employment and education of all children employed in factories subject to the Factory Acts, 1833 to 1871, and not subject to the Factory Act, 1874, or in workshops subject to the Workshop Acts, 1867 to 1871. Provided that section 12 of the Factory Act, 1874, shall not apply to any child so employed who has attained the age of eleven years before the commencement of this Act." Repealed by the Factory and Workshop Act, 1878, s. 107, 6th sch.

Section 11. If either—

1. "The parent of any child above the age of five years, who is under this Act prohibited from being taken into full time employment, habitually and without reasonable excuse neglects to provide efficient elementary instruction for his child; or

2. "Any child is found habitually wandering or not under proper control, or in the company of rogues, vagabonds, disorderly persons or reputed criminals; it shall be the duty of the local authority, after due warning to the parent of such child, to complain to a Court of summary jurisdiction; and such Court may, if satisfied of the truth of such complaint, order that the child do attend some certified efficient school willing to receive him, and named in the order, being either such as the parent may select, or, if he do not select any, then such public elementary school as the Court think expedient, and the child shall attend that school every time that the school is open, or in such other regular manner as is specified in the order. An order under this section is in this Act referred to as an attendance order."

(2) Factories Act, 1878 (41 Vict. c. 16), s. 107. sub-s. 7: "A child exempted by section 8 of the Elementary Education Act, 1876, from the

referred to in section 8 of the Act of 1876, and, in consequence, section 11, sub-section 1 of that Act is gone, because it only affects children who cannot be taken into full time employment; but under the Factory Act, as the law now stands, a child above the age of thirteen years is not prohibited from full time employment.

HUDDESTON, B.—It is extremely difficult to construe these Acts. Section 11 of the Elementary Education Act, 1876, only applies to children between the ages of thirteen and fourteen years, because provision is made in the former Acts not repealed for children under thirteen. Sub-section 1 of section 11 relates to what, by way of distinction, we may call the "respectable child," and gives power to make an order for attendance on the parent of such a child, if he neglects to provide efficient elementary education for his child. Sub-section 2 refers to what may be called the "vagabond" child. In section 48, the definition of a child is "a child between the ages of five and fourteen years." But as regards the "respectable" child, the order cannot be made unless the child is "under this Act prohibited from being taken into full time employment." Now there is no prohibition of taking children into full time employment, except by the reference to the Acts mentioned in section 8, which Acts, however, have been repealed. The section, therefore, now stands to the effect that an order may be made for the attendance either of the "vagabond" child or the "respectable" child under thirteen; but for the "vagabond" child, only when the child is above thirteen years and under fourteen; whereas the "respectable" child above thirteen and under fourteen cannot be dealt with under the statute.

Appeal dismissed with costs.

Solicitors—Gedge, Kirby, Millett & Morse, for appellants; The Solicitor to the Treasury, for respondent.

provisions of section 12 of the Factory Act, 1874, by reason of his having attained the age of eleven years before the 1st day of January, 1877, shall, on attaining the age of thirteen years, be deemed to be a young person within the meaning of this Act."

1882. { VICKARY ADMINISTRATRIX v. THE
June 26. { GREAT NORTHERN RAILWAY
COMPANY.

Practice—Costs—Oral Examination of Party—Omitting to answer—Order XXXI. rule 10—Order LV. rule 1.

An order was made by the Master at chambers that the plaintiff, who had insufficiently answered interrogatories, should be examined viva voce, and should pay the costs of and occasioned by the examination in any event:—Held, that the Master had jurisdiction to make such order as to costs.

This was a motion by way of appeal from Lopes, J., at chambers, confirming the order of Master Butler that the plaintiff, not having sufficiently answered certain interrogatories, should be orally examined, and that the plaintiff should pay the costs of and occasioned by the said examination in any event.

Cock, for the plaintiff, in support of the motion.—Order XXXI. rule 10 (1) contains no provisions that such costs shall be in the discretion of the Court, or that the Court shall make the order on such terms as shall seem just, or to the Court shall seem fit; there is therefore no power, as in the cases of orders for the inspection and production of documents and orders of that kind, to direct the costs to be paid in any event by one or the other party. If such order could be made it might lead to a system of oppression, as the other party might unduly prolong the examination, and ruin his opponent.

Cyril Dodd, for the defendants.—The person in default cannot justly be entitled to have the costs of the examination rendered necessary by his default. Therefore there is no practical utility in delaying the order till the trial. The Master has power

(1) Order XXXI. rule 10: "If any person interrogated omits to answer, or answers insufficiently, the party interrogating may apply to the Court or a Judge for an order requiring him to answer, or to answer further, as the case may be. And an order may be made requiring him to answer, or answer further, either by affidavit or by *viva voce* examination, as the Judge may direct."

to make an order as to a proceeding before him. The question of the examination and the costs thereof constituted the proceeding before him. The forms in *Chitty's Forms and Rules* provide for the costs.

DENMAN, J.—In this case application was made, under Order XXXI. rule 10 (1), to the Master to order the oral examination of the plaintiff, on the ground that she had not sufficiently answered interrogatories administered to her. The Master made the order, and on appeal the Judge at chambers having the matter before him affirmed the Master's decision in all respects, including the direction that the costs of the oral examination should be paid by the plaintiff in any event. I am of opinion that the Judge has the power so to deal with these costs, either under Order LV. rule 1 (2), or by some power *dehors* the Judicature Acts. If this power be not given by Order LV. rule 1 (2), it is one of the powers of the Court existing at the time of the passing of the Judicature Acts, and is not taken away by any provision in those Acts. It is part of the practice of the Court therefore, and I see no reason why the exercise of his discretion by the Judge should be interfered with.

POLLOCK, B., concurred.

Appeal dismissed with costs.

Solicitors—R. Chapman, for plaintiff; Nelson, Barr & Nelson, for defendants.

(2) Order LV. rule 1: "Subject to the provisions of the Act, the costs of and incident to all proceedings in the High Court shall be in the discretion of the Court; but nothing herein contained shall deprive a trustee, mortgagee or other person, of any right to costs out of a particular estate or fund to which he would be entitled according to the rules hitherto acted upon in Courts of equity: provided that where any action or issue is tried by a jury, the costs shall follow the event, unless upon application made at the trial, for good cause shewn, the Judge before whom such action or issue is tried, or the Court, shall otherwise order."

1882. }
Feb. 27. }

JACK v. KIPPING.

Bankruptcy—"Mutual Credit, Debts or other Dealings"—Set-off—Fraudulent Representations on Sale of Goods—*Bankruptcy Act, 1869* (32 & 33 Vict. c. 71), ss. 39 and 49.

In an action by the trustee in liquidation of a vendor of shares for the price of the same, the purchaser has a right of set-off in respect of a claim for unliquidated damages for a fraudulent misrepresentation whereby he was induced to purchase them.

This was a demurrer to a set-off and counter-claim.

The action was brought by the trustee of a debtor in liquidation to recover the balance of the price of certain shares sold by the debtor to the defendant.

The statement of defence alleged that the plaintiff made certain fraudulent misrepresentations, with the intention of deceiving the defendant, as to the condition and prospects of the said companies; and that the defendant, believing and relying on the truth of the said statements, agreed to buy the said shares. And by way of set-off and counter-claim, the defendant repeated his allegations as to the fraudulent misrepresentations, adding that the said shares were, and had always been, since the date of the defendant's purchase, worthless and of no value, and the defendant counter-claimed for the amount paid for the said shares by him. The plaintiff demurred to the set-off and counter-claim, on the ground that the claims sought to be set off were not provable under the liquidation, and could not be set off.

T. Terrell, for the plaintiff, contended that section 39 of 32 & 33 Vict. c. 71 (1),

(1) 32 & 33 Vict. c. 71. s. 39: "Where there have been mutual credits, mutual debts or other mutual dealings between the bankrupt and any other person proving or claiming to prove a debt under his bankruptcy, an account shall be taken of what is due from the one party to the other in respect of such mutual dealings, and the sum due from the one party shall be set off against any sum due from the other party, and the balance of such account and no more shall be claimed or paid on either side respectively;

deals only with mutual debts or credits arising from mutual dealings between the parties, and not with claims for damages for a personal tort, such as fraud or misrepresentations, from which the order of discharge does not release the bankrupt, and that the defendant could not therefore rely on his set-off and counter-claim.

R. Henn Collins, for the defendant.—The tort here sued on is not a personal tort within the rule alluded to in *Peat v. Jones & Co.* (2), but a breach of an obligation arising out of a contract for sale, which has been held by the Master of the Rolls, in the case cited, to be "in its nature mutual, imposing reciprocal obligations on the vendor and purchaser." There are here, therefore, mutual dealings which can be the subject of set-off.

Terrell, in reply.

Cur. adv. vult.

The judgment of the Court (3) was (on Feb. 27) delivered by

CAVE, J.—The question in this case is, whether, in an action by the trustee in liquidation of a vendor of shares for the price of the same, the purchaser has a right of set-off in respect of a claim for unliquidated damages for a fraudulent misrepresentation whereby he was induced to purchase them. We are of opinion that *Peat v. Jones* (2) governs this case, and that the purchaser is entitled to the set-off he claims, on the ground that the contract of sale and purchase is in its nature mutual, imposing reciprocal obligations on the vendor and purchaser, and consequently that claims arising out of that contract are mutual dealings within section 39 of the *Bankruptcy Act, 1869* (1). It seems impossible to conceive that we could, with any equity or justice, hold that a purchaser,

but a person shall not be entitled under this section to claim the benefit of any set-off against the property of a bankrupt in any case where he had, at the time of giving credit to the bankrupt, notice of an act of bankruptcy committed by such bankrupt, and available against him for adjudication."

Section 49: "An order of discharge shall not release the bankrupt from any debt or liability incurred by means of any fraud or breach of trust, nor from any debt or liability whereof he has obtained forbearance by fraud."

(2) *Ante*, p. 128; Law Rep. 8 Q.B. D. 147.

(3) Matthew, J., and Cave, J.

Jack v. Kipping.

who has had a worthless article palmed off on him by the fraudulent misrepresentations of a vendor who has since become bankrupt, should be compelled to pay the full agreed price to the trustee, and, on the other hand, be only entitled to recover from the trustee a part of the said sum by way of dividend. It is said that such a fraudulent misrepresentation is a *tort*; but we hold it to be not a personal *tort*, but a breach of the obligation arising out of the contract of sale. The argument was that this is a debt or liability incurred by means of a fraud, and being such, is, under section 49 of the Bankruptcy Act, 1869 (1), not a debt provable in the bankruptcy, and therefore cannot be set off. But the section clearly does not mean this, because the expression "debt or liability incurred by means of a fraud" implies that a liability arising out of fraud which is not a debt may be proved in bankruptcy.

Judgment for the defendant.

Solicitors—White, Collisson & Prichard, for plaintiff; Le Riche & Son, agents for B. W. Stead, Manchester, for defendant.

1882. }
June 14. }

GRAVES v. TERRY.

Practice—Reply—Non-delivery within Time—Judgment on Admissions in Pleadings—Rules of Court, Order XXIV. rule 1; Order XXIX. rule 12; Order XL. rule 11.

Where the plaintiff failed to deliver a reply to the defendant's statement of defence within the three weeks prescribed by Order XXIV. rule 1, but subsequently delivered a reply before the defendant gave notice of motion to enter final judgment, the Court refused to order final judgment to be entered for the defendant.

Action to recover damages for injuries sustained by the plaintiff through the negligent driving of the defendant's servant.

The statement of defence delivered on

the 30th of March denied the allegations in the statement of claim, and alleged contributory negligence on the part of the plaintiff.

No reply was delivered within the three weeks (Order XXIV. rule 1), and no extension of time was obtained. On the 23rd of May a reply was delivered joining issue, and the case was subsequently set down for trial by the plaintiff.

The defendant now moved for final judgment, on the authority of *Lumsden v. Winter* (1). The notice of motion was given on the 23rd of May, after the plaintiff had delivered his reply.

Buck, for the defendant.—The defendant is entitled to final judgment on the authority of *Lumsden v. Winter* (1). By Order XXIV. rule 1, the time for reply is limited to three weeks, and no reply can be delivered after three weeks unless an extension of time has been obtained. Here no extension of time was obtained. No reply has therefore been delivered within the terms of the rules. See also *Jenkins v. Davies* (2), and *Rutter v. Tregent* (3).

[FIELD, J.—*Rutter v. Tregent* (3) and *Jenkins v. Davies* (2) are not in point. In *Lumsden v. Winter* (1) no reply was ever delivered. Here a reply was delivered before the notice of motion to enter final judgment. This is really only a matter of costs; we will not give final judgment if we think there is a real issue the plaintiff means to try.]

Holmes Poulter, for the plaintiff, not called on.

FIELD, J.—This is an attempt to obtain judgment by a short cut. The action is brought to recover damages for injuries to the plaintiff arising, as it is alleged, from the negligent driving of the defendant's servant. The defence set up is contributory negligence on the part of the plaintiff. No reply was delivered within three weeks, but afterwards the plaintiff, learning the step which the defendant was about to take, on the 23rd of May delivered a reply joining issue. This reply was in itself

(1) *Ante*, p. 413; Law Rep. 8 Q.B. D. 650.

(2) Law Rep. 1 Ch. D. 696.

(3) 48 Law J. Rep. Chanc. 791; Law Rep. 12 Ch. D. 758.

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perfectly good, although not delivered within the three weeks allowed by the rules. So long as no reply had been delivered after the expiration of the three weeks, the pleadings were closed. But even in such a case, before allowing final judgment to be signed, we should enquire if the other side really meant to reply, and, if so, we should allow them to deliver a reply, reserving the question of costs. In this case, however, the reply was actually delivered before the notice of motion was given, and the case of *Lumsden v. Winter* (1) has no application.

CAVE, J.—I am of the same opinion.

Motion dismissed with costs.

Solicitors—Thomas Sampson, for plaintiff;
Rose & Fry, for defendant.

1882. }
June 12. } - HEAVEN v. PENDER.

Negligence—Contract—Supply of Defective Article—Injury to Stranger—Right of Action.

The plaintiff, a painter, had been employed by G., who had contracted with a shipowner to paint a vessel. The defendant had contracted with the shipowner to erect a staging round the vessel for the purpose of having the vessel painted. While engaged in painting the vessel the plaintiff fell from the staging into the dock, owing to the defective state of one of the ropes of the staging. In an action for damages in consequence of injuries sustained,—Held, that the action was not maintainable.

George v. Skivington (39 Law J. Rep. Exch. 8; Law Rep. 5 Exch. 1) not followed.

This was a rule calling upon the plaintiff to shew cause why a verdict and judgment in the County Court should not be set aside, and judgment entered for the defendant or a nonsuit, on the ground that the evidence shewed no liability of the defendant to the plaintiff, and that on the facts proved at the trial the defendant was in law entitled to judgment.

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The facts were as follows: The owners of a steamship had engaged one William Gray to paint her, and Gray had employed the plaintiff. The ship was berthed in the defendant's dry dock at Poplar, and the defendant had contracted with the owners of the vessel to erect a staging round her suspended by ropes and tackle. While the plaintiff was standing upon the staging engaged in painting the ship, one of the ropes broke and the plaintiff fell into the dock.

At the trial of the action in the County Court to recover damages in respect of such accident, the learned County Court Judge (the damages being agreed) held that the defendant was liable to the plaintiff, and that the rope was defective and unfit for the purpose for which it was supplied.

Charles, Q.C. (Scott with him), shewed cause.—The judgment of the learned County Court Judge is right. In *George v. Skivington* (1) the defendant, a chemist, was held liable, in an action by husband and wife, for selling to the husband an article of a deleterious character, for the use of the plaintiff's wife, which proved injurious. Kelly, C.B., in his judgment, says (1): "Now, under these circumstances, the question is whether an action at the suit of the plaintiff Emma George will lie. It is contended that it will not. There was no warranty, it is said, either express or implied, towards the purchaser himself. But it is not necessary to enter into that question, because the contract of sale is only alleged by way of inducement, the cause of action being not upon that contract, but for an injury caused to the wife of the purchaser by reason of an article being sold to him for the use of his wife, and so sold to the defendant's knowledge, turning out to be unfit for the purpose for which it was bought. And I think, quite apart from any question of warranty, express or implied, there was a duty on the defendant, the vendor, to use ordinary care. Unquestionably there was such a duty towards the purchaser, and it extends in my judgment to the person for whose use the vendor knew the compound was purchased." And Cleasby, B., says: "Substitute the

(1) 39 Law J. Rep. Exch. 8; Law Rep. 5 Exch. 1.

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word 'negligence' for 'fraud,' and the analogy between *Langridge v. Levy* (2) and this case is complete. . . . Under the circumstances I think there was a duty imposed upon him to use due and ordinary care, and of the breach of that duty I am of opinion the female plaintiff, who was injured, can take advantage. The two things concur—negligence, and injury flowing therefrom. There was therefore a good cause of action in the person injured, similar to that which was held to be good in *Langridge v. Levy* (2)."

[FIELD, J.—*Winterbottom v. Wright* (3) does not appear to have been quoted to the Court in *George v. Skivington* (1)].

I submit that *Winterbottom v. Wright* (3) is no longer law since the later case. The defendant is in a position analogous to a landlord contracting that the premises are in good repair—*Nelson v. The Liverpool Brewery Company* (4). He cited *Pretty v. Bickmore* (5), *Todd v. Flight* (6), *Payne v. Rogers* (7), *White v. France* (8) and *Smith v. Steel* (9).

Bompas, Q.C. (*H. F. Dickens* with him), in support of the rule.—The judgment of the learned County Court Judge is wrong. The plaintiff cannot maintain this action against the defendant, for there was no contract between them, and the defendant owed no duty to the plaintiff. Neither is it a case of fraud. The case of *Winterbottom v. Wright* (3) is precisely similar to the present, and has not been overruled. He cited *Longmeid v. Holliday* (10), *Blackmore v. Bristol and Exeter Railway Company* (11), *Collis v. Selden* (12), *Francis v.*

Cockrell (13), *Redhead v. The Midland Railway Company* (14).

FIELD, J.—This rule must be made absolute. It is a case not free from difficulty. The action is brought by a man who has sustained an injury, and of course it is very much a matter of regret that he has sued the wrong person. Now it is all important in a case like this to see what the precise facts are. The plaintiff, while engaged in painting a ship under a contract made by him with his master, Gray, fell into the dock and sustained an injury. It is clear that the injury was occasioned by the defective condition of one of the ropes, but there is not the smallest proof that the defendant knew of it, although there is evidence shewing that if any person had examined it, he would have found that it had been burnt. When that burnt part came there, whether it was there at the time when the defendant provided the tackle or not, or whether the plaintiff was careless in not noticing it, does not appear, but it is quite clear that there was no defect in the original manufacture of the rope. Therefore the facts simply are these: that the defendant did supply a defective rope, and *prima facie*, perhaps, there would be evidence unanswered of want of care in so doing. As my brother Cave pointed out several times during the argument, mere negligence does not always give a right of action. In order to support an action you must either have a contract with the person whom you are suing, or there must be some relation establishing a duty to use due and reasonable care. Now there are cases in which occupiers of property are held liable to persons whom they invite on their premises. It was well settled in *Indermaur v. Dames* (15), which has been followed by subsequent cases, that the rule of law is clear that, if a man invites another to come upon his premises to pursue his lawful business, that creates a duty on his part to use due and reasonable

(2) 2 Mee. & W. 519; in Exch. Chamb. 4 Mee. & W. 337; Law J. Rep. Exch. 387.

(3) 10 Mee. & W. 109; 11 Law J. Rep. Exch. 415.

(4) 46 Law J. Rep. C.P. 675; Law Rep. 2 C.P. D. 311.

(5) Law Rep. 8 C.P. 401.

(6) 9 Com. B. Rep. N.S. 377; 30 Law J. Rep. C.P. 21.

(7) 2 H. Bl. 349.

(8) 46 Law J. Rep. C.P. 823; Law Rep. 2 C.P. D. 308.

(9) 44 Law J. Rep. Q.B. 60; Law Rep. 10 Q.B. 125.

(10) 6 Exch. Rep. 761; 20 Law J. Rep. Exch. 430.

(11) 8 E. & B. 1035; 27 Law J. Rep. Q.B. 167.

(12) 37 Law J. Rep. C.P. 233; Law Rep. 3 C.P. 495.

(13) 39 Law J. Rep. Q.B. 113; Law Rep. 5 Q.B. 591.

(14) 38 Law J. Rep. Q.B. 169; Law Rep. 4 Q.B. 379.

(15) 35 Law J. Rep. 184; Law Rep. 1 C.P. 274; affirmed 36 Law J. Rep. C.P. 181; Law Rep. 2 C.P. 311.

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care that his premises are in a fit state, so that the person invited is not exposed to injury. If the facts of this case were brought within that principle there would be no doubt about the plaintiff's right to recover. I think they are not. I agree with what Mr. Justice Blackburn says in *Smith v. Steel* (9), that there is no distinction in the obligation imposed on the owner of property whether fixed or movable. What are the facts in this case upon that point? They are that the ship-owner made a contract with Gray to paint his ship, and left Gray to select the person to paint it. For this purpose staging must be formed, and the defendant accordingly supplied it to the owner of the ship. If it could be shewn that after that time the defendant had got any control over the staging, so that he might move it away or prevent persons passing on it, or if there was any evidence to bring him into the position of an occupier (to use a strong word), that is, a person having control and dominion over the staging, I should have then said that the principle of the cases cited applied. But I see no evidence of that at all. It appears to me that the staging being once erected, the defendant completely parted with the control of it, just as much as a landlord does with his property when he parts with the whole possession of a house. There is no fraud in this case—that is clear—as there was in the case of *Langridge v. Levy* (2). But I quite agree that there is no distinction between *George v. Skivington* (1) and this case, and that it is immaterial whether it is known who is the party about to use the thing or not. Therefore, is there any duty, as contended for, imposed upon the defendant towards the plaintiff? Now it seems to me that that point was deliberately discussed and clearly decided in *Winterbottom v. Wright* (3), upon a declaration carefully framed stating the facts of the case. There the Court held that they could not see any duty on the part of the defendant towards the coachman. The man suing—namely, the coachman—was the man of all others whom the defendant knew would be the person to use the coach. Surely if there ever was a case in which a duty arose out of a contract with another person, that was one. But the Court of Exchequer gave

judgment for the defendant. That case has been followed by the same Court in *Longmeid v. Holliday* (10) and other cases. The only case that has thrown any doubt on that decision is *George v. Skivington* (1). That is an authority standing by itself, and it is to be observed that *Winterbottom v. Wright* (3) is not referred to in it, and I therefore have to choose between the two. I must take one or the other, and I prefer to follow *Winterbottom v. Wright* (3).

CAVE, J.—I am of the same opinion. As I understand the law it is this: When a licensee goes on to the property of the licensor, or uses the property of the licensor for a purpose in which the licensor is interested, then there is a duty on the part of the licensor to take care that his licensee is not exposed to danger. That is the general rule in the case of land; so, too, in the case of a ship or anything else where there is a duty arising out of having possession and control of the thing, not out of having the absolute property in it. Now the only case which has been cited against that proposition is *George v. Skivington* (1). In that case *Winterbottom v. Wright* (3) is not referred to, and in the former case one of the judgments proceeds on the assumption that there is a kind of negligence analogous to fraud, something of which all the world can complain. To that reasoning I cannot assent, and therefore I prefer to follow *Winterbottom v. Wright* (3). The other case which was referred to—namely, *Nelson v. The Liverpool Brewery Company* (4)—is not in point. Under these circumstances, the question in this case is who was the licensor? The burden is upon the plaintiff to shew that the defendant was his licensor. I do not think he has successfully done that, and therefore on that ground I think the ruling was wrong, and that the defendant is entitled to our judgment.

Rule absolute.

Solicitors—E. J. Anning, for plaintiff; Watson Sons & Room, for defendant.

[IN THE COURT OF APPEAL.]

1882. }
 June 8, 9. } CORY AND SONS v. BURR.*
 July 1. }

Shipping — Marine Insurance — Barratry leading to Seizure—Warranty free from Seizure—Proximate Cause of Loss.

The plaintiffs insured a ship with the defendant by a time policy against the ordinary perils, including barratry of the master. The subject-matter of the insurance was warranted "free from capture and seizure and the consequences of any attempt thereat." While the policy was in force the ship was seized by a foreign government, in consequence of the master having barratrously engaged in smuggling.

In an action to recover from the underwriter the expenses incurred by the plaintiffs in obtaining the release of the ship,—

Held (affirming the judgment of the Queen's Bench Division), that the defendant was not liable, and that the warranty extended to the seizure, although such seizure was caused by a barratrous act.

The case is reported *Ante*, p. 95, where the Special Case is set out.

The plaintiffs insured with the defendant, amongst others, a steamship for twelve months. The material words of the policy were: "Touching the adventures and perils which we, the assurers, are contented to bear and do take upon us in this voyage, they are perils of the seas, men-of-war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart and countermart, surprisals, takings at sea, arrests, restraints and detainments of all kings, princes and people of what nation, condition or quality soever, barratry of the master and mariners, and of all other perils, losses and misfortunes that have or shall come to the hurt, detriment or damage of the said goods, merchandise and ship, &c., or any part thereof." The policy contained the usual sue and labour clause, and the subject-matter of the insurance was "warranted free from capture and seizure and the consequences of any attempt thereat."

* *Coram* Lord Coleridge, C.J.; Brett, L.J.; and Cotton, L. J.

While the policy was in force the master engaged in smuggling transactions, in consequence of which the ship was seized by the Spanish revenue officers; and the plaintiffs having incurred heavy expenses in obtaining the liberation of the ship, brought an action against the defendant to recover the proportion of those expenses due from the defendant under the policy.

A Special Case was stated, in which it was found that, if it was a question of fact, the conduct of the master was barratrous.

The Queen's Bench Division gave judgment for the defendant.

The plaintiffs appealed.

Webster, Q.C., and *Myburgh, Q.C.*, for the appellants.—The loss in this case was a loss consequent on the barratrous conduct of the master; but for the barratry there would have been no seizure. Loss by barratry forms an exception to the general rule of *causa proxima spectatur—Arnould on Insurance* (1); and in this case the barratry was the sole foundation for the seizure. *Vallejo v. Wheeler* (2) and *Goldschmidt v. Whitmore* (3) shew you must treat as barratry that which is a consequence of barratry. The American case of *The American Insurance Company v. Dunham* (4) shews that when the case is one of barratry a limitation must be put on the words "capture and seizure," and the policy must be construed so as to make the warranty include barratry; and to the same effect is *Wilcocks v. The Union Insurance Company* (5). In *Havelock v. Hancill* (6) the ship was insured in any lawful trade, and was lost by unlawful trading on the part of the master; it was there held that this being barratrous, the insurer was liable, as barratry was a peril insured against.

The words "capture and seizure" have never been held to include anything more than the actual seizure of the ship. *Kleinwort v. Shepard* (7) shews that this warranty does not include this seizure; such a

(1) Vol. ii. 5th ed., p. 773.

(2) *Lofft*, 631; *Cowp.* 143.

(3) 3 *Taunt.* 508.

(4) 12 *Wendell*, 463; 15 *Wend.* 9.

(5) 2 *Binney*, 574.

(6) 3 *Term Rep.* 277.

(7) *E. & E.* 447; 28 *Law J. Rep. Q.B.* 147.

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warranty includes a seizure without any pretence of legal ground; it cannot cut down the effect of the insurance against barratry. It may be urged that *Livie v. Janson* (8) tells against this contention, but it does not decide this question; it was a decision on the distinction between a total and a partial loss, and *Hahn v. Corbett* (9) explains this distinction and decides that a seizure such as this does not take the case out of the insurance against barratry.

Cohen, Q.C., and *Barnes*, for the defendant.—The object of the warranty is the diminution of the liability of the underwriter. The intention was to exclude all losses caused by capture or seizure, or any attempts thereat. No satisfactory distinction can be drawn between capture or seizure caused by barratry, and capture or seizure caused by any of the other perils enumerated in the policy. The words "capture and seizure" must receive their ordinary meaning—*Kleinvoort v. Shepard* (7). The ordinary rule is that in insurance all losses are referred to their proximate cause, and in this case the seizure was the proximate cause of the loss. It is contended by the plaintiffs that barratry is an exception to the general rule; but that is an attempt to write certain words into the policy. There is no reason why words should be written in as to one peril and not as to all the other enumerated perils. In *Arcangelo v. Thompson* (10) there was no warranty against the actual proximate cause of the loss, nor was there in *Heyman v. Parish* (11). What is here sought to be recovered is not a loss proximately caused by barratry, but a loss caused by seizure. In *Blyth v. Shepherd* (12) it was held that perils of the sea would be properly alleged as the cause of the loss, although there were previous barratry; so in *Green v. Elmslie* (13) the loss was held to be one by capture, although the vessel would not have been captured but for damage previously suffered. The American case of *The American Insurance Company v. Dunham* (4) is founded on *Havelock v. Hancill* (6), and

(8) 12 East, 648.

(9) 2 Bing. 205.

(10) 2 Campb. 620.

(11) Ibid. 149.

(12) 9 Mee. & W. 763; 11 Law J. Rep. Exch. 293.

(13) Peake, 212.

that case turned entirely on the question of what was a lawful trade, and whether the words applied to any trade unless the ship was employed therein by the owners, and there was there no warranty against a loss by barratry. *Suckley v. Delafield* (14) decides nothing save a question of what would satisfy a representation that a vessel shall sail in ballast. *Wilcocks v. The Union Insurance Company* (5) was a case at Nisi Prius, and that (like the last case) was a decision on a trade contract and not a decision on a warranty affecting perils insured against.

Vallejo v. Wheeler (2) does not support the contention of the appellants, for it cannot be assumed that an implied condition to allow deviation is equivalent to an express warranty to deviate. In *Powell v. Hyde* (15) the warranty was the same as here, and it was held that that warranty was not confined to legal capture, but that an illegal capture was within the warranty.

Webster, in reply.

Cur. adv. vult.

BRETT, L.J. (on July 1).—In this case an action was brought on a policy of insurance for the purpose of recovering money paid by the owner to prevent the seizure of the ship, or to release the ship from seizure. The seizure was made on the ground that the master had smuggled, and it was admitted that that was an act of barratry. The policy of insurance contained a warranty, which was not in an unknown form, that the subject-matter of the insurance should be free from capture and seizure, and the consequences of any attempt thereat. It was said by the defendant, one of several underwriters, that the reasonable construction of this warranty would relieve him from liability, although the seizure in this case was in other respects one within the perils insured against. It was argued by the plaintiffs that the seizure was the result of the barratry, and that as the policy contained barratry as one of the perils insured against, the warranty could not relieve the defendant from the consequences of a loss by barratry. Reliance was placed by the plaintiffs on

(14) 2 Caine, 221.

(15) 5 E. & B. 607; 25 Law J. Rep. Q.B. 65.

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the peculiar doctrine which is applied to losses resulting from barratry: as to all other losses it is the ultimate or proximate cause which alone is looked at; but this is not the case in barratry, and if the barratry is the effective cause, or the *causa causans*—and even though it be not the ultimate cause, yet the effective cause, or *causa causans*, may be relied on where there is barratry; so that the plaintiffs alleged they could prove a loss by barratry, that the seizure need only be proved as a means by which the loss by barratry affected the shipowner, and that the seizure was but the measure of the damage caused to the shipowner by the barratry. On behalf of the defendant it was said that the mere barratry by itself would not have caused damage to the shipowner, that the only damage which accrued to him was by reason of the seizure, and that the terms of the warranty are not confined, and apply to every seizure, whatever may be the provoking cause of that seizure. It is true that in cases of loss by barratry the *causa causans* may be looked at, and in this case the act of barratry was that cause; in this case if there were no warranty the assured could sue for loss by seizure or for loss by barratry; the assured could also sue for the loss by barratry alone, and could prove the barratrous act and the subsequent seizure; it is also clear that he could sue for the loss by seizure, leaving out the barratry. That this is so is clear from the case of *Arcangelo v. Thompson* (10). In that case the loss claimed was a loss by capture, and it was alleged that the loss was caused by barratry, and therefore that the declaration was not proved; but Lord Ellenborough held that as there was in fact a capture the plaintiff could disregard the barratry and sue for the capture; and that is an authority that here the shipowner could sue for the seizure and disregard the barratry, or that he could sue for the barratry disregarding the seizure. It would seem strange if the result should now depend on the form of the pleadings, for in these days pleadings are not material as affecting the rights of parties. It seems to me that this case is one in which the question is whether a warranty against seizure includes a seizure the result of a barratrous act. If the case were one of

first impression it would be arguable that a warranty against capture and seizure was only a warranty against war risks, and I should incline, were there no authority on the point, to adopt that view; but it has been decided that this is not so. In *Kleinwort v. Shepard* (7) the warranty was the same as that here. There the loss was occasioned by the rising of the coolies who were emigrants on board the ship, and it was held that if there had been no warranty that would have been a loss by seizure: it was doubtless a loss by piracy, but it was also a loss by seizure. It was there argued that the warranty was wholly a warranty against war risks, and that such a rising as there occurred was not a war risk. It was said that the only seizure intended to be insured against was a seizure in time of war; but it was held that the warranty must not be so confined, and that it included such a seizure as that which there occurred. It is to be remarked that the risks in the policy included a seizure by a piratical act, and therefore, that although it was in that case possible to sue for loss by piracy and also for loss by seizure, yet the plaintiff could not by bringing an action for loss by piracy get rid of the warranty, which in fact took out part of the policy.

In *Powell v. Hyde* (15), there was a policy against ordinary loss, and also a warranty such as is found in this case, and there the ship was fired into by Russians at a time when there was no war between this country and Russia. It was held that the firing was an attempt at capture or seizure, although not the act of an enemy. There it was argued that the warranty only included war losses; but it was held that the terms of the warranty could not be so confined, that there had been an attempt to seize, and that the warranty applied to all kinds of seizure.

On reflection, I am of opinion that those cases are an authority for saying that this warranty must be read, as the ordinary meaning of the words would dictate, that it includes every kind of seizure, and that it so far affects the other words in the policy as to apply, as it were, to certain parts of those words; that is to say, that it is a warranty against a seizure by enemies, by pirates and by foreign governments, and

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that there is nothing to prevent it from applying to a seizure which is the result of barratry; that the peculiar doctrine as to barratry does not interfere with the warranty; and therefore that the plaintiffs are not entitled to recover.

It was, however, argued, that the two decisions in the American case of *The American Insurance Company v. Dunham* (4) would lead us to come to an opposite conclusion. Now, if those decisions in that case were clear, and if there were no authority against them, I should be anxious to follow them. I agree with the opinion there expressed by the Chancellor that it is most desirable that decisions on insurance law should be in conformity in all countries if possible; and if there were a course of American decisions, and nothing to the contrary, I should follow the authority of those decisions. I always find the American decisions on insurance law to be based on admirable reasoning and supported by good sense, and I think it would be wanton not to consider them with care and with a view to agreement with them. But the American case does not cover this case. In that case there was a warranty that the subject-matter of the insurance should be free from the effects of a seizure on account of any illicit or prohibited trade—that warranty differed from this warranty—and it was decided that the meaning of that warranty was that it was a warranty against illicit trading by the owner assured, and those acting with his knowledge or assent; so that a barratrous illicit trading was not within the terms of the policy, and that was only a decision that the warranty did not apply to trading by any one else. Certainly that American case is like the case of *Havelock v. Hancill* (6), where the ship was insured while carrying on any lawful trade, and it was held that that was a warranty against illicit trading by the owner; that decision, therefore, does not apply to this case. It seems to me that this case is within the decisions in *Kleinwort v. Shepard* (7) and *Powell v. Hyde* (15). It is said that those cases are not binding on this Court; but I do not think this Court ought to differ from those decisions in interpreting a warranty as old as this, and the principle of those decisions is that this warranty is

one against seizure of every kind. There are many barratrous acts which would injure the shipowner even though they did not result in seizure, and I am of opinion that the whole policy must be construed together, and, therefore, that the judgment of the Divisional Court must be affirmed.

COTTON, L.J., read the following judgment.—The question in this case depends on the true construction and effect of a policy of marine insurance on the ship *Rosshlyn*, which amongst the perils insured against includes barratry. The policy also contains a warranty by the insured against capture and seizure. In consequence of the master having at Gibraltar taken a cargo for smuggling into Spain, the vessel was seized by the Spanish authorities. The action was to recover expenses incurred by the owner for the release of the vessel. The act of the master in taking the cargo was barratrous, and as in cases of barratry there is an exception to the general rule that the loss must be referred to its proximate cause, but for the warranty the insured might have recovered his loss as occasioned by barratry. But the immediate cause of the loss was the seizure, and the question is whether the warranty deprives the insured of his right to recover. In my opinion it does.

It has been decided that in such a policy capture and seizure is not confined to capture and seizure by an enemy, and as this is the case I think that these words must be construed to include capture and seizure for breach of the revenue laws of a foreign state. I think that the warranty must be construed as a limitation of the liability which would otherwise have been undertaken by the underwriters. Several of the perils insured against besides barratry, such as kings' enemies and pirates, might have resulted in capture or seizure, and I think that the warranty protects the underwriters from loss in respect of the perils insured against where such loss is the immediate result of capture or seizure. It was attempted to limit the effect of the warranty by applying it to those perils only which would probably result in capture or seizure. But I can see no sufficient reason for thus limiting the operation of the

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warranty, and if several perils insured against may produce capture or seizure as well as other losses, the warranty must modify the liability of the underwriters in respect of all the perils which can produce the result mentioned in the warranty, which in terms applies to capture or seizure for whatever causes.

But it was said that the case was decided by authority—*Vallejo v. Wheeler* (2) was referred to. There the insured owners recovered a loss, the consequence of a barratrous deviation of the master, and it was argued that the implied condition against deviation was equivalent to the warranty in the present policy. But an implied condition only regulates what is not expressly provided for, and the implied condition against deviation would not modify the express provision as to barratry. *Havelock v. Hancill* (6) was also relied on. There the vessel was insured in any lawful trade against (amongst other things) barratry. Loss was incurred by the master barratrously engaging in a prohibited trade. The owner recovered against the underwriters. But there "in lawful trade" was construed "during employment by the owner in lawful trade," that is, by limiting the condition to acts of the owner. This was also the principle of the decision in the cases in the United States to which we were referred, where warranty against seizure on account of prohibited trade was construed as a covenant against employment by the owners in unlawful trade. In my opinion none of these cases are authorities in favour of the plaintiff, and in my opinion the decision appealed from is right and must be affirmed. With regard to the American cases I cannot regard them as authorities, although the judgments are worthy of all respect as expressing the opinions of learned persons.

BRETT, L.J.—We are requested to say that Lord Coleridge agrees in the judgment of the Court.

Appeal dismissed.

Solicitors—H. C. Coote, agent for Adamson, North Shields, for plaintiffs; Waltons, Bubb & Walton, for defendant.

[IN THE COURT OF APPEAL.]

1882. }
June 29, 30. } TITTERTON v. COOPER.*

Bankruptcy—Trustee in Liquidation—Vesting of Property of Liquidating Debtor in—Liability of, for Rent and on Covenants in Lease—Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), ss. 17 and 23.

The plaintiff sued the trustee in liquidation of his lessee for rent due both before and after the appointment of the defendant as trustee. The trustee had not disclaimed the lease, nor had he entered into possession of the premises, but he had attempted to effect the transfer of the lease to an assignee:—Held, that the property comprised in the lease vested, by virtue of section 17 of the Bankruptcy Act, 1869, in the trustee from the date of his appointment; that to fix him with liability under the lease it was not necessary to shew that he had done any act signifying his acceptance of the lease; that if that were necessary he had so dealt with the property as to signify his acceptance, and thus to fix him with liability under it; and that as he had not disclaimed he was liable for the rent which accrued due subsequent to the date of his appointment, but not for that which was due before his appointment as trustee.

Appeal from the judgment of Huddleston, B., at the trial without a jury.

Action to recover rent and damages for breach of covenant to repair. It appeared that the plaintiff had demised, at a rent payable quarterly, certain premises to one Morison for twenty-one years from the 25th of December, 1879, the lease to be determinable at three, seven, or fourteen years. On the 8th of December, 1880, Morison presented a petition for liquidation. The defendant was appointed trustee in his liquidation, and his appointment was certified on the 3rd of January, 1881. He did not disclaim the lease, nor did he enter on the premises; but he attempted to arrange by correspondence for the assignment of the liquidating debtor's interest in the lease to one Sharp, and terms were discussed between them, although the assignment was not effected.

* *Coram* Lord Coleridge, C.J.; Brett, L.J.; and Cotton, L.J.

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The action was brought to recover one quarter's rent due on the 25th of December, 1880, and another quarter's rent due on the 25th of March, 1881, and damages for breach of a covenant to repair.

The facts being admitted, Huddleston, B., on the authority of *Wilson v. Wallani* (1), gave judgment for the plaintiff for the rent claimed, the amount of damages for non-repair being referred.

Notice had since been given to determine the lease, and it had been accepted by the plaintiff.

The defendant appealed.

Cohen, Q.C., and C. J. Peile, for the defendant.—The learned Judge followed the decision of Stephen, J., in *Wilson v. Wallani* (1), and that judgment was based upon *Cartwright v. Glover* (2); but in both those cases the trustee had taken possession, so that it was not necessary to hold that a lease vests in a trustee in liquidation in cases where he has not taken possession of the property. It was settled law that under sections 141 and 145 of the Bankruptcy Act, 1849 (3), which are sec-

(1) 49 Law J. Rep. Exch. 437; Law Rep. 5 Ex. D. 165.

(2) 2 Giff. 620.

(3) 12 & 13 Vict. c. 106. s. 141, enacts: "That when any person shall have been adjudged a bankrupt, all his personal estate and effects, present and future, wheresoever the same may be found or known, and all property which he may purchase, or which may revert, descend, be devised or bequeathed, or come to him before he shall have obtained his certificate, and all debts due or to be due to him, wheresoever the same may be found or known, and the property, right and interest in such debts, shall become absolutely vested in the assignees for the time being for the benefit of the creditors of the bankrupt, by virtue of their appointment; and after such appointment, neither the bankrupt nor any person claiming through or under him shall have power to recover the same, nor to make any release or discharge thereof, neither shall the same be attached as the debt of the bankrupt by any person according to the custom of the City of London or otherwise, but the assignees shall have like remedy to recover the same in their own names as the bankrupt himself might have had if he had not been adjudged bankrupt."

Section 145: "That if the assignees of the estate and effects of any bankrupt having or being entitled to any land either under a conveyance to him in fee or under an agreement for any such conveyance subject to any perpetual yearly

tions analogous to sections 17 and 23 (4) of the Act of 1869, the property of a

rent reserved by such conveyance or agreement, or having or being entitled to any lease or agreement for a lease, shall elect to take such land, or the benefit of such conveyance or agreement, or such lease or agreement for a lease as the case may be, the bankrupt shall not be liable to pay any rent accruing after the issuing of the fiat or filing of the petition for adjudication of bankruptcy against him, or to be sued in respect of any subsequent non-observance or non-performance of the conditions, covenants or agreements in any such conveyance or agreements, or lease or agreement for a lease; and if the assignees shall decline to take such land, or the benefit of such conveyance or agreement, or lease or agreement for lease, the bankrupt shall not be liable if, within fourteen days after he shall have had notice that the assignees have declined, he shall deliver up such conveyance or agreement, or lease or agreement for lease, to the person then entitled to the rent, or having so agreed to convey or lease, as the case may be; and if the assignees shall not (upon being thereto required) elect whether they will accept or decline such land, or conveyance or agreement for conveyance, or such lease or agreement for a lease, any person entitled to such rent, or having so conveyed or agreed to convey, or leased or agreed to lease, or any person claiming under him, shall be entitled to apply to the Court, and the Court may order them to elect and deliver up such conveyance or agreement for conveyance, or lease or agreement for lease, in case they shall decline the same, and the possession of the premises, to the vendor or person claiming under him, or may make such other order therein as it shall think fit."

(4) 32 & 33 Vict. c. 71. s. 17, enacts that, "Until a trustee is appointed the registrar shall be the trustee for the purposes of this Act, and immediately upon the order of adjudication being made the property of the bankrupt shall vest in the registrar. On the appointment of a trustee the property shall forthwith pass to and vest in the trustee appointed."

Section 23: "When any property of the bankrupt acquired by the trustee under this Act consists of land of any tenure burdened with onerous covenants, of unmarketable shares in companies, of unprofitable contracts or of any other property that is unsaleable, or not readily saleable by reason of its binding the possessor thereof to the performance of any onerous act, or to the payment of any sum of money, the trustee, notwithstanding he has endeavoured to sell or has taken possession of such property, or exercised any act of ownership in relation thereto, may, by writing under his hand, disclaim such property, and upon the execution of such disclaimer, the property disclaimed shall, if the same is a contract, be deemed to be determined from the date of the order of adjudication, and if the same is a lease, be deemed

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bankrupt of a nature such as this did not vest in the assignees of the bankrupt until they had done some unequivocal affirmative act shewing their acceptance of the property—*Goodwin v. Noble* (5) and *Mackley v. Pattenden* (6). The law on this point has not been changed by the provisions of the Act of 1869. Section 23 gives the trustee a power of disclaimer and places leases on the same footing as contracts, so that this case is in fact governed by *Ex parte Davis; in re Sneezum* (7), where it was decided that a trustee in bankruptcy who does not disclaim the contract of a bankrupt does not thereby adopt it either personally or on behalf of the estate; nor is this view inconsistent with the decision in *Ex parte Dressler; in re Solomon* (8), for in that case the trustee had taken possession of the leasehold property; James, L.J., however, said during the argument in that case that the trustee "need not take possession," shewing that the trustee has a right to

to have been surrendered on the same date, and if the same be shares in any company be deemed to be forfeited from that date, and if any other species of property, it shall revert to the person entitled on the determination of the estate or interest of the bankrupt, but if there shall be no person in existence so entitled, then in no case shall any estate or interest therein remain in the bankrupt. Any person interested in any disclaimed property may apply to the Court, and the Court may, upon such application, order possession of the disclaimed property to be delivered up to him, or make such other order as to the possession thereof as may be just. Any person injured by the operation of this section shall be deemed a creditor of the bankrupt to the extent of such injury, and may accordingly prove the same as a debt under the bankruptcy."

Section 24: "The trustee shall not be entitled to disclaim any property in pursuance of this Act in cases where an application in writing has been made to him by any person interested in such property requiring such trustee to decide whether he will disclaim or not, and the trustee has for a period of not less than twenty-eight days after the receipt of such application or such further time as may be allowed by the Court declined or neglected to give notice whether he disclaims the same or not."

(5) 8 E. & B. 587; 27 Law J. Rep. Q.B. 204.

(6) 1 B. & S. 178; 30 Law J. Rep. Q.B. 225.

(7) 45 Law J. Rep. Bankr. 137; Law Rep. 3 Ch. D. 463.

(8) 48 Law J. Rep. Bankr. 20; Law Rep. 9 Ch. D. 252.

elect and must do some definite act to manifest his acceptance of the property. *Ex parte Brook* (9), *Lowrey v. Barker* (10), *Mills v. The East London Union* (11) and *Hawkins v. Hawkins* (12) were also cited.

If it be necessary that a trustee should do some unequivocal act, then none such has been done in this case—the lease never passed to the trustee; so that section 23 (4) has no application to this case, for he had never "acquired" the property, and a mere omission to disclaim is no evidence of acceptance.

Cock (with him *Kemp, Q.C.*), for the plaintiff.—The judgment is right, for the trustee here accepted the lease, and he is therefore liable to the burdens as well as entitled to the benefits of it. If indeed it were necessary that a trustee should do some affirmative unequivocal act to shew his acceptance, then the attempts made by the trustee to sell the lease, and the negotiations which he entered into, shew conclusively that he had accepted the lease and considered himself owner of it. But the difference between the provisions of the Act of 1849 and those of the Act of 1869 is on this point most marked. In section 141 (3) of the Act of 1849 it is provided that the personal estate of the bankrupt "shall become absolutely vested" in the assignee, and section 145 provides that the assignee may elect or decline to accept a lease to which the bankrupt is entitled; but section 17 (4) of the Act of 1869 enacts that on the "appointment of a trustee the property shall forthwith pass to and vest" in him, and that until he is appointed the property of the bankrupt shall "immediately" upon the order of adjudication vest in the registrar; so that the question, which was a difficult one under the Act of 1849, does not arise under the Act of 1869. The case of *Ex parte Davis* (7) does not govern this case: the question argued there was whether a trustee could disclaim a contract of the

(9) 48 Law J. Rep. Bankr. 22; Law Rep. 10 Ch. D. 101.

(10) 49 Law J. Rep. Exch. 433; Law Rep. 5 Ex. D. 170.

(11) 42 Law J. Rep. C.P. 46; Law Rep. 8 C.P. 79.

(12) Law Rep. 13 Ch. D. 47.

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bankrupt after he had for a time performed it. In *Ex parte Dressler* (8) this question did not arise, for there the trustee had taken possession and had not disclaimed.

[COTTON, L.J.—The argument for the defendant is that the Act in fact makes a statutory conveyance, and that this conveyance must be accepted by the trustee.]

The whole scheme of the statute of 1869 is against that view, and it expressly alters the law of 1849 as to acceptance. It is not suggested that the defendant can be liable for rent accrued due before the property vested in him.

Peile, in reply.—*Ex parte Davis* (7) shews that failure to disclaim is not acceptance; and in *Ex parte Blandy* (13), a case decided in 1835, it was held that taking no step was rejection and not acceptance.

[BRET, L.J.—But the defendant here did all he could to sell.]

In *Turner v. Richardson* (14) the assignees advertised for sale a lease, and yet it was held that that act was not evidence of an assent on their part to take the term. In *Lindsay v. Limbert* (15) it was decided that a mere attempt to make personal estate available to the estate is not such an act of ownership as to create an implication of assent to a term.

[LORD COLERIDGE, C.J.—In *Hastings v. Wilson* (16), Gibbs, C.J., held that putting up premises to auction, finding a purchaser and receiving a deposit, fixed the assignees with the term.]

But in that case there was a binding contract for sale which the assignees could have enforced, whereas there were here only negotiations.

LORD COLERIDGE, C.J.—In this case we have to construe, for the first time, as it would seem, in this Court, sections 17 and 23 of the Bankruptcy Act, 1869 (4). An action has been brought against a trustee in liquidation, in order to recover the rent of certain premises which had been demised by lease to the liquidating debtor, and it is said that the defendant has become tenant of these premises by the operation of the Bankruptcy Act of 1869.

The question has been argued on two grounds: it is first said that no alteration has been made in the law as it stood under the enactments of the statute of 1849, saving so far as the words of section 23 of the Act of 1869 effected an extension of the law; and, secondly, it was said that the acts which were necessary under the statute of 1849 to be done by assignees in bankruptcy, and which it was assumed were also necessary under the statute of 1869 to be done by trustees in bankruptcy or liquidation, so as to render them liable as assignees of the lease, had not in this case been done by the defendant, so that the defendant could not be held liable. I am against the appellant on both grounds. The provisions of the Act of 1849 are materially different from those contained in the Act of 1869, and it is to be noted that the later Act was passed for the purpose of changing the law as enacted by the Act of 1849. Under the Act of 1849 leases passed to an assignee in bankruptcy by virtue of his appointment, and became by section 141 (3) absolutely vested in him for the benefit of the creditors of the bankrupt. The word "vest" is found in both Acts, and it is urged that it means in the Act of 1869 what it meant in the Act of 1849, and that conduct which was held necessary to impose liability upon an assignee in the cases which were decided under the Act of 1849 would also be necessary conduct on the part of trustees under the Act of 1869, in order to cause the word "vest" to have any practical effect. It is, however, to be observed that the two statutes are couched in very different terms. I do not desire to rely on the distinction between the enacting part of section 141 and section 142 of the Act of 1849, and the enacting part of section 17 of the Act of 1869 (4), but I am of opinion that reliance is to be placed upon the qualification put upon the word "vest" found in section 141 by the provisions of section 145 of the Act of 1849. Section 145 (3) of that Act contemplated three separate cases. It contemplated first, the case in which an assignee elected to take the land or lease of the bankrupt, in which case the bankrupt was entirely relieved from all liability; it contemplated secondly, the case in which the assignee declined to

(13) 1 Deac. 286.

(14) 7 East, 335.

(15) 12 Moore C.P. 209.

(16) Holt's N.P. 290.

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do so, and then other consequences followed; and it contemplated in the third case, the case of the assignee remaining passive, and in this case certain rights were given to the owner of the property. Such being the scheme of that statute, I am of opinion that section 145 (3) shewed the intention of Parliament to be that, although for certain purposes the property of a bankrupt was to vest in his assignee, yet for the purpose of fixing an assignee with liability it was necessary that he should take some step or do some act. Turning now to the Act of 1869, we find a different set of provisions, and we find that the words of section 17 (4) differ from those used in the earlier statute. Section 17 enacts that "immediately upon the order of adjudication being made the property of the bankrupt shall vest in the registrar," and that "on the appointment of a trustee the property shall forthwith pass to and vest in" him. These words "immediately" and "forthwith" are not found in the statute of 1849, and different considerations arise on the construction of section 17 (4) of the Act of 1869 from those which arose on the construction of the vesting section of the earlier Act. Turning now to section 23 (4), I find further a broad distinction between its language and the language of what I may call the correlative section of the Act of 1849. Section 23 provides that when "any property of the bankrupt acquired by the trustee" is of an onerous nature, the trustee may disclaim such property. The word "acquired" shews that the property spoken of is property come to the trustee by virtue of the operation of the Act, and the section provides that he may disclaim, notwithstanding he has endeavoured to sell, or has taken possession, or exercised any act of ownership. The section, therefore, is couched in wholly different language from that of the earlier Act, and it is reasonable that it should receive a different interpretation. In this case a lease has become vested in the trustee of the liquidating debtor, and he has, to use the words of the statute, "acquired" property of the bankrupt under the Act; but as it is onerous property he can, if he thinks fit, disclaim it, in which case the disclaimer relieves the trustee

altogether, for it dates back to the date of the order of the adjudication; but if the trustee does not disclaim the property in question, he then possesses it, and with the property he has the burdens, for the property is in him for all purposes, and he is bound to pay the rent and to perform the covenants. It does not appear to me that this view is invalidated by the provisions of section 24 (4), although the time for disclaimer is limited by that section. It is quite true that the words of the Act of 1869 make the same interpretation true of the registrar as of the trustee in any case in which there might be an interval between the devolution of the property, and of course this might not be immediate; but it does not appear to me that this would be practically of much consequence, for the property would only be in the registrar for a very short time, inasmuch as the first thing the Court has to do is to order the creditors to meet, and the first thing that they have to do is to elect a trustee. This being the opinion which I have formed on the construction of the statute it becomes immaterial to consider whether anything has been done by the trustee here to shew whether he made any election, or whether he took to the property or not. No act of that kind was required, for the property vested in him by the operation of the statute itself; and even if he were to do nothing, he would still be fixed with the liabilities consequent on ownership. It is, however, the fact that there are further circumstances in this case which would, if the principles which were laid down under the Act of 1849 were applicable to this case, render the trustee liable in this action, for he has done that which would bring him within the principle of the cases to which reference has been made—he has attempted to sell, he has negotiated with a view to a sale, and has done such unequivocal acts as would, under the old law, have amounted to an election.

The two cases of *Turner v. Richardson* (14) and *Hastings v. Wilson* (16) shew plainly that under the old law what has been done here would have been sufficient to charge the defendant. The distinction is, as has been pointed out by Lord Justice Brett, that where the assignee did nothing

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more than get the materials for the exercise of his judgment, it was held that he had but taken a reasonable preliminary step to test the value of the property, and that he had not actually exercised his judgment or made an election. Such a case was *Turner v. Richardson* (14). There the assignees made an experiment to ascertain the value of the premises: they put up the premises, but they did not state the premises belonged to them, and they did not give any particulars. It was held that they had not made an election but had only taken a preliminary step. But when further steps had been taken, and when, as in *Hastings v. Wilson* (16), which was subsequent to *Turner v. Richardson* (14), and in which that case was cited, actual negotiations for a sale were entered into, and the assignees held themselves out as owners or accepted a bidding, then it was held that an election had been made.

The present case is, however, within the statute of 1869, and whether the trustee did or did not attempt to sell, I am of opinion that on the true construction of the statute, irrespective of any special facts, the plaintiff is entitled to succeed, inasmuch as the provisions of the Act of 1869 are different from those of the Act of 1849; but even if the principles of the earlier Act are applicable, then I am of opinion that the trustee has here done enough to make himself liable in this action.

There is a smaller point which was not pressed before the learned Judge, but which was reserved to the appellant, and on that he is entitled to succeed, for the plaintiff cannot recover for rent accrued due on a quarter-day prior to the appointment of the trustee, and for one quarter's rent the trustee is not liable—he must therefore be relieved from that; but the respondent has substantially succeeded, and the appeal must be dismissed.

BRETT, L.J.—This action is brought against a trustee in liquidation; it is brought to recover several quarterly payments of rent reserved by a lease, and the question is, whether the trustee is personally liable for all or any of these quarterly payments. Upon this appeal the question is raised, whether the lease by which the rent is

reserved is vested in the trustee—if it has so become vested, then it is admitted that he is personally liable. It has been argued by the appellant that the lease never did vest in him; but it is admitted that if it has so vested, then the trustee never exercised his right of disclaimer. It is urged that the lease never vested in the trustee, because it is said that he never accepted it, and it is argued that it could not vest in him unless he did something to shew his acceptance. Assuming that to be a valid argument, then it is admitted that if the trustee did some positive act of acceptance the lease would vest in him. If it were necessary that the trustee should do some positive unequivocal act of acceptance, then I am of opinion that the defendant did do some such act. It is not necessary to give an exhaustive definition of acts which would have the effect of shewing that a trustee in liquidation or bankruptcy had adopted a lease as his own; one of such acts is taking possession, and another would be any act shewing a clear exercise of absolute ownership. In the present case the act is the attempt to sell. Now it has been held that the mere putting up property to auction, without any particulars as to ownership or any description of the trustee as owner or vendor, so as to get a bid or an estimate, is not such an act of ownership as would make a trustee liable, for such an act has been held to be but a preliminary step. The case of *Hastings v. Wilson* (16) shews that, if a trustee or assignee describes himself as owner, then that is an effective act of ownership, and that would agree with the business view of the matter.

In this case the defendant did assume to sell the estate and did propose terms of sale. That was an exercise of an act of ownership; so that even if the argument of the appellant were valid on all the other points, still that act of ownership would make him liable in this action. But I think that the appellant fails on the argument based on the construction of the statute. A lease vests in a trustee in liquidation from the moment his appointment is certified pursuant to the Act, whether he does any positive act or not. This depends on the true construction of section 17 of the Bankruptcy Act, 1869 (4)

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for that is the vesting section, and section 23 can only be used to help us to construe section 17. We have, no doubt, a right to consider the provisions of the Act of 1849, and the cases decided under that Act, if the provisions of that Act are similar to those of the Act of 1869; and if they are not, then to see if the alteration throws light on the meaning of the later Act. In the Act of 1849 there was a vesting section, and if that section stood alone and were still in force, it would vest this lease in the trustee without any positive act on his part; but then section 145 (3) of that statute added something to the provisions of section 141 (3), and in a sense qualified them. It was held, therefore, that it threw light on the vesting section, and the Court construed section 141 as effecting that property should not vest absolutely in the assignee from the moment of his appointment; it might be difficult, therefore, to decide at what moment of time the property did, under the Act of 1849, vest in the assignee. However that may be, the case is different now. Section 23 (4) of the Act of 1869 is not equivalent to section 145 of the Act of 1849 (3); the words of the vesting section also differ in the two statutes: they differ for a reason, and they are strong in the Act of 1869 to fix the time beyond doubt. The section provides that, "upon the order of adjudication being made, the property of the bankrupt shall vest in the registrar, and that on the appointment of a trustee, the property shall forthwith pass to and vest in the trustee." Now this property is property within section 17, for section 4 defines property to be "every description of property whether real or personal"; and, further, section 23 shews even more plainly that a lease such as this is within section 17. This lease, therefore, vested in the registrar "immediately" and passed to the trustee "forthwith." The words of the Act of 1849 were vague as to time, but in the Act of 1869 the words are express and stringent; no time is given to the trustee to consider whether such a lease shall be accepted or not, for unless the word "forthwith" is struck out it is vested in him at once. Knowing, as one does, the difficulties which arose under the Act of 1849, one sees the intentional importance of this word—

one sees that it was intended to do away with the doctrine of there being a time for considering whether a lease should be accepted or not. If this be true, then it is admitted that the trustee is personally liable for the rent.

It is then urged that the enactment in section 23 (3) does away with the positive enactment of section 17, and for this, reliance is placed on the words "notwithstanding he has endeavoured to sell or has taken possession of such property, or exercised any act of ownership in relation thereto;" but it was said in opposition, that those words were immaterial, and that they could only apply to property other than leases. I am not inclined to accede to that argument, I rather incline to the opinion that they were inserted to meet a possible suggestion that, although a lease had become vested in a trustee by section 17, yet if the trustee had after that done some positive act, which it might be urged shewed he considered himself owner of the property, then in such case he could not disclaim; and to make security more secure, to meet such a suggestion these words were inserted, so as to reserve to the trustee all the rights conferred on him by the section. There is nothing in section 23 (4) which militates against the true construction of section 17, regard being had to the state of the law when section 17 was enacted. I do not think section 24 assists either of the parties; nor do sections 88, 89 and 90 assist the appellant: they do not deal with property passing to the trustee under section 17, and they are empowering and not limiting sections.

It was then said that there were certain cases which must prevent us from so interpreting section 17, and the first case referred to was *Ex parte Davis; in re Sneezum* (7). That case does not govern this case: that action was not brought against a trustee with the view of making him personally liable, although that question did arise. The contract there was merely a mercantile executory contract, and in that case the trustees had for a time performed the obligation under the contract, and had then disclaimed and ceased to perform the contract; the question then was raised, whether the trustees were personally liable

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for the non-fulfilment of the contract, and it was held they were not. The ground of that decision was that they took the contract as assignees, and that an assignee of a contract such as that could not be sued personally, as there was no privity of contract; whereas an assignee of a lease is liable to be sued for the rent, inasmuch as there is no need to establish privity of contract, for that privity passes with the privity of estate. Other points were also raised and decided in that case, but they are not applicable to the present case.

Then it was said that we were bound by *Ex parte Dressler*; *in re Solomon* (8), and it was urged that the Court had there relied on the affirmative acts of the trustee. I was party to that judgment, and I did state the facts; but although one may, when there are *a fortiori* facts, rely on them, it does not follow that the non-existence of those facts will alter the decision of a case; and I am of opinion that there is nothing in that judgment which is inconsistent with the interpretation which we are to-day putting upon section 17 of the Act of 1869, as interpreted by Baron Huddleston at the hearing of this cause, and by Mr. Justice Stephen in *Wilson v. Wallani* (1). The appeal therefore fails, and the judgment must be affirmed as to all the quarterly payments except the first; as to that, the trustee is not personally liable, for he cannot, as assignee of the lease, be liable for rent due and payable before he became such assignee. The difficulty arises because the case is one of a liquidating debtor, and it was urged that the lease was vested in the assignee from the time of the adjudication or act of bankruptcy; but the question is one of personal liability, and it is impossible that he can be personally liable before he is assignee. Section 17 fixes a positive moment of time, which relates to antecedent as well as to subsequent liability, and I think that if a trustee were to come into possession in the middle of a quarter, he would then be liable for the rent due on the quarter-day after his appointment, and liable for the whole quarter's rent. The question of damages was mentioned, but it is not necessary to decide whether they would be nominal or not, whether they would be for the amount

of the injury to the reversion or for the amount of the repairs, as notice having been given to determine the lease, and that notice having been accepted, the amount would be the same. The appeal must be dismissed, save as to the amount claimed for the first quarter's rent.

COTTON, L.J.—I am of the same opinion. It has been held, without there being any special provision to that effect, that a trustee, if he is the assignee of the leaseholds of a bankrupt, is liable to the lessor just as is any other assignee. It has been suggested that it is necessary he should have some beneficial occupation; but there is no rule to that effect; the only question is, whether the facts shew that he is assignee, or whether, if acceptance is necessary, he has done acts shewing his acceptance of the lease. Possession has sometimes been relied on, because possession may well shew acceptance. In the present case, if acceptance were necessary, or if it were necessary to shew an act of ownership, there are facts which would establish that position. It is true that the defendant did not effectually dispose of the property; but his acts were more than a mere attempt to do so: he acted as an owner would act with regard to the disposition of the property; and that is what distinguishes this case from the cases as to which property has been put up to auction as a test, but not put up for sale with a declaration of ownership.

That really disposes of the case; but as the construction of the statute is in question, it is necessary to add something on that. Under the earlier statute it has been decided that acts of acceptance were necessary; but the words of the statute of 1869 are different from those of the statute of 1849. Under the later statute the property of the bankrupt is first vested in the registrar, and then in the trustee; it passes from the registrar to the trustee, who thereby becomes the owner of the property. It is said that that is hard on the trustee; and so it would be, if the estate out of which he has a right to an indemnity were insufficient, but for the provisions of section 23 (4), which provide a remedy for that hardship. It is urged that section 23 only applies if certain

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things are done which would otherwise amount to acceptance; but the section is general in its terms, it gives the trustee power to disclaim, and the words as to endeavouring to sell and taking possession were only inserted to prevent the argument being put forward that a trustee cannot disclaim if he has tried to do some act which would appear as though he were in fact the owner of the property. Section 83, sub-section 6, also points to the conclusion that no act is needed to vest the property; and the whole statute goes, as far as this is concerned, on the footing that the property vests in such trustee for the purposes of the creditors, without any act done by him. Sections 88 and 90 apply to property which might not otherwise be assignable, and so which would not be within section 17. Reliance was placed on the Act of 1849, and on the cases decided under it. One of those cases turned on section 145 (3), which is different from sections 23 and 24 of the Act of 1869; it enabled the landlord to call on the assignee to elect, and so it implied that acceptance was necessary before the property could vest in him; and the language of section 145 justifies the interpretation put on sections 141 and 142—an interpretation different from that to be put on section 17 of the later Act.

Then it was said *Ex parte Davis* (7) bound us. But I am of opinion that it only decided that sections 23 and 24 were to be connected with the sections relating to the carrying on business, and that those sections did not amount to an enactment that the trustee was personally liable if he carried on the business with respect to contracts existing at the time of the adjudication. Lord Justice Mellish referred to section 25, sub-section 2, which enacts that, "subject to the provisions of this Act, the trustee shall have power to carry on the business of the bankrupt, as far as may be necessary for the beneficial winding up of the same;" and he said, "Are those words sufficient to make the trustee personally liable for any damages the other party to the contract may have sustained by reason of the trustee throwing up a contract of the bankrupt after he had carried it on for a time? . . . In my opi-

nion, they are wholly insufficient for that purpose."

Ex parte Dressler (8) was also relied on by the appellants. Now in that case the trustee had taken possession of leasehold property, and had not disclaimed, and we held that as he had so taken possession, he was personally liable; and in answer to the argument of hardship, Lord Justice James did say during the argument that he need not have taken possession; but that was not a decision that certain acts of acceptance were necessary, and does not conflict with our judgment in this case.

Section 125 fixes the date of the appointment of a trustee in liquidation as the date when his liability commences. He cannot be liable for rent due before the property vested in him, for his liability arises from the position which he holds by virtue of the statutory transfer to him, so that he cannot in this case be liable for the quarter's rent due before his appointment. With that variation the judgment must be affirmed.

Judgment for the plaintiff for the rent accrued due subsequent to the appointment of the defendant as trustee.

Solicitors—W. H. Downing, for plaintiff
Keen & Rogers, for defendant.

1882. { THE SCHOOL BOARD ATTENDANCE
April 28. { COMMITTEE OF HELPER UNION
(appellants) v. BAILEY (respondent).

Elementary Education Acts, 1870 (33 & 34 Vict. c. 75. s. 74), 1873 (36 & 37 Vict. c. 86), 1876 (39 & 40 Vict. c. 79), 1880 (43 & 44 Vict. c. 23)—Causing a Child to attend School—Reasonable Excuse.

[For the report of the above case, see 51 Law J. Rep. M.C. 91.]

[IN THE COURT OF APPEAL.]

1882.
 May 13, 17. } MILLER v. PILLING.*
 June 6. }

Practice—Reference of Issues of Fact for Trial by Official or Special Referee—Form of Report—Judicature Act, 1873, ss. 57 and 58—Order XXXVI. rule 34.

A referee acting under section 57 of the Judicature Act, 1873, is not bound to set out in his report the reasons or grounds upon which he has arrived at the findings of fact referred to him for trial; but the Court has power, under Order XXXVI. rule 34, to require any explanation or reasons from the referee as to the principle upon which the findings of fact have been arrived at by him.

Appeal by the plaintiff from an order of Field, J., made on motion for judgment, sending certain issues of fact and questions of account back to an official referee for re-trial.

The action was brought by the plaintiff, who was a Scotch engineer, against the defendant, who had entered into a sub-contract to make the Girvan and Port Patrick Junction Railway, to recover a sum of 1,407*l.* 13*s.* 6*d.*, and interest thereon, on account of services rendered by him to the defendant, and money expended in getting the sub-contract for the making of the above-mentioned railway transferred to the defendant from Taylor, Cameron & Co., of London, the contractors. The plaintiff also claimed 1,200*l.* as damages for breach of an agreement by the defendant to give to the plaintiff 1,000*l.* stock in the said railway company in consideration of the plaintiff giving a guarantee to the National Bank of Scotland to secure certain sums of money to be advanced by the bank to the defendant. The plaintiff also claimed a sum of 450*l.*, and interest thereon, which he had been compelled to pay to the bank under his guarantee, but which the defendant had not repaid. There was also a claim in respect of several bills of exchange which the defendant had not paid.

The defendant, in his statement of defence, denied the various allegations in

the statement of claim; and, in answer to the action, set up a counterclaim, which, in substance, was as follows: first, a claim for repayment of certain expenses incurred with respect to certain plans and estimates relating to the railway; secondly, an allegation that the plaintiff had made fraudulent misrepresentations to the defendant as to the prospects of the line in order to induce him to enter into the contract, so that the plaintiff was liable for the whole of the losses sustained by the defendant; and further, that the plaintiff, by handing the plans and estimates relating to the railway to the defendant, had entered into a contract that the plans and estimates had been *bona fide* prepared with reasonable care and skill. The defendant claimed 25,000*l.* for debt and damages, and that the plaintiff might be declared trustee of the bills of exchange for the defendant. The reply joined issue on the defence, and also set up a defence to the counter-claim. The rejoinder joined issue upon the reply.

The action came on for trial at the Guildhall in June, 1880, before Field, J., who made an order under section 57 of the Judicature Act, 1873 (1), that "the

(1) Judicature Act, 1873, s. 57: "In any cause or matter (other than a criminal proceeding by the Crown) before the said High Court, in which all parties interested who are under no disability consent thereto, and also without such consent in any such cause or matter requiring any prolonged examination of documents or accounts, or any scientific or local investigation which cannot, in the opinion of the Court or a Judge, conveniently be made before a jury, or conducted by the Court through its other ordinary officers, the Court or a Judge may at any time, on such terms as may be thought proper, order any question or issue of fact, or any question of account arising therein, to be tried either before an official referee, to be appointed as hereinafter provided, or before a special referee to be agreed on between the parties; and any such special referee so agreed on shall have the same powers and duties and proceed in the same manner as an official referee. All such trials before referees shall be conducted in such manner as may be prescribed by rules of Court, and subject thereto in such manner as the Court or Judge ordering the same shall direct."

Section 58: "In all cases of any reference to or trial by referees under this Act, the referees shall be deemed to be officers of the Court, and shall have such authority for the purposes of such reference or trial as shall be prescribed by rules of Court, or (subject to such rules) by the

* *Coram* Brett, L.J.; and Cotton, L.J.
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issues of fact in this cause, and the questions of account arising therein," be tried by one of the official referees.

The official referee, in accordance with the above order, tried the issues of fact, and made a report, in which he answered the issues of fact categorically in favour of the plaintiff in the terms in which those issues were raised in the pleadings. Upon motion for judgment made by the plaintiff the defendant took an objection to the form of report (2); and, ultimately, Field, J., made an order, sending the case back to the referee for re-trial as to certain paragraphs of the official referee's report, and for further consideration as to certain other paragraphs; being of opinion that it was the duty of the referee to set out the grounds and reasons upon which he had arrived at the conclusions in his report.

Against this latter order the plaintiff now appealed.

Bompas, Q.C. (with him *Brymnor Jones*), for the plaintiff.—The Judge has held that all questions are open, and that it is the duty of the referee to report to the Court very fully, so that the Court may be able to examine the grounds for his conclusion; but it is submitted that the case was sent for trial before him as though he were a jury; and the judgment of Bramwell, L.J., in *The Dunkirk Colliery Company v.*

Court or Judge ordering such reference or trial; and the report of any referee upon any question of fact on any such trial shall (unless set aside by the Court) be equivalent to the verdict of a jury."

Order XXXVI. rule 34: "The referee may, before the conclusion of any trial before him, or by his report under the reference made to him, submit any question arising therein for the decision of the Court, or state any facts specially, with power to the Court to draw inferences therefrom, and in any such case the order to be made on such submission or statement shall be entered as the Court may direct; and the Court shall have power to require any explanation or reasons from the referee, and to remit the cause or matter or any part thereof for re-trial or further consideration to the same or any other referee; or the Court may decide the question referred to any referee on the evidence taken before him, either with or without additional evidence, as the Court may direct."

(2) A further contention was raised by the defendant that the findings of the official referee were against the weight of evidence; but for the purposes of this report it is unnecessary to further consider that question.

Lever (3), though given upon the construction of a rule which has since been repealed, contains the true principle. Section 58 of the Judicature Act, 1873 (1), was inserted to meet cases such as this; and it was never intended that cases which are unfit for trial before a jury should be discussed in a Court of appeal upon all the details of the evidence—*Sullivan v. Rivington* (4). The Court, moreover, has power, under Order XXXVI. rule 34 (1), to require the referee to explain or give his reasons for the conclusions at which he has arrived. The report is in a form which the official referee might properly make, and consists of a series of findings as to specific facts.

Horne Payne, and *G. S. Bower*, for the defendant.—This is not a report upon which the Court can frame its judgment, nor is it such a one as it was intended should be made where issues of fact are referred under section 57. It is difficult to say whether the referee, by these findings, means that he negatives each of the averments contained in the statement of defence and counter-claim, or whether he means that he denies that such averments have been proved. The findings are so involved that it is doubtful what the referee really meant. The Court cannot say what has, in fact, been found by the referee as a fact.

BRETT, L.J.—The first question necessary to be determined is the meaning of the order made by Mr. Justice Field. The order is in express terms, and sends the issues of fact and questions back to the official referee for re-trial as to certain paragraphs in the report. It appears that Mr. Justice Field wished that the referee should hear further argument and reconsider some of these issues or questions. Taking these observations in company with the order, it seems that the referee is not asked for an explanation why he has found as he has found, but that the case is sent back in order that he may consider whether he will alter the findings substantially so as to come to different findings. A referee who is told to consider the matter in that form, after hearing the arguments,

(3) Law Rep. 9 Ch. D. 20.

(4) 28 W.R. 372.

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is, in fact, told to re-try the case. As this order stands it seems to me that it would be open to him, and would be his duty, not of course to re-hear the whole evidence, but, if the parties desire it, to hear further evidence upon the issues of fact which he is directed to re-try. It is clear the true meaning of the order is that there should be a new trial of certain issues of fact, and the question is whether there is any sufficient ground to support that order.

It was admitted in the argument before us by both parties that the order sending the questions to the official referee was made, not under section 56, but under section 57, of the Judicature Act, 1873. When a question is sent under section 56 to an official or special referee "for enquiry and report," the report of such referee may be adopted wholly or partially by the Court. But if, under section 57, certain conditions be fulfilled, the Court or a Judge may order any question or issue of fact, or any question of account, to be tried before either an official or a special referee. To my mind, the meaning of "any question or issue of fact" is that which would, under the old form of pleadings, have been an issue in the cause—not an issue to be determined by the Court upon demurrer, but an issue of fact which would be tried by a jury. Then under the conditions given in section 57, the Court or a Judge might be of opinion that the investigation of such an issue of fact would not be one which could be taken by a jury, and would therefore order that issue of fact or any number of issues of fact to be tried by a referee, who must report his conclusions upon those issues. Then by section 58, the report of any referee upon any question of fact on any such trial shall, unless set aside by the Court, be equivalent to the verdict of a jury. It seems to me that, upon the reference of the issues of fact under section 57, what the referee is to do is really to put his report as to the matters which are referred to him in the same state as a jury would have done under the old form of procedure if asked to find a special verdict—that is, finding facts or finding each issue, and leaving the Court to determine how the final judgment should be entered. Neither under section 56 nor under section 57 is the referee to give

judgment—that must be given by the Court; but the report or finding on any question of fact is to be equivalent to the verdict of a jury.

The Judge here has taken an objection to the form of the report, on the ground that, although it is true that the referee has reported the findings upon the issues of fact, yet he has reported them in an objectionable form. Now the form which was adopted by the referee was to answer the issues of fact in the terms in which the parties raised those issues in the pleadings, and he has given a categorical answer to each issue. The learned Judge, as I understand him, inclined to think he could not say whether the findings are contrary to the evidence unless the data upon which they are based are known. But I think that he can. The findings are equivalent to the verdict of a jury, which no doubt can be set aside upon the ground of misdirection or as being against the weight of evidence; but here I doubt whether a referee could be guilty of misdirection.

I can see no way of getting rid of the findings of the arbitrator here unless it can be said that they are against the weight of evidence; and no suggestion has been made in this case why the findings are wrong except upon that ground. But this case could have been dealt with on that ground without sending it back to the referee, for, upon proper motion, evidence might have been brought before the Court, in order to satisfy it, if possible, that the finding was against the weight of evidence. Therefore the further statements in the report were not required here for the purpose for which alone they would have seemed to have been required—namely, to see whether the findings were in consonance with the evidence. If the findings can be set aside on the ground that there is something equivalent to misdirection, I should say that materials could be brought before the Court so as to shew that there were no principles of law upon which the findings could be supported. I must therefore, with respect, differ from the view that it is the duty of a referee acting under section 57 to make his report in terms other than those in which the issues of fact are raised by the pleadings. I do not say that the referee is bound to give them in

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those terms, and I think that the report in this case would have been shorter if the form of the pleadings had not been adopted, but I cannot see that he was wrong in so doing. I should venture to recommend the referee not to be too diffuse in giving reasons for his findings of fact, for, although his findings of fact could not be disputed, yet it might be said that his reasons or explanations were objectionable. Therefore, so far from saying that the official referee, acting under section 57, was wrong in not giving his reasons, I should say he was only prudent in not doing so. The main ground of objection taken by Mr. Justice Field is therefore one with which I am unable to agree.

Now, even where the Court does not understand the principles upon which the findings of fact have been arrived at, there is a course pointed out by Order XXXVI. rule 34, which provides that the Court shall have power to require any explanation or reasons from the referee. The referee, if he had been asked to do so, must have explained or given his reasons for any one of the findings, and it would have been open to the Judge or to the parties, after having heard such reasons or explanation, to consider whether they shewed that the findings in fact were wrong. The Judge did not go through the preliminary form of asking for any explanation or reasons, but, being of opinion that the referee must give his reasons on the face of the report in the first instance, sent the case back to be re-tried. It seems to me that no such power is given in the case of a report made by an official referee under section 57. If it could be shewn, by looking at the evidence which had been laid before the referee, that the findings upon the issues of fact, if they had been findings of a jury, might have been set aside as being against the weight of evidence, the Court could then send this case back to be tried by the same or any other referee (5).

The result, therefore, is that this order sending the case back to the official referee for certain questions to be re-tried is one

(5) His Lordship then dealt with the question whether the various findings of the official referee were against the weight of evidence, and finally came to the conclusion that they were not.

with which I am unable to agree, and must therefore be set aside.

COTTON, L.J.—This is an appeal from an order of Mr. Justice Field sending back for re-trial the report of an official referee, and one of the principal contentions in favour of the order was that the Judge had rightly held that the report could not be acted upon because it did not state the reasons by which the referee had arrived at his conclusions; and, so far as that was the ground, I am of opinion that the learned Judge was in error. The order was made under section 57 of the Judicature Act, 1873. There is a difference between sections 56 and 57. Section 56 deals principally with reports on matters where expert evidence is required, and there the Court may act upon and adopt the report wholly or in part, or need not act upon it at all. But under section 57 a Judge may order certain questions or issues of fact to be tried before a referee. By section 58 the report of any referee upon any question of fact is to be dealt with as equivalent to the verdict of a jury. The effect of that section is, that where there are findings of fact by a referee under section 57, they must be dealt with as if they were findings of a jury. I am of opinion that in the case of a reference under section 57, the referee has merely to state the conclusion at which he has arrived on what may properly be considered issues of fact, and need not state the steps by which he has arrived at that conclusion.

The referee here seems to have gone further than was necessary. In my opinion the referee need only state the findings or ultimate issues of fact upon which the rights of the party depend. It would do away with references and their utility if it were part of the duty of the referee to state either the questions of law which arose and which he decided, or the various questions of fact which are important as leading up to the ultimate issue between the parties. I am therefore of opinion that the objection, so far as it relates to the form of the report, cannot prevail.

It was said that this might cause injustice to be done; but if the Court were satisfied that the referee, on the evidence which was laid before him, must have decided the case

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on some ground which in law was untenable, then the Court has full power under Order XXXVI. rule 34, to ask the referee his reasons for arriving at the particular conclusion, and also his reasons on any particular point of law, if that were necessary in order to do justice between the parties. But a person objecting to a report must satisfy the Court that, having regard to the evidence before it, it could only be decided in that way on a particular finding of law. The Court may enquire on what ground the referee so decided. It might be that he had decided the case on a mistake of law. It might be that he had decided it on the ground that he did not believe the witnesses on the one side or the other; but in that case there would not be any ground of objection to his report. It was said by the counsel for the respondent that the effect of the order of Mr. Justice Field was to ask the referee for his reasons or for an explanation. But that is not so. The effect of the order is to send the case back for re-trial as to certain findings, and for further consideration as to other findings (5). The order must therefore be set aside.

Appeal allowed.

Solicitors—Faithfull & Owen, for plaintiff;
Combe & Wainwright, agents for R. Han-
kinson, Manchester, for defendant.

[IN THE COURT OF APPEAL.]

1882. }
June 26. } WEBBER v. LEE.*

Statute of Frauds (29 Car. 2. c. 3), s. 4
—Right to share Shooting and to carry
away Game—Interest in Land.

The plaintiff agreed to allow the defendant to take a one-fourth share of a shooting, and to take away one-fourth of the game killed:—Held, that this was a contract for an interest in land, and required to be authenticated by a memorandum in writing, so as to comply with the provisions of section 4 of the Statute of Frauds.

Appeal from the judgment of Bowen, J., on further consideration.

The case is reported *Ante*, p. 174.

* *Coram* Jessel, M.R.; Brett, L.J.; and Cotton, L.J.

Action to recover damages for the breach of an agreement to share a shooting and to pay 100% and one-fourth of the expenses.

The statement of claim alleged that the plaintiff was possessed of certain shooting rights, and of a shooting box; that the defendant agreed with the plaintiff that, in consideration that the plaintiff would permit him to share those rights and that shooting box, he would pay the plaintiff 100% and one-fourth of the expenses to be incurred by the plaintiff.

The defence denied the agreement, and alleged that there was no memorandum in writing within the Statute of Frauds.

It appeared at the trial that the plaintiff was the lessee of 500 acres of shooting, and that he advertised for some one to share the shooting and the shooting lodge with him. The advertisement described the shooting, and stated that the "lessee requires a genial sporting companion to join him on equal terms, paying 200% for his half-share of shooting, and receiving half of total game killed." The plaintiff afterwards wrote to the defendant as follows:—

"I now write to say, that if you think a half-share would be more than you could manage, I should be very pleased to give you half of the share I retain for myself—that is, 100% from the 1st of September to the 1st of February, shooting with equal liberty with myself, and a quarter of the total game killed. . . . The shooting days could be arranged to suit our convenience." The plaintiff and defendant then met, and it was agreed, by word of mouth, that the defendant should take half of the plaintiff's share, and one-fourth of the game killed. The defendant declined to carry out the arrangement. The jury found a verdict for the plaintiff for 40%. Bowen, J., gave judgment for the defendant, on the ground that there was no memorandum in writing to satisfy the Statute of Frauds.

The plaintiff appealed.

McClmont, for the plaintiff.—No interest in land was here granted; the case is analogous to *Taylor v. Waters* (1).

Webber v. Lee, App.

[JESSEL, M.R.—That was the case of a licence to enter the opera-house.]

This is a licence to shoot game; shares in a mine worked on the cost-book principle are not an interest in land—*Powell v. Jessop* (2); a right of shooting was not rateable under the statute of Elizabeth, because there was no occupation; and although it has been made rateable by 37 & 38 Vict. c. 54, the principle is still applicable.

Wickham v. Hawker (3), which was a decision on the Prescription Act, shews that a grant of the liberty to hawk, hunt and fowl, granted to one, his heirs and his assigns, is an interest or a profit in land *à prendre*, and not a mere personal licence; but here the defendant had only a personal licence, merely a permission to join the plaintiff in shooting: he had no absolute right to shoot by himself, he had no possession of the land, and if the plaintiff had refused to allow him to shoot he could not have brought an action of trespass—*Wright v. Stavert* (4) and *Wells v. The Mayor of Kingston-upon-Hull* (5) were also cited.

Clarke, Q.C., and *Anstie*, for the defendant, were not called on.

JESSEL, M.R.—It has been admitted, and I think rightly admitted, that a right to shoot game, and to take game away when shot by the person who shoots it for his own benefit, is an interest in land, and a right of profit *à prendre*. That being so, the only question is whether the agreement which was entered into between the plaintiff and the defendant in this case was as to such a right as that or not. It appears to me that the plaintiff, who as lessee owned the right of shooting, agreed to give to the defendant a right both to shoot game and to take away game which was shot by both or either—the defendant had in fact by the agreement a right to take away every fourth bird that was shot. This right, therefore, was a right of a profit *à prendre*; and the cases decide that a right to take away dead game, coupled with a

right to shoot game, is a right which requires authentication in the manner enacted by the Statute of Frauds. The appeal therefore must be dismissed.

BRETT, L.J.—I think that it has rightly been admitted that an agreement by which a person is allowed to shoot game and to take it away is a grant of a profit *à prendre*, and that it is within the Statute of Frauds. I own that but for the decisions I should have thought it difficult to understand why the grant of a right to shoot game which is not necessarily bred on or confined to the land where it falls should be considered to be the grant of an interest in land, but it is well settled that it is so.

There is no doubt but that the right which the plaintiff had from his lessor was a right of profit *à prendre*; and it is admitted that a grant of that right must be made in writing. Now if the plaintiff has agreed with the defendant to give him a share in that right, and if the grant of the whole right must be in writing, it is not unreasonable to hold that a grant of a share of that right must also be in writing.

COTTON, L.J.—This case is doubtless one of some nicety. It is conceded that a right to take dead game is a right which belongs to a person as the owner of the land, and therefore that the grant of that right to another is the grant of a profit *à prendre*. I had some doubt as to what the agreement between the plaintiff and defendant really was; but I think, on the whole, that the plaintiff agreed to give to the defendant one-fourth share of what he himself had; for I do not think it could be held that the defendant had no right to go out and shoot, supposing that the plaintiff was unable to go out himself; so that the agreement gave the defendant a right to shoot and carry away game. The decision, therefore, was right, and must be affirmed.

Judgment affirmed.

Solicitors—J. O. Jacobs, for plaintiff; J. P. Murrigh, for defendant.

(2) 18 Com. B. Rep. 336; 25 Law J. Rep. O.P. 199.

(3) 7 M. & W. 63; 10 Law J. Rep. Exch. 153.

(4) 2 E. & E. 721; 29 Law J. Rep. Q.B. 161.

(5) 44 Law J. Rep. C.P. 257; Law Rep. 10 C.P. 402.

1882. }
March 24, 28. } KEAL v. SMITH AND
ANOTHER.

*Solicitor and Client—Implied Authority
—Execution—Direction to Sheriff.*

*The defendant having recovered judgment against one Law, issued by his solicitors a writ of *fi. fa.* to the sheriff to levy execution. The sheriff being in doubt as to whether Law was partner in a certain brewery business, asked for information of the defendant's solicitors. In answer to the sheriff's enquiry the solicitors' clerk answered that Law had a share in the brewery, and that the sheriff had better seize there. Afterwards the sheriff seized some goods at the brewery, which turned out to be the property of the plaintiff, who thereupon brought an action of trespass against the defendant:—Held, that there was no evidence to go to the jury that the solicitors' clerk had directed the sheriff to seize the goods.*

Held, further, by POLLOCK, B., and MANISTY, J. (STEPHEN, J., dissenting), that a solicitor, acting for an execution creditor, has no implied authority to direct the sheriff to seize particular goods in pursuance of a writ of execution.

Action of trespass to goods.

The present defendants had brought an action against one Law, in which they had recovered judgment, and issued by their solicitors a writ of *fi. fa.* to the sheriff to levy execution. It having been represented that Law had been in partnership in a brewery business with the plaintiff, and the sheriff being in some doubt as to what goods he should seize, wrote to the defendant's solicitors, asking for an interview; their managing clerk accordingly went to see the sheriff, and in answer to the sheriff's enquiries, said to him that Law had a share in the brewery, and that he had better seize there. Afterwards the sheriff seized some goods at the brewery which were claimed by the plaintiff, whereupon the sheriff interpleaded, and an interpleader issue, whether the goods seized were the property of the plaintiff as against the defendants, the execution creditors, was tried. The issue was decided in favour of the plaintiff. The plaintiff then brought the present action against the defendants for trespass, on the ground that the de-

fendants had, by their solicitors, directed the sheriff to seize the plaintiff's goods. The action came on for trial at the Manchester winter assizes, 1882, before Pollock, B., and a special jury, when the learned Judge nonsuited the plaintiff, holding that there was no evidence to go to the jury that the solicitors' clerk had directed the sheriff to seize. A rule *nisi* having been obtained calling on the defendants to shew cause why the judgment of nonsuit should not be set aside, and a new trial had on the ground of misdirection,

Jordan shewed cause, and contended—first, that there was no evidence to go to the jury that the solicitors' clerk had directed the sheriff to seize; secondly, that a solicitor acting for an execution creditor had no implied authority from his client to direct the sheriff to seize particular goods.

Addison, Q.C., appeared in support.

The following authorities were cited:—*Woollen v. Wright* (1), *Collett v. Foster* (2), *Wilson v. Tunman* (3), *Childers v. Wooler* (4), *Cronshaw v. Chapman* (5), *Levy v. Abbott* (6), *Jarmain v. Hooper* (7), *Lush's Practice* (8) and *Walker v. Olding* (9).

Cur. adv. vult.

MANISTY, J. (on March 28), after stating the facts.—The first question which arises, is whether there was evidence to go to the jury that the sheriff was directed to seize the goods at the brewery. This is a question of fact, and the only evidence in support of this part of the case is what passed between the sheriff and the solicitors' managing clerk. I am of opinion that this only amounted to an expression of opinion, and was not evidence on which a

(1) 1 Hurl. & C. 554; 31 Law J. Rep. Exch. 513.

(2) 2 Hurl. & N. 356; 26 Law J. Rep. Exch. 412.

(3) 6 Man. & G. 236; 12 Law J. Rep. C.P. 306.

(4) 2 E. & E. 287; 29 Law J. Rep. Q.B. 129.

(5) 31 Law J. Rep. Exch. 277.

(6) 4 Exch. Rep. 588; 19 Law J. Rep. Exch. 62.

(7) 6 Man. & G. 827; 13 Law J. Rep. C.P. 63.

(8) 3rd ed. p. 250.

(9) 1 Hurl. & C. 621; 32 Law J. Rep. Exch. 142.

Keal v. Smith.

jury could reasonably find that the solicitors' clerk directed the sheriff to seize the plaintiff's goods, and also I think that the sheriff so understood it. Further, I do not think that the sheriff would have been entitled to the protection of the Interpleader Act if he had seized on the responsibility of the solicitor—see *Tucker v. Morris* (10) and *Dudden v. Long* (11). In order to make the execution creditor liable, there must be evidence forthcoming to shew that the seizure was made by his direction, and in my opinion no such evidence was forthcoming, even assuming that the defendants' solicitors had authority to do so. I do not propose to discuss all those cases in which conclusions have been drawn from what passed between a solicitor and the sheriff about to levy an execution. I will refer only to the case of *Childers v. Wooller* (4). In that case an action was brought by the sheriff against an execution creditor and his solicitor, in which the sheriff sought to make the defendants liable on the ground that the solicitor had directed him to seize the goods of the wrong person. The question in the case turned on the indorsement on the writ of *fi. fa.*, which stated that the execution debtor resided at a certain place, whereas it was his son who resided there, and in consequence the sheriff seized the goods of the son. The Judges differed in opinion on the question whether the indorsement amounted to a direction to the sheriff or not. Mr. Justice Wightman held that it did, but the rest of the Court—Chief Justice Cockburn, Mr. Justice Hill and Mr. Justice Blackburn—were of a contrary opinion. That case has a strong bearing on the present, and in some respects it is a stronger case, because there appears to have been evidence to be left to a jury in support of the plaintiff's contention.

There remains the important question of whether a solicitor acting for an execution creditor has implied authority to direct the sheriff to seize particular goods in pursuance of a writ of execution. I have looked in vain for any direct authority on this point. The cases of *Jarmain v. Hooper* (7) and *Levy v. Abbott* (6), which were cited, are by no means deci-

sive of the present point. In the first case—*Jarmain v. Hooper* (7)—it was held that, in indorsing the writ of *fi. fa.*, the solicitor was acting within the scope of his authority; and that, therefore, the client was liable for damage resulting from incorrectness in the indorsement. In the second case—*Levy v. Abbott* (6)—the solicitor ordered the sheriff to withdraw, and it was also held that the solicitor was acting within the scope of his authority; but neither of these cases seem to touch the present point. The case which appears to come nearer to the present is *Collett v. Foster* (2), in which the solicitor for an execution creditor had signed judgment and issued a *ca. sa.*, and it turned out eventually that nothing was due. There was some evidence, though very slight, of actual authority by the client: the case was left to the jury, and the verdict which passed for the plaintiff was allowed to stand. Baron Bramwell concurred, though with some misgiving, expressing a great desire to limit the doctrine of *respondeat superior*, and to make the actual wrong-doer alone responsible, and I entirely concur with that view.

As a question of principle, I am of opinion that a solicitor has no right, without express authority, to impose on his client a responsibility which the law casts on the sheriff. It is, no doubt, the duty of the solicitor to inform the sheriff who the execution debtor is; but when he has performed that duty, the responsibility rests with the sheriff of levying according to the writ. On these grounds, I come to the conclusion that the nonsuit was right, and that this rule should be discharged.

STEPHEN, J.—I agree that the non-suit in this case was right; but I differ on the question whether the defendant is liable for the act of his solicitor. I am of opinion that he is; and that the cases of *Jarmain v. Hooper* (7), *Levy v. Abbott* (6) and *Collett v. Foster* (2) are authorities in support of this proposition. None of them is directly in point—each must be read with reference to the particular facts; but one must not merely regard the facts but the general principles laid down, and it appears to me that the general principle of the client's responsibility for the acts of

(10) 1 C. & M. 73; 1 Dowl. P.C. 638,

(11) 1 Bing. N.C. 299.

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his solicitor is laid down in sufficiently wide terms to cover the present case.

The question appears to me to be whether it is within the scope of the solicitor's authority to point out to the sheriff the goods which he is to seize. When a client puts his cause into the hands of a solicitor, the solicitor, in taking all necessary steps, undertakes duties of considerable responsibility—he is therefore one of those agents for whose mistake in any act incidental to his duty the employer ought to be responsible. I find this laid down in general terms by Chief Justice Tindal in *Jarmain v. Hooper* (7), and by Baron Alderson in *Levy v. Abbott* (6); and it appears to me that a solicitor, in pointing out to the sheriff particular goods and calling on him to seize, is acting within the scope of his authority, and performing an act incidental to his duty. Supposing, on the other hand, that the solicitor had reason to believe that certain goods were the property of the execution debtor—which, in truth, they were—and that, from fear of incurring any responsibility, he abstained from indicating the goods to the sheriff, I am not sure but that he would be liable to his client for negligence. In *Collett v. Foster* (2) Baron Bramwell no doubt felt a difficulty as to the client's responsibility; but the majority of the Court took the wider view, and were in favour of the client's responsibility. Chief Baron Pollock says: "I think there is a great distinction between employing an attorney, who represents the parties in a suit, and employing a contractor to do some other piece of work different from the carrying on a suit at law, such as building a house, building a carriage, and so on; for you are not liable to the public for the acts of the person who contracts to do the work: he is responsible, you are not. But it has certainly always been held (and I am not aware that in any text-book or in any case there will be found a single exception to the rule) that a man is liable for the acts of his attorney in the conduct of a suit at law brought under his authority. He gives the attorney the right to represent him, and for whatever the attorney does he is responsible." Baron Martin gives judgment to the same effect, and

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refers to *Barker v. Braham* (12) as having settled the principle. These authorities appear to me to lay down the rule in such a manner as to prevent me from coinciding with my brother Manisty.

As to the question whether the solicitors' clerk in this case directed the sheriff to seize the goods in question, I do not, as a matter of fact, think he did. All that he did was to proffer some information, on which the sheriff acted. I am far from saying that the information given by the solicitors' clerk might not, under special circumstances, have amounted to a direction; but there is no evidence to shew, and no reason to believe, that it did in the present instance. I agree, therefore, that the rule ought to be discharged.

POLLOCK, B.—Agreeing, as I do, with my brother Manisty, as to the question whether the solicitor has implied authority to direct the sheriff as to what goods he ought to seize, I think it only necessary, in dealing with the other point in the case, to refer to the actual words used by the solicitors' clerk on the occasion of the sheriff seeing the clerk and asking for general information: the clerk answered that he thought that Law had a share in the brewery, and he had better seize there. These words being ambiguous I should, if the case had rested on their construction, have thought it right they should have been submitted to the jury; nevertheless, I agree with my brother Manisty as to their construction; but on the proposition of law contended before us, namely, that there being no express authority given to the solicitor by the client, the clerk was warranted in giving this direction in pursuance of his implied authority, I have a very clear opinion, and I think that I ought to decide the case in accordance with that opinion.

On general principles, I agree with Baron Bramwell in *Collett v. Foster* (2), that we should be cautious how we extend the doctrine of implied authority. There are many cases in which it is essential there should be an implied authority in the agent to act, and this is particularly so in those cases in which the agent is placed in

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a position of authority, as, for instance, in the case of a railway official, who is necessarily put in the place of the company and represents it with regard to the general conduct of some branch of its business. The company are responsible for his acts, though he may have no express authority for what he does. But, so far as regards the authority of a solicitor, those cases in the books in which the client has been held liable for his acts have been instances in which the solicitor has done some act which it was essential should be done by him on behalf of his client, steps necessary to the conduct of the cause, and incidental to his duty as a solicitor. That was certainly so in *Parsons v. Loyd* (13), one of the earliest of this class of cases; and *Jarmain v. Hooper* (7), *Levy v. Abbott* (6) and *Collett v. Foster* (2) seem to have been decided on the same grounds. In the last three cases there are certain *dicta* which, if read generally, and not with regard to the particular case, might be said to govern the present case, but I do not see that they are applicable.

Supposing that when the sheriff applied for information, the solicitor had answered, "It is your business to ascertain, not mine," and all the time the solicitor had received certain information—information on which a reasonable man ought to act—to the effect that there were certain goods that might be seized belonging to the execution debtor, would an action of negligence, at the suit of the client, lie against the solicitor for not giving the information to the sheriff? I should think certainly not. I never heard of such an action, and it would be dangerous to lay down any such doctrine, because it would lead to intermeddling between the solicitor and the sheriff. Again, supposing the sheriff had said, "I will seize these goods if you will give me an indemnity," and the solicitor had given the indemnity—it seems to me that such an indemnity would be worthless.

In my opinion, the client is only liable in those cases where the solicitor is doing an act which, in the conduct of the cause, it is essentially his duty to do, and that in other cases the client is not liable. Under

these circumstances, I do not think it necessary to refer to *dicta* which have been quoted as authorities governing this case. No doubt, if applicable, they would sustain the plaintiff's contention, but I do not think they are applicable. Cases of this sort must have often arisen, but it is remarkable that during all these years we find no case like the present in which it has been held that the solicitor has an implied authority to act for his client. For these reasons I am of opinion that the rule must be discharged.

Rule discharged.

Solicitors—Chester & Co., agents for R. G. Lawson, Manchester, for plaintiff; Hare & Co., agents for C. Heywood & Son, Manchester, for defendant.

1882. { DRUIFF AND COMPANY V. JOEL,
June 8. { EMMANUEL AND COMPANY.

County Courts—Costs—Charges in "Conduct of a Suit"—Business done out of Court—Scale of Costs, 1875—Statutes 38 & 39 Vict. c. 50. s. 8; 19 & 20 Vict. c. 108. s. 36.

The County Courts Act, 1856 (19 & 20 Vict. c. 108), s. 36, enacts that, where in any action the debt or damage claimed shall not exceed twenty pounds, an attorney shall not be entitled to recover from his client any further costs or charges in the conduct of such suit than those mentioned in 9 & 10 Vict. c. 95. s. 91:—Held, that the words "conduct of such suit" did not include work done out of Court before the commencement and after the termination of a suit.

This was an appeal from an order made by Stephen, J., at chambers, dismissing an application made by Messrs. Isaac, Druff & Co. to compel a Master to review a taxation of a bill of costs in respect of certain items of charge alleged to have been wrongfully allowed by him.

The facts of the case were shortly as follows:—

Messrs. Emmanuel & Co. were solicitors for Henry Isaac, trading as Isaac, Druff

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& Co., who carried on business in Hatton Garden, and as such solicitors sued for a number of debts in the Clerkenwell County Court for amounts under 20*l*.

In November, 1881, Messrs. Emmanuel sent in to Isaac, Druiff & Co. two bills of costs, which were afterwards, upon the application of a member in the firm, ordered to be taxed.

Pursuant to the order the bills of costs were taxed by Master Philip Smith, when a number of objections were taken to items contained therein on behalf of Isaac, Druiff & Co.

Among other items which were objected to were the following:—

	s.	d.
Attending County Court to ascertain if instalments were paid into Court	3	4
Attending you thereon, when you requested me to write to the defendant	3	4
Writing to defendant	3	6
Attending and receiving instructions to issue execution	3	4
Attending issuing execution	3	4
Attending you on your instructing us to see bailiff	3	4
Attending bailiff	3	4
Attending you, consulting on a claim	6	8

The Master allowed all the above items except the last, on the ground that they were matters after judgment, and were not provided for in the County Court Scale; the last item was allowed on the ground that the charge was for a reasonable attendance and before action commenced in the County Court.

W. G. Harrison, Q.C., and Littleton, for Messrs. Druiff & Co. (the applicants).— These items were wrongly allowed by the Master. The 19 & 20 Vict. c. 108. s. 36, expressly provides that, "Where in any action the debt or damage claimed shall not exceed twenty pounds, an attorney shall not be entitled to recover from his client any further costs or charges in the conduct of such suit than those mentioned in 9 & 10 Vict. c. 95. s. 91," unless there has been an agreement in writing to pay further costs or charges. This section was framed in consequence of the decision in *In re Toby* (1), overruling *In*

re Clipperton (2). In *Toby's Case* (1) it was held that the 91st section of the County Courts Act (9 & 10 Vict. c. 95), which provides that no attorney shall have or recover for "appearing or acting on behalf of any other person in the County Court" more than 10*s*. for his fees and costs where the debt or damage does not exceed 5*l*., or more than 15*s*. in any other case, did not apply to services rendered by an attorney in the conduct of a suit out of Court and before its commencement. The words in 9 & 10 Vict. c. 95. s. 91, "appearing or acting on behalf of any other person in the said Court," were held to apply only to what was done in the Court. See also *In re Keighley* (3). The main object of the County Courts Acts was to enable persons to carry on suits for amounts not exceeding 20*l*. at a comparatively small expense. And inasmuch as the interpretation put on 9 & 10 Vict. c. 95. s. 91 in *Toby's Case* (1), tended considerably to increase the expense of such actions, the Legislature deemed it desirable to introduce into 19 & 20 Vict. c. 108. s. 36, words capable of bearing a more extended construction. All the items for which the Master has allowed were incurred "in the conduct of such suit," within the meaning of 19 & 20 Vict. c. 108. s. 36, and fall within the County Court Scale of Costs, framed under the provisions of 38 & 39 Vict. c. 50. s. 8.

McIntyre, Q.C. (A. G. McIntyre with him), for the defendants Messrs. Joel, Emmanuel & Co., was not called upon to argue.

DENMAN, J.—This is an application to review the taxation of a Master and to reverse a decision of Stephen, J., at chambers, who declined to send the matter back to the Master to review. The bill of costs in question was, it appears, delivered by Emmanuel & Co. to Isaac & Co. in respect of work alleged to have been done in several County Court proceedings. Numerous objections were taken to items in the bill of costs on the ground that they were not chargeable, because the business in respect of which the charges were made

(2) 12 Q.B. Rep. 687; 19 Law J. Rep. Q.B. 503.

(1) 12 Q.B. Rep. 694; 19 Law J. Rep. Q.B. 503.

(3) 9 Com. B. Rep. 838; 19 Law J. Rep. C.P. 166.

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was done in the institution and carrying on or perfecting of County Court proceedings, and, that being so, ought not to be allowed, because they were not according to scale, and were therefore in excess of the statutory allowance.

The objection thus taken to some of the items raises a somewhat important question. Prior to the passing of 19 & 20 Vict. the law was regulated by 9 & 10 Vict. c. 95. s. 91, which provided that no attorney should have or recover for acting in behalf of any other person in the County Courts more than 10*s.* for his fees and costs where the debt or damage did not exceed 5*l.*, or more than 15*s.* in any other case. That section was held in *Toby's Case* (1), overruling a previous decision in *Ex parte Clipperton* (2), not to apply to services rendered by an attorney in the conduct of a suit out of Court and before its commencement. The question before us does not, however, depend on the state of the law at that time, but upon the construction to be placed on section 36 of 19 & 20 Vict. c. 108, which enacts that "where in any action the debt or damage claimed shall not exceed 20*l.*, an attorney shall not be entitled to recover from his client any further costs or charges in the conduct of such suit" save as therein specified.

It has been contended on behalf of Messrs. Isaac that upon the true construction of this section those items complained of ought not to be allowed, inasmuch as they were incurred "in the conduct of a suit," and the solicitors were not entitled to anything beyond what appears in the scale of costs and charges framed in pursuance of 38 & 39 Vict. c. 50. s. 8. I think such a contention is erroneous, and that the operation of the 36th section, to which the scale is applicable, is limited to certain charges which do not include these particular items.

Now the argument on the part of Messrs. Isaac is that under the term "instructions," as used in the scale, are to be included every possible charge connected with a suit before or after action, and that anything done before action or trouble taken afterwards as to the payment of instalments cannot be charged for. But I do not think that the words "in the conduct of the suit" can reasonably be held to include matters

of this kind. An admission made during the argument appears to me important in the consideration of what interpretation ought to be put upon the above words. Suppose no action were in fact brought, would a solicitor have no right to charge anything for advice given to a client, which advice might possibly be the means of preventing litigation? Can it be supposed that the Legislature intended by using the words "in the conduct of the suit" that nothing should be recovered for such advice? The proper conclusion to be drawn, as it seems to me, from the limited character of the scale, is that such matters as those I have just referred to were intended to be excluded. The limitations to be found in the scale of costs framed under the provisions of the statute must I think be confined to such matters as might reasonably be included under the words in "the conduct of the suit," and do not touch the matters in respect of which the allowances complained of were made by the Master. On those grounds I am of opinion that this appeal must be disallowed.

POLLOCK, B.—I am of the same opinion. The main objection raised here is that the taxation is not in accordance with the statutory scale of costs. This latter objection is one of considerable importance. There were two objects which the framers of the scale, which came into force in 1875, had in view—first, to allow a solicitor fair remuneration for work done; and, secondly, to protect clients from separate charges being made in respect of matters provided for by the scale. The contention on the part of the solicitor who prepared the bill of costs has been that the charges in question are in respect of matters altogether distinct from those included in the scale, and are not within the words "in the conduct of the suit." In nine cases out of ten the question to be determined is one entirely of fact; for instance, as to what cases come within the words "Instructions for particulars," mentioned in the scale. Take the case of a solicitor who is honourably performing his duty, and has been at great pains to discover whether or not there is any cause of action, and which case comes within the charge "Attending for consulting on a claim." It would be illogical to say that the question

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whether or not such a charge was or was not to be allowed was to depend on whether proceedings are or are not afterwards taken. Such a charge could not properly be said to be a charge for a matter "in the conduct of a suit," because there is no suit. Moreover, 38 & 39 Vict. c. 50. s. 8, only empowered a scale of costs and charges to be framed with respect to "proceedings" in Court, and the scale framed under the provisions of that statute is headed "A scale of costs and charges to be paid to solicitors in actions under 20l." I think that neither the statute nor scale were intended to embrace such charges as those now in question, and that to give effect to Mr. Harrison's contention would in many cases inflict great injustice. I think, therefore, that this appeal should be dismissed with costs.

Appeal dismissed.

Solicitors—Grover & Humphreys, for applicants;
Joel, Emmanuel & Co., for defendants.

1882. }
June 20. }
July 1. }

JENNINGS v. HAMMOND.

Company—Companies Act, 1862 (25 & 26 Vict. c. 89), s. 4—Unregistered Association of more than Twenty Members—Acquisition of Gain by Individual Members—Action on Promissory Note by Trustee—Consideration—Loan in pursuance of Illegal Object.

By 25 & 26 Vict. c. 89. s. 4, no company, association or partnership consisting of more than twenty persons shall be formed for the purpose of carrying on any business (other than banking) that has for its object the acquisition of gain by the company, association or partnership, or by the individual members thereof, unless it is registered as a company under that Act.

A mutual benefit society, of more than twenty persons, formed for the purpose of carrying on the business of money-lending, such business having for its object the acquisition of gain by the individual members of the association, requires to be registered under 25 & 26 Vict. c. 89, even though the

business of the association is not to lend money generally, but only to members of the association.

In an action brought against the defendant to recover the balance of a promissory note made by the defendant in favour of the plaintiff, an individual member of an illegal association, it was admitted that the plaintiff had no beneficial interest in the note or the money claimed, but was suing only on behalf of and as trustee for an association illegal by virtue of section 4 of the Act of 1862:—

Held, that the action could not be maintained, inasmuch as the loan to the defendant was made in pursuance of an illegal object, and the promissory note in question was given for an illegal consideration, and consequently could not be sued upon either by the society, or by any one suing merely as a trustee for the society, or even for his own benefit, if he took the note with a knowledge that it was given for an illegal consideration.

This was an appeal by the plaintiff from a decision of the Judge of the Ipswich County Court. The facts and arguments sufficiently appear in the judgment of the Court.

A. H. Poyser, for the plaintiff.

Laxton, for the defendant.

The following cases were cited during the argument:—*Bear v. Bromley* (1), *Smith v. Anderson* (2), *Sykes v. Beadon* (3) and *In re Padstow Total Loss and Collision Assurance Association* (4).

Cur. adv. vult.

The judgment of the Court (5) was (on July 1) delivered by

CAVE, J.—This is an action brought by the plaintiff against the defendant to recover the balance remaining unpaid on a promissory note for 10l. made by the

(1) 18 Q.B. Rep. 271; 21 Law J. Rep. Q.B. 354.

(2) 50 Law J. Rep. Chanc. 39; Law Rep. 15 Ch. D. 247.

(3) 48 Law J. Rep. Chanc. 522; Law Rep. 11 Ch. D. 170.

(4) 51 Law J. Rep. Chanc. 344; Law Rep. 20 Ch. D. 137.

(5) Field, J.; and Cave, J.

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defendant in favour of the plaintiff. At the trial the defendant admitted that the signature to the note was his, but set up as a defence that the plaintiff had no beneficial interest in the note or the money claimed in the action, but was suing only on behalf of and as trustee for the Ipswich Mechanics' Mutual Benefit Society, by which society the money had been lent to the defendant, and which it was alleged was an association formed contrary to the 25 & 26 Vict. c. 89. s. 4. That section enacts "that no company, association or partnership consisting of more than twenty persons shall be formed for the purpose of carrying on any business (other than banking) that has for its object the acquisition of gain by the company, association or partnership, or by the individual members thereof, unless it is registered as a company under that Act."

There are three points for our consideration: first, whether the society in question is an illegal association within the Act. If it is so, then, secondly, whether the society could have recovered in an action if they had lent the money and taken the note in the names of the individual members; and if they could not, thirdly, whether the plaintiff can sue as a trustee for them. From the rules and regulations of the society it appears that certain persons exceeding twenty in number, whose names were inscribed in the book of the society containing the number or amount of their respective shares, had agreed to become members of the society, and had, for their mutual benefit, raised by subscription a sum of money, and had agreed by further monthly subscriptions and payments to raise further sums of money, all the moneys so raised having been raised with the intention of afterwards lending or advancing the same to such members of the society as should be entitled to receive the same under the rules thereof, on such security as should be approved by the committee, at interest at the rate of five per cent., in the proportions, in such manner and under such regulations as were contained in the rules, so that ultimately every member of the society who should not withdraw his share under the rule to that effect, should have advanced or allotted to him the sum of 10*l.* for every

share he should hold therein. It further appeared that there were 400 shares of 10*l.* each, of which no member could hold more than twenty. Each member pays a monthly subscription, and when these subscriptions amount to the sum of 5*l.*, such sum is put up for sale, and the highest bidder is the purchaser, and receives the 5*l.* on loan at interest at the rate of five per cent., subject to the provision that no member can receive on loan more than the nominal amount of his shares. Should there be no bidders for the loans, the money in hand may be allotted by ballot, or the committee elected annually by the members may, if they think fit, lend the money to other similar societies at the rate of five per cent., repayable on demand.

By rule 14 it was provided—"That a trustee be appointed for this society, in whose name alone all securities shall be made and taken, and by whom or in whose name all actions or other proceedings shall be commenced for the recovery of any of the funds, securities, books or other papers of or belonging to the society; and the society shall have power at any time to displace him from his office without notice. That such trustee shall be allowed to resign his office whenever he shall think fit so to do, he giving two months' previous notice of his intention to the secretary of the society for the time being; but he shall be fully reimbursed all damages, costs and expenses which he shall sustain or in any manner incur by reason or in consequence of such appointment; and that such trustee shall permit his name, and upon his decease, the names of his executors or administrators, to be used in any proceedings to be taken by him or them in any matter relating to the society, and that he or his executors or administrators shall not at any time release or become nonsuit in any action or actions that may at any time become commenced or prosecuted in his or their name or names, or do any act to delay or protract such action or other proceeding, and shall on his removal from or resignation of the said office of trustee of the said society, forthwith deliver over to such person as the committee shall appoint, all and every the papers, securities or documents in his custody relating to the said society."

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The defendant in the action is a member of the society, and has received a loan of 10*l.* pursuant to the rules, in order to secure which the promissory note sued on was made by him and given to the plaintiff, the trustee of the society, who in accordance with the rules brought this action to recover the amount remaining unpaid on the note.

We are of opinion that the case is governed by *In re Padstow Total Loss and Collision Assurance Association* (4). There is here an association of more than twenty persons, formed for the purpose of carrying on the business of money-lending, such business clearly having for its object the acquisition of gain by the individual members thereof. It is true that the business of the association is not to lend money generally, but primarily at least only to members of the association; but the case cited above shews that that makes no difference. Those members of the association who are anxious to obtain loans will bid against one another for the money which is put up for sale in accordance with the rules, and the purchase-money will be the source of gain to the individual shareholders. The association is therefore one which is forbidden by the 4th section of 25 & 26 Vict. c. 89. If, as we hold is the case, the association is forbidden by the Act in question, it follows that all contracts made directly for the purpose of carrying on the business of the association are illegal. In this case the business of the society was to lend money, and consequently the loan to the defendant was made in pursuance of an illegal object, and the note sued on was given for an illegal consideration, and cannot be sued upon, either by the society or by any one suing merely as a trustee for the society, or even for his own benefit, if he took the note with a knowledge that it was given for an illegal consideration. The judgment of the County Court Judge therefore was right, and the appeal must be dismissed with costs.

Rule discharged.

Solicitors—Aldridge, Thorn & Morris, for plaintiff; A. St. Paul, agent for A. Watts, Ipswich, for defendant.

1882. } HETHERINGTON v. THE NORTH-
June 20. } EASTERN RAILWAY COMPANY.

Negligence—Action on behalf of Relatives of Deceased—Lord Campbell's Act (9 & 10 Vict. c. 93)—Pecuniary Interest in Life of Deceased.

The plaintiff, as administrator, sued the defendants, under the provisions of 9 & 10 Vict. c. 93, to recover damages for the death of his son, who had been killed by their negligence. At the trial, the plaintiff gave evidence to the effect that he was nearly blind, and was injured in his leg and hands, and that the deceased was always very kind to him, and used to contribute to his support five or six years ago when he required it:—Held, upon the above facts, that there was some evidence for the jury of a reasonable expectation of benefit from the continuance of the son's life, entitling the plaintiff to sue under 9 & 10 Vict. c. 93.

This was an action brought under 9 & 10 Vict. c. 93, for the benefit of the father of the deceased, a servant of the defendants, and whose death, it was alleged, had been caused by their negligence.

At the trial in the County Court of Northumberland, under the provisions of the Employers' Liability Act, 1880, the plaintiff gave the following evidence—*"The deceased was my son, and was twenty-nine years old at the time when he met with his death. I am nearly blind, and am injured in my leg and hands. My son used to contribute to my support. I work when I can. I am not so able to work as I used to be. I am fifty-nine. My son was not married."* Cross-examined—*"Five or six years ago I was out of work for six months, and my son was very kind to me and helped me."* Re-examined—*"He was always kind to me; I have never had money from him since."*

Upon the above facts, the County Court Judge nonsuited the plaintiff, on the ground that there was no sufficient evidence of pecuniary injury to the father by the death of the deceased. A rule nisi was afterwards obtained to set aside the nonsuit, against which

Hetherington v. North Eastern Rail. Co.

Gainsford Bruce shewed cause on behalf of the respondents.—The plaintiff has suffered no pecuniary loss by his son's death sufficient to entitle him to maintain an action under 9 & 10 Vict. c. 93. The present case is governed by the decision in *Sykes v. The North Eastern Railway Company* (1).

[CAVE, J.—In *Sykes's Case* (1) the deceased worked for his father and was paid full wages; it was accordingly held that the father had suffered no pecuniary loss. In *Pym v. The Great Northern Railway Company* (2), however, Erle, C.J., expressly said that the reasonable probability of pecuniary benefit lost by the death was a good ground of action.]

Stevenson appeared in support of the rule, but was stopped by the Court.

FIELD, J.—This is an action, brought under the provisions of Lord Campbell's Act, against a railway company for the benefit of a parent to recover damages from them for pecuniary loss of which he has been deprived through their fault. The question which has been argued before us has already received judicial attention in *Pym v. The Great Northern Railway Company* (2) and *Sykes v. The North Western Railway Company* (1). It is argued that there is no evidence of reasonable expectation of benefit. The plaintiff's evidence, however, shewed that the son was only twenty-nine years old, and was earning wages, a portion of which he gave to his father when he wanted it. Upon the facts, I think there was evidence to go to the jury, though I don't say what conclusion the jury would form upon it.

CAVE, J.—I agree; there was some evidence for the consideration of the jury, whose province it was to determine whether there was reasonable expectation, and if so, what was its value.

Rule absolute.

Solicitors—W. Elgood, agent for Keenlyside, Forster & Forster, Newcastle-on-Tyne, for plaintiff; Williamson, Hill & Co., agents for Richardson, Gutch & Co., York, for defendants.

(1) 44 Law J. Rep. C.P. 191.

(2) 4 B & S. 396; 32 Law J. Rep. Q.B. 377.

[IN THE COURT OF APPEAL.]

1882. } BLACKMORE v. THE VESTRY OF
June 17. } MILE END OLD TOWN.*

Metropolitan Local Management Act, 1855, ss. 96 and 116—*Negligence—Surveyors of Highways—Vestry—Water Meter.*

The plaintiff, while walking along a street which was vested in the defendants as surveyors of highways under 18 and 19 Vict. c. 120, s. 96, fell over the iron flap cover to a water-meter box which was imbedded in the pavement, and broke his leg. The meter had been supplied by a water company to the defendants to enable them to water their streets under the powers given to them for that purpose by section 116, and the flap had been worn smooth by traffic. In an action to recover damages for the injuries sustained by the plaintiff, —Held, that the defendants were liable, not as surveyors of highways, but as owners of the meter, for their negligence in not keeping the iron flap in repair.

White v. The Hindley Local Board of Health (44 Law J. Rep. Q.B. 114; Law Rep. 10 Q.B. 119) followed.

Appeal by the defendants from a judgment of the Queen's Bench Division discharging a rule nisi for a new trial.

This was an action against the defendants to recover damages for injury sustained by the plaintiff by reason of the defendants' negligence in permitting an iron flap which covered a water-meter box to be in a dangerous condition. The meter was supplied by a water company to the defendants to enable them to water streets in their parish under the powers given to them for that purpose by the *Metropolitan Local Management Act*, 1855 (1), and they paid rent to the water company for the use of the meter.

* *Coram* Brett, L.J.; and Cotton, L.J.

(1) By 18 & 19 Vict. c. 120, s. 96, "Every vestry and district board shall, within their parish or district (exclusively of any other persons whatsoever), execute the office of and be surveyor of highways, and have all such powers, authorities and duties, and be subject to all such liabilities, as any surveyor of highways in England is now, or may hereafter be, invested with or liable to by virtue of his office under the laws for the time being in force, so far as such powers, authorities, duties and liabilities

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The plaintiff, whilst walking in Charles Street, Stepney, along the pavement in which the meter box was placed, slipped and fell over the iron flap, which had worn smooth, and broke his leg.

The action was tried before Grove, J., when a verdict was obtained by the plaintiff for 154*l.* damages.

A Divisional Court (Denman, J., and Lopes, J.) discharged a rule *nisi* for a new trial on the ground of misdirection, and the defendants now appealed.

Kemp, Q.C., and *Pitt Lewis*, for the defendants.—The defendants are in charge of the meter in their capacity as surveyors of highways under the Metropolitan Local Management Act, 1855 (1), for the purpose of fulfilling the powers conferred by section 116 as to watering streets within their parish. By section 96 every street is vested in the vestry as surveyor of highways; and as a vestry is not liable for non-feasance under this Act, the defendants are not liable. *White v. The Hindley Local Board of Health* (2) is distinguishable, because there the board were held liable on the ground that they were owners of the sewer, and as such were bound to keep the iron grid in repair. The defendants here are not the owners of the meter, and consequently are not liable. *Rolls v. The Vestry of St. George, Southwark* (3), and *Hamilton v. The Vestry of St. George, Hanover Square* (4), were also referred to.

Waddy, Q.C., and *Crispe*, for the plain—are not inconsistent with this Act; . . . and all streets, being highways, and the pavements, stones and other materials thereof, and all other things provided for the purposes thereof by any surveyor of highways, or by any person serving the office of surveyor of highways, or by any vestry or district board under this Act, shall vest in and be under the management and control of the vestry or district board of the parish or district in which such highways are situate."

Section 116: "Every vestry and district board shall have full power and authority to cause all or any of the streets in their parish or district to be watered as often as they think fit. . . ."

(2) 44 Law J. Rep. Q.B. 114; Law Rep. 10 Q.B. 219.

(3) 49 Law J. Rep. Chanc. 691; Law Rep. 14 Ch. D. 785.

(4) 43 Law J. Rep. M.C. 41; Law Rep. 9 Q.B. 42.

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tiff, who relied on *White v. The Hindley Local Board of Health* (2), were not called upon.

BRETT, L.J.—I am of opinion that this case is clearly within the principle laid down in *White v. The Hindley Local Board of Health* (2). The only question, therefore, is whether we are prepared to say that that case was wrongly decided. I am not. It seems to me that the defendants are surveyors of highways, but by section 116 they are something else independently of being surveyors; for power is given to them as a vestry under that section to water the streets, and that was no part of their duty as surveyors. That power was given to them in some other capacity, and in the same way that powers of watering and lighting are given to commissioners. In one way they are surveyors of highways, and in the other they are commissioners; but they are the same body. This flap was laid down for two purposes. It never would have been laid down for the purposes of the highway only; but it was laid down for the purpose of protecting the meter, which is also a protection to the defendants, because they pay a rent to the water company which depends on the quantity of water used. The flap is, therefore, laid down for two purposes—first, to protect the meter; and, secondly, to protect the highway. It is true that the defendants had possession of this iron flap as surveyors of highways in one sense—namely, as part of the highway; but they also had possession of it in another capacity, in which they have power to water the highway; and it is in respect of that other capacity that I am of opinion they are liable in this action, notwithstanding that they have possession also for the purposes of the highway. I think that *White v. The Hindley Local Board of Health* (2) was rightly decided.

COTTON, L.J.—I am of the same opinion. Section 116 gives the defendants power not as surveyors, but as a vestry, to water the streets. The question to be considered is whether the iron flap was laid down by the defendants as surveyors of highways or in a different capacity and under a different authority, so as to make them liable. It

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is clear that it was put down by the defendants as waterers of the highway. In my opinion the decision of the Court below was right. This appeal must therefore be dismissed.

Appeal dismissed.

Solicitors—Noon & Clarke, for plaintiff; M. Jutsum, for defendants.

1882. }
March 11. } THE WARRINGTON WATERWORKS
May 26. } COMPANY v. LONGSHAW.

Waterworks Company—Water-rate, how Calculated—Annual Value—Waterworks Clauses Act, 1847 (10 Vict. c. 17), s. 68.

A waterworks company were required by their Act, which incorporated the Waterworks Clauses Act, save so far as its provisions were expressly varied or excepted, to furnish to every occupier of a dwelling-house water at a rate not exceeding six per cent. per annum "upon the annual rack-rent or value of the premises," and such rate was payable "according to the annual value at which the premises shall be assessed to the poor-rate, if the same shall be so assessed, or, if not, according to the net annual value of the premises."

By section 68 of the Waterworks Clauses Act, 1847, "Water-rates, except as herein-after and the special Act mentioned, shall be payable according to the annual value of the tenement supplied":—

Held, that the water-rate was to be calculated on the rateable value, not on the gross estimated rental.

This was a Case stated on appeal from the judgment of the County Court Judge of Lancashire in favour of the defendant, in an action brought by the waterworks company to recover two quarters' water-rate for water supplied to the defendant's premises. The defendant paid into Court a sum which was arrived at by applying the company's authorised rate per cent. to the rateable value of the premises as appearing in the poor-rate assessment. The claim of the company was, that they were

entitled to charge a rate calculated on the gross estimated rental.

The gross estimated rental of the house was 10*l.*—the rateable value 8*l.*

The special Act of the Company, 9 & 10 Vict. c. cxii. s. 53, enacted that the company should, at the request of the owner or occupier, furnish to every occupier of a private dwelling-house a sufficient supply of water for domestic purposes, at a rate not exceeding six per cent. per annum upon the annual rack-rent or value of the premises so supplied. Section 54 enacted that such water-rates should be payable according to the annual value at which the premises should be assessed to the poor-rate, if the same should be so assessed, or, if not, according to the net annual value of the premises.

The later special Act, 18 & 19 Vict. c. xciii. s. 3, repealing the earlier one, incorporated the Waterworks Clauses Act, 1847, save so far as the clauses or provisions thereof were expressly varied or excepted by the Act.

Section 63 enacted that the company should, at the request of the owner or occupier, furnish to every occupier of a private dwelling-house a sufficient supply of water for domestic purposes, at a rate not exceeding six per cent. per annum upon the annual rack-rent or value of the premises so supplied; and section 65 enacted that such water-rates should be payable according to the annual value at which the premises were from time to time assessed to the poor-rate, if the same were so assessed, or, if not, according to the net annual value of the premises.

R. E. Webster, Q.C. (S. Taylor with him), for the plaintiffs.—The rate is fixed by the Act at a sum not exceeding six per cent. upon the "annual rack-rent or value" of the premises. This is the sum which would be paid as rent by an occupier to his landlord, and when the Act provides for the rates being payable according to the annual value at which the premises are assessed to the poor-rate, this clearly means the gross estimated rental, which is the same as the rack-rent. The assessment is not necessarily the sum charged, the gross estimated rental is the basis upon which the payments are made; but there

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are deductions and allowances from it. It is the person and not the premises who is assessed, and the Act is dealing with the person in relation to his landlord, and speaks of annual value as between them. Thus annual value is not the same as rateable value. In the Waterworks Clauses Act, 1847, s. 68, water-rates are made to be payable according to the annual value of the premises supplied. This is incorporated with the private Act, and the principle of assessment was doubtless intended to be the same in each. It is submitted that annual value in the Waterworks Clauses Act must mean gross estimated rental, or actual rent paid to a landlord without any deductions having been made. *The Sheffield Waterworks Company v. Bennett* (1) is an authority for the plaintiffs.

Sir H. S. Giffard, Q.C. (Aspland with him), was not called upon, the Court intimating that, if necessary, he would be heard after the argument in *Dobbs v. The Grand Junction Waterworks Company* (2).

Cur. adv. vult.

The judgment of the Court (3) was (on May 26) delivered by

FIELD, J.—This is an action brought to recover a sum of 6s. for half a years' supply of water by the plaintiffs to the defendant, in respect of a dwelling-house of which he is the owner.

The defendant admitted his liability to the extent of 4s. 10d., but disputed the rest. The plaintiffs claimed to recover the full sum under their special Acts.

By the first of these (the Warrington Waterworks Act of 1845, c. 112. s. 53) the plaintiffs were obliged to furnish to every "occupier" of a dwelling-house water at a rate not exceeding six per cent. per annum upon the "annual rack-rent or value" of the premises, and such rate is, by section 54, to be payable "according to the annual value at which the premises shall be assessed to the poor-rate, if the same shall be so assessed, or, if not, according to the net annual value of the premises."

By section 61, "owners" of dwelling-

(1) 42 Law J. Rep. Exch. 121; Law Rep. 7 Exch. 409.

(2) *Post*, p. 501.

(3) Field, J.; and Bowen, J.

houses, "the annual rateable value" of which shall not exceed 10%, and let upon periods not exceeding a month, are made liable to the water-rate instead of the occupier.

By and with a subsequent Act (1855) the Act of 1845 was repealed, and the Waterworks Clauses Acts, save "so far as the clauses or provisions thereof respectively are expressly varied or excepted," are incorporated. By section 63 of this Act of 1855, the plaintiffs are obliged, as in the former Act, to furnish a supply of water at a rate not exceeding six per cent. per annum upon the "annual rack-rent or value" of the premises supplied, such water-rate being, by section 65, made payable according to the "annual value at which the premises are from time to time assessed to the poor-rate, if the same be so assessed, or, if not, according to the net annual value of the premises," this provision being in substance identical with that of the 54th section of the repealed Act. The words "annual value" thus used in these Acts are the same words that are used in the General Parochial Assessment Act (5 & 6 Will. 4. c. 97), by which the assessment of occupiers to the poor-rate is governed, and by which (as is well known) no poor-rate is of force which is not made upon "an estimate of the net annual value" of the hereditaments. In that Act the words "net annual value" are followed by an express definition of the sense in which they are used—that is to say, it is to be the rent at which the hereditaments may reasonably be expected to be let, "free of all usual tenant's rates and taxes and tithe-rent charge, and deducting therefrom the probable average annual cost of the repairs, insurance and other expenses (if any) necessary to maintain them in a state to command such rent."

Under the Act, therefore, the sum at which the party chargeable to the poor-rate is to be assessed is arrived at by two steps—first, by ascertaining the rent, without taking into account the rates and taxes and tithe rent charge usually borne by the tenant, or, in other words, the sum which is ordinarily paid as "rent" to the landlord; and secondly, by deducting from that sum the expenses necessary to be incurred by the landlord in order to keep the rate-

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able hereditament in the necessary condition to command that rent. The sum arrived at by the first stage of this calculation is, in the words of the heading of the form of rate given by the Act, and of the definition given in the Union Assessment Act of 1862, "gross estimated rental"; the ultimate result being described as "rateable value," and that is the sum upon which the computation of the amount payable by the person chargeable is to be made.

This being the state of the law applicable to the subject, the following are the facts to which it has to be applied:—

The defendant is the owner, within the meaning of the 65th section of the Act of 1855, of the dwelling-house to which the water was supplied, and by the poor-rate assessment at the time in force this dwelling-house was stated to have a "gross estimated rental of 10*l.*," and to be of the "rateable value of 8*l.*"; and the defendant was "assessed" as "owner" upon the latter sum, and did not dispute his liability to that extent. The plaintiffs, however, claimed to compute his water-rate upon the higher sum. At the hearing before the learned County Court Judge, he held that the defendant's contention was correct; but stated the Case for the opinion of the Court, upon which we are now called on to decide.

Upon the arguments before us, it was not disputed on the part of the plaintiffs that the sum upon which the computation had to be made was to be found in the poor-rate; but it was said that the words decisive of the question as to the part of the poor-rate in which that sum was to be found, were the words "annual rack-rent or value" in the earlier part of the 63rd section, and which "annual rack-rent or value," they said, was in truth the sum ordinarily going as rent into the pockets of the landlord, without making any deduction for what may be shortly called landlord's charges, or, in other words, the "gross estimated rental" of the poor-rate.

In support of this contention, Mr. Webster prayed in aid the 68th section of the Waterworks Clauses Consolidation Act of 1847, by which the water-rates are to be payable according to the "annual value" of the tenements, alleging that it could not be

reasonably held to be the intention of the Legislature to point out one principle of assessment in the general Act, and sanction a different principle in a private Act. But the general Act is, as is well known, of no binding force until it has been applied by some special Act, and inasmuch as in the present case the general Waterworks Act is only incorporated, save as its enactments are varied and altered by the special Act, the latter and its true interpretation must be had recourse to for the purpose of deciding the question now before us. Thus the contention is narrowed to the simple question whether by the special Act it is the "gross estimated rental" or "net annual value" of the hereditaments that is to be taken as the basis of the water-rate, and upon that question we think that the language of the Act now before us clearly points to the latter, and not to the former; and that the Legislature designedly intended to remove the question from the uncertainty of the words "annual rack-rent or value," as used in the 63rd section and in the Waterworks Clauses Act of 1847, by declaring their meaning by the 65th section of the Act of 1855; for the 65th section says that the sum to be paid for water-rate is to be calculated by a percentage upon the amount at which the premises are "assessed" to the poor-rate.

It is true, as Mr. Webster pointed out, that the language is not technically accurate, for it is the occupier or owner, and not the hereditament, upon which the assessment is made; but surely the sum upon which he or the premises are assessed is not the "gross estimated rental." Before the ultimate assessment can be arrived at, that sum must be reduced by deducting therefrom the landlord's charges, which leaves the "net annual value" as the basis of the water-rent. That, therefore, is the sum at which the owner or occupier is assessed to the poor-rate, and it seems to us to be the sum upon which his water-rate is to be charged.

Mr. Webster referred us to the case of *The Sheffield Waterworks v. Bennett* (1); but whatever light that case might have thrown upon a case in which the language, Act and question had been precisely similar, it does not assist us in the present case, where all differ.

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We think, therefore, that the decision of the County Court Judge was correct, and affirm it with costs.

Appeal dismissed.

Solicitors—Gregory, Rowcliffes & Co., agents for Nicholson & Co., Warrington, for plaintiffs; Field, Roscoe & Co., agents for Ridgway & Worsley, Warrington, for defendant.

1882. { DOBBS (appellant) v. THE
March 18. { GRAND JUNCTION WATER-
May 26. { WORKS COMPANY (respon-
 { dents).

Waterworks Company—Water-rate, how calculated—“Annual Value”—Actual Amount on which Assessment to Poor-rate computed—7 Geo. 4. c. cxl. s. 27—15 & 16 Vict. c. clvii. ss. 46 and 57.

A waterworks company was required by its Act to furnish a supply of water to inhabitants of dwelling-houses at certain rates per cent. per annum; and it was provided that the rate was to be “payable according to the actual amount of the rent of the premises where the same can be ascertained, and where the same cannot be ascertained according to the actual amount or annual value upon which the assessment to the poor-rate is computed.”

The appellant occupied a house of which he was lessee for a long term at a small ground-rent, and the question was upon what the water-rate was to be calculated—whether the gross estimated rental was to be treated as being “the actual amount of rent,” within the first part of the above section, or whether no actual amount of rent being ascertainable because none was paid, the annual value—that is, the rateable value in the poor-rate assessment—furnished the standard for computation:—

Held, that the water-rate must be calculated on the rateable value of the premises.

This was a Case stated by a police magistrate, to whom a dispute between the appellant and the respondents as to the annual value of the premises supplied with water had been referred for determination, under section 68 of the Waterworks Clauses Act, 1847 (10 Vict. c. 17).

The appellant was the occupier of a house under a lease for a term, of which seventy years were unexpired, at a ground-rent of 15*l.*, and was supplied with water by the respondent company. In the poor-rate assessment the house appeared as follows:—Gross estimated rental, 140*l.*; net rateable value, 118*l.*; and the company sought to charge the appellant at the rate of 4*l.* per cent. per annum on 140*l.*

The special Act of the company, 7 Geo. 4. c. cxl., in s. 27, enacted: “That the company shall be obliged to furnish a supply of water to the house of every inhabitant occupying a private dwelling-house, at the following rates per annum—that is to say,”—then follows a graduated scale, from 7*l.* 10*s.* per cent. for a rent not exceeding 20*l.*, up to—“where such rent shall be above 100*l.* per annum, at a rate per cent. per annum not exceeding 5*l.*; and every such rate shall be payable according to the actual amount of the rent where the same can be ascertained, and where the same cannot be ascertained according to the actual amount or annual value upon which the assessment to the poor-rate is computed in the parish or district.”

The later special Act, 15 & 16 Vict. c. clvii. s. 46, enacted: “That the co any shall furnish to such owner or occupier a sufficient supply of water for their domestic purposes at the rates hereinafter specified—that is to say, where the annual value of the dwelling-house shall not exceed 200*l.*, at a rate per cent. per annum on such value not exceeding 4*l.*.”

Section 57: “That, except as by this Act expressly provided, this Act or any thing therein contained shall not repeal, alter, interpret or in any manner affect any of the provisions of the recited Acts or any of them in force at the commencement of this Act.”

R. E. Webster, Q.C. (H. Sutton with him), for the appellant.—On the true construction of section 27 of the Act of Geo. 4, the appellant's water-rate ought to be computed on the rateable value as appearing in the poor-rate assessment. It is said that that section is repealed by the later Act of 15 & 16 Vict.; but if so, then it is contended that “annual value” in that

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Act is the same as "rateable value" in the former Act. At the time when the 7 Geo. 4 was passed nothing was known except net annual value; it was the basis on which the assessment to the poor-rate was computed.

But then there is a saving clause, section 57, guarding against any repeal except in express terms; and there is nothing in the Act expressly affecting section 27 of Geo. 4. The Act was dealing only with percentages, not with the sum upon which those percentages were chargeable; the change in the rate per cent. does not alter the meaning of annual value, there is nothing to shew that it has any different meaning to that which it had in the Act of Geo. 4.

Then it is contended here that the rent is not ascertainable within the meaning of the first part of the section. Rent means where there is what may be called a dwelling-house rent—not rent for land, nor ground-rent, nor for part of a house. In *The Sheffield Waterworks Company v. Bennett* (1), the Court only decided what rent in the Act of Parliament meant, not what the amount was. Here the Act itself has said, where there is no standard of actual rent, the Court shall not be required to find out the "rent," but shall go to the assessment for the poor-rate. So the Act provides two plain modes of determining the water-rate. If there is rent paid under a lease, or for the house as it stands, that is the standard; if not, then the rateable value is the standard.

C. Russell, Q.C. (J. F. Clerk with him), for the respondents.—The object of all general rates is to spread money that has to be raised equally over all property. Water-rates differ in that they are to recompense the water company for goods supplied.

The Act of Geo. 4 is repealed by express provision of the Act of 1852, in the sense that the two provisions cannot exist side by side, and the later must therefore displace the earlier. Immediately the Act 10 Vict. c. 17 (Waterworks Clauses Act) had been passed, and that is incorporated in 15 & 16 Vict. c. clvii. Section 46 of that Act is important as

(1) 42 Law J. Rep. Exch. 121; Law Rep. 7 Exch. 409.

referring to the company's earlier Act—the words "such rate" mean rates antecedently mentioned; but those rates are gone, because the Legislature has provided an entirely new set of rates, and therefore the whole section is repealed. Further, "annual value" in section 46 is not an equivalent for both the matters provided for in the Act of Geo. 4. It is, however, a substitute for both, and so section 57 is satisfied. As to express repeal, there is no express repeal of any of the prior Acts, 19 & 20 Vict. c. 56.

Then, secondly, it is contended that "annual value," which are the governing words, is the same as "gross value." By the company's first Act, 51 Geo. 3. c. clxix. s. 36, they were empowered to make such agreement as they pleased; afterwards some restriction was placed upon profits. Section 27 of 7 Geo. 4 is thus the first provision which imposes a limit on the rate. And it cannot be supposed upon this statute alone that a different standard was intended where the rent was ascertainable and where it was not ascertainable. If the appellant were paying a rent of 140*l.*, he would, under this section, have to pay on that amount; and the Legislature could not intend a lower standard of payment, the value being the same, merely because the rent was not fixed. The argument of convenience is nothing, because before the rateable value can be found, the gross estimated rental must be found; the former is arrived at by means of deductions as shewn by the schedule to the Metropolitan Local Management Act (32 & 33 Vict. c. 67).

[BOWEN, J.—If "actual amount of rent" and "annual value" are the same, why is a different mode of calculation provided for?]

The intention was to provide an approximate equivalent for actual rent paid, the object of both alternatives being to find gross estimated value. "On which it is computed," means "with reference to which it is computed."

Webster, in reply.—The argument upon inequalities arising from two standards is just as forcible as to actual rents which vary in the cases of identical houses. What is meant is, that if circumstances shew that the actual rent—*e.g.* ground-rent

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—is not the true rent, then reference is to be made to the poor-rate—*The Queen v. Tomlinson* (2) and *The Queen v. Adams* (3). Nor is it necessary that gross estimated rental should be found first—it is a purely hypothetical thing; and “actual amount upon which the assessment to the poor-rate is computed,” can only mean rateable value. The Waterworks Clauses Act does not define annual value.

On the other point the two sections can stand together. Section 46 was in favour of the consumer, reducing the percentages to be charged on the annual amounts. If it had been intended to increase or alter the principal sums on which the percentages were charged, express words were necessary. Being a charging Act, the use of the words “annual value” is not enough to effect an alteration.

Cur. adv. vult.

The judgment of the Court (4) was (on May 26) delivered by

FIELD, J.—The question raised on this Case (which was stated by Mr. Major Cooke, one of the metropolitan police magistrates) was as to the principle upon which the respondents are entitled to charge the appellant for two quarters' supply of water to his dwelling-house, and which charge was based by the respondents upon an annual value of 140*l.*, the appellant's contention being that he was liable to be charged on no greater annual value than 118*l.* The 140*l.* was the “gross estimated rental,” as the 118*l.* was the “net annual value,” of the premises, as stated in the poor-rate assessment of the appellant which was in force at the time of the supply. The respondents claimed to be entitled to the greater sum by virtue of their special Acts.

By one of these, 7 Geo. 4. c. cxl. s. 27, the respondents were compelled to furnish a supply of water to inhabitants of private dwelling-houses at certain “rates” per annum, graduated upwards from a rent not exceeding 20*l.* per annum to 100*l.* per annum, and where the rent is above 100*l.* per annum, then “at a rate per cent. per annum not exceeding 5*l.*” And section 27

of the same Act provided that the “rate” was to be payable according to the “actual amount of the rent of the premises where the same can be ascertained, and where the same cannot be ascertained according to the actual amount or annual value upon which the assessment to the poor-rate is computed.”

By a subsequent Act (15 & 16 Vict. c. clvii.) (by which the respondents had further powers conferred upon them), it is enacted (section 46) that the company shall at the request of the owner or occupier of a house, or of any person who shall be entitled to demand a supply under that Act or any Act incorporated therewith, furnish such supply at the “rates” following—that is to say, “where the annual value of the dwelling-house shall not exceed 200*l.*, at a rate per cent. per annum on such value not exceeding 4*l.*; and where such annual value shall exceed 200*l.*, at a rate per cent. per annum on such value not exceeding 3*l.*” This section does not contain the closing words of the 27th section of the previous Act, by which the mode of computing the “rate” is given, nor does this Act of 1852 repeal in express terms the prior Act or any part of it. On the contrary, the 57th section of the later Act enacts that except as expressly provided the Act or anything therein contained shall not repeal, alter, interpret or in any manner affect any of the provisions of the Acts recited, of which 7 Geo. 4 is one.

The assessment to the poor-rate must, as is well known, be made according to the provisions of the General Parochial Assessment Act 5 & 6 Will. 4. c. 97, upon an estimate of the net annual value of the hereditaments, and such net annual value is defined as being the rent at which the same might reasonably be expected to let, “free of all usual tenant's rates and taxes and tithe rent charge,” and deducting therefrom the probable average annual cost of the repairs, insurance and other expenses (if any) necessary to maintain them in a state to command such rent. There are therefore two necessary steps to be taken in making the calculation, in order to arrive at the sum upon which the assessment to the poor-rate is to be computed—that is, first, gross estimated rental;

(2) 9 B. & C. 163.

(3) 4 B. & Ad. 61.

(4) Field, J.; and Bowen, J.

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and, secondly, the result of net rateable value.

In the present instance, however, the computation for the poor-rate is not made under the provisions of the General Assessment Act, but under those of the Metropolitan Assessment Act, 32 & 33 Vict. c. 67, by which the rateable hereditaments subject to it are divided into different classes, with a percentage applicable to each class for the purpose of making a fixed deduction, by which gross estimated rental is reduced to net rateable value.

On the hearing of the present case before the magistrate it was admitted that the appellant was the lessee of a term, of which about seventy years were unexpired, at a ground-rent of 15*l.* a year, of a house known as No. 34 Westbourne Park, which he occupied as his residence, and the lease of which contained covenants by him to repair and insure the premises, as well as the other usual covenants entered into by a tenant.

The amount of the water-rate which the respondents sought to charge against the appellant was arrived at by a calculation of four per cent. upon 140*l.*, the amount of the "gross estimated rental" appearing in the valuation list, and the appellant denied his liability to be charged upon any greater sum than 118*l.*, "which appeared in the list as the net rateable value"; and the dispute thus existing between the parties was referred to the magistrate under the 68th section of the Waterworks Clauses Act of 1847.

Before the magistrate the appellant's contention was founded upon what he alleged to be the true construction of the 27th section of the Act 7 Geo. 4. c. cxi., but he was met *in limine* by the contention of the respondents that the whole of that section was repealed by the 46th section of the subsequent Act, and that it was by that Act alone that the water-rate was governed. This contention was supported by the magistrate, who also held, upon the authority of *The Sheffield Waterworks Company v. Bennett* (1), that the "gross estimated rental" of the valuation list and not the "net rateable value" was the true representation of the "annual value" of the 46th section.

But we are unable to agree in this con-

clusion, for we do not think the 27th section of the former Act is repealed by the 46th section of the subsequent Act. The first Act is expressly recited in the later one, and not only is there no express repeal of it, but instead of any express repeal there is the enactment (section 57) which we have already adverted to.

This would not be enough to enable us to decide the question, for although there is no express repeal that effect would have been produced according to the ordinary rules of construction of statutes, if the enactments of the 46th section of the later Act cannot be construed so as to be consistent with the continuance of the earlier enactments in section 27; for in that case the inconsistent subsequent affirmative enactment would import a negative fatal to the earlier one.

Now it is clear beyond doubt (as was admitted by Mr. Webster, who argued the case for the appellant), that so much of the 27th section as graduates the amount of the percentage according to the rent of the dwelling-house in stages or leaps from 20*l.* up to 100*l.*, and puts it at five per cent. upon all above, is inconsistent with the subsequent enactment, which gives a uniform charge of not exceeding four per cent. up to 200*l.*, and of not exceeding three per cent. on all rent above, and that so much therefore of the 27th section is by implication repealed. But he said that this inconsistency between the enactments goes no further, and that there is no inconsistency in adopting the later percentages and applying to them the mode of computation provided by section 27 of the sum upon which the rate of four or three per cent., as the case may be, is payable; and in this contention we agree with him.

It seems to us that if from section 27 the graduated scale of rates jumping by successive steps is eliminated, and the more simple and general one of starting with 200*l.* a year and diminishing the rate for all above is substituted, the whole of the rest of the 27th section may well stand together with the 46th. Repeal by implication is never to be favoured; it is no doubt the necessary consequence of inconsistent legislation wherever it occurs, but it must not be imputed to the Legislature unless absolutely necessary.

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We think, therefore, that the enactment of the 27th section defining the mode by which the sum upon which the percentage is to be calculated is in force; and therefore the next question is whether in the case now before us the "actual amount of the rent can be ascertained."

What, then, is the meaning of the "actual amount of rent"? It must, we think, mean some actual amount which has been *bona fide* arrived at by contract between the landlord and tenant (where such a contract exists) as the sum payable to the landlord by way of rent for the hereditament which is the subject of the letting. But in the case now before us no such contract exists, nor has any such actual amount been in any way ascertained, for the hereditament is in the occupation of its owner. It is true that he pays a rental to his landlord of a small sum, but that is, as it is called, a "ground," not a rack or other rent, for the demised hereditament, and Mr. Webster could not and did not contend that the tenant was entitled to have his water supplied upon the footing of that view. But Mr. Russell said that the actual amount of rent "could nevertheless be ascertained in the present case," for he said it is to be found in the amount of the "gross estimated rental" of the valuation list, which, applying to this case the principle which he said was at the base of *The Sheffield Waterworks Company v. Bennett* (1), was the equivalent of "rent" or its equivalent "annual value."

In that case "rent" and "annual" were the only words to be construed; there was neither actual amount of rent nor reference to poor law, and the Court, not however without considerable doubt and hesitation, held that where a landlord takes upon himself voluntarily to pay, or is under a statutory obligation to pay, charges not in themselves in the nature of rent, in consideration of a larger sum than rent strictly speaking, the owning consumer is entitled to discard every part of the sum so paid which is not rent, and to have his supply based upon that which is actually rent. No doubt also, if the principle is applied to a converse case, in which a tenant pays a less sum by way of what is called rent on account of his undertaking to bear

part of the landlord's necessary expenses in keeping the rateable hereditaments in a state to command the rent, it might be urged that the amount paid in money as for rent should be increased by the annual amount of the obligation so incurred, and thus bring the water charge to the "gross estimated rental"; and that, as we understand it, was Mr. Russell's contention, who was able to point out some apparently startling inconsistencies which might occur upon any other view. But however that might be in any case where the question shall arise, it is not necessary for us to decide the question in the present, for we think that the Legislature, in using the words it has in the 27th section, intended to free the question from all these difficulties, and that it intentionally created as the standard of charge either the actual rent where ascertained, or in the alternative the poor-rate assessment; and if the first words are to be read as compelling the persons supplying and supplied to go to the poor-law assessment to find out the basis of computation, the latter words have no meaning, and so no alternative is given.

This being so, the question in the present case is reduced (allowing for a very slight variation in words) to the question which we have just had to consider in *The Warrington Case* (5), and we give it the same answer, and for the same reasons.

In arriving at this conclusion we do not shut our eyes to the possibility that the application to the sale of water of a standard adopted for and adapted to a totally different purpose, may in some instances produce results not altogether consistent with uniformity or equality of price which in ordinary commercial transactions would be found, but we think that the Legislature intended to apply to the charge for supply of so universally necessary an article as water by a privileged body an already ascertained standard easily to be referred to, and upon which the company and the consumer could alike act, and that that standard is to be found either in a *bona fide* contract for rent reduced to its true elements, where that exists, or in "net

(5) *Ante*, p. 498.

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rateable value," which is the actual basis of chargeability, rather than in gross estimated rental, which is only a step in the calculation.

For these reasons we have come to the conclusion that the magistrate's order cannot be supported, and the order we make is that the annual value of the appellant's dwelling-house is to be taken at 118*l.*, the sum upon which the assessment to the poor-rate is computed, and we allow the appeal with costs.

Appeal allowed.

Solicitors—Hollingsworth, Tyerman & Andrewes, for appellant; Bircham & Co., for respondents.

[IN THE HOUSE OF LORDS.]

1882.
April 27, 28. } ENRAGHT v. LORD PENZANCE
May 22. } AND ANOTHER.

Public Worship Regulation Act, 1874—(37 & 38 Vict. c. 85)—Monition—Inhibition for Offences not specifically mentioned in the Monition—Prohibition.

A clerk, having been charged under the Public Worship Regulation Act with offences against the ecclesiastical law, was found by the judgment of the Arches Court to have offended in respect of certain specified acts—among others, the wearing while officiating at divine service certain vestments called an albe, a chasuble and a biretta, and the forming an unlawful procession at the commencement of morning prayer. A monition was then issued requiring him to abstain from the acts specifically mentioned in the judgment, "and also from all practices, acts, matters and things of the same or a like nature to those hereinbefore particularly set forth, or any of them, or from unlawfully permitting the same or any of them":—Held, that it was not an excess of jurisdiction to admonish against the practice of which the specific acts were instances, and that the question whether in this case the monition should or should not have extended to practices of a like

nature, was matter for appeal only, not for prohibition.

An inhibition was subsequently issued to enforce obedience to the monition. It recited that the clerk had disobeyed by (amongst other things) permitting his curate to wear a biretta and a stole and to form a procession between morning prayer and the Communion service; and for such his disobedience inhibited him for three months:—Held, that the Ecclesiastical Judge had jurisdiction to decide that the wearing of a stole and the forming a procession between morning prayer and the Communion service were practices of a like nature to those specified in the judgment, and that his decision could not form the ground of a prohibition. Held also, that even if the Judge had acted in excess of jurisdiction in treating the wearing of a stole and the procession between morning prayer and Communion service as breaches of the monition, the inhibition might well have been good, since there were other acts of disobedience charged which were sufficient to sustain the sentence. Prohibition will not be granted against a judgment merely because of a defect within the principle of O'Connell's Case (11 Cl. & F. 155).

This was an appeal from that part of a judgment of the Court of Appeal which refused to grant a prohibition against Lord Penzance directing him to abstain from further proceeding with an inhibition issued against the appellant under the Public Worship Regulation Act.

The case is reported in the Courts below (50 Law J. Rep. Q.B. 234; Law Rep. 6 Q.B. D. 376). The facts are fully stated in Lord Blackburn's judgment.

Charles, Q.C., and Poland (Phillimore with them), for the appellant.—The inhibition is bad, because it is directed against the wearing of a biretta and a stole, whereas the appellant had been tried for wearing a biretta, an albe and a chasuble. The power to issue an inhibition is purely statutory, depending on section 13 of the Public Worship Regulation Act. It is to be used merely to enforce obedience to a monition. By inhibiting for wearing the stole, which was not mentioned in the monition, the Judge has gone beyond the

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statute, and acted without jurisdiction. Inasmuch as the inhibition is not severable, it is wholly bad, on the principle of *O'Connell's Case* (1), *In re Pollard* (2), and *Campbell v. The Queen* (3).

The statute must be followed strictly—*Harrison v. Wright* (4).

The *alia similia* clause is mere verbiage, or, at any rate, could at most extend only to a colourable evasion of a monition.

[LORD BLACKBURN.—Has there not been an adjudication that a stole is similar to the other vestments; and if so, is there matter for a prohibition?]

The appellant has never been tried for wearing a stole. The Judge could not, by holding the wearing of a stole to be of a like nature to other offences, sentence a clerk for an offence for which he had never been tried. If the stole had been included in the original judgment, this would have barred proceedings under the Church Discipline Act in respect of the stole—Public Worship Regulation Act, 1874, section 18; but if this inhibition is right, the appellant may be proceeded against for the same offence under the Church Discipline Act.

The inhibition does not shew any adjudication that the stole was of a like nature to the vestments in the original charges.

[LORD BRAMWELL.—May we not take judicial notice that it is so?]

The inhibition must shew jurisdiction on its face—*Christie v. Unwin* (5) and *Harrison v. Wright* (4).

The fact that the question may be matter for appeal does not take away the jurisdiction to grant a prohibition—*The Mayor of London v. Cox* (6), *Burder v. Veley* (7) and *The Bishop of Chichester v. Harward* (8).

It is contrary to the practice and an excess of jurisdiction to insert the *alia similia* clause in a monition—*Grooms v.*

Forrester (9), *The Queen v. Barton* (10), *Coote's Ecclesiastical Practice* (p. 255) and *Newbery v. Goodwin* (11).

There was no such clause in *Sumner v. Wix* (12), *Wyndham v. Cole* (13), *Serjeant v. Dale* (14) or *Clifton v. Ridsdale* (15).

Sir F. Herschell, Solicitor-General (*Sir H. James, Attorney-General*, and *A. L. Smith* with him), for Lord Penzance, cited *Cox v. Goodday* (16), *Hoile v. Seales* (17), *Jarman v. Bagster* (18), *Taylor v. Morley* (19), *Burder v. Langley* (20) and *The Dean of York's Case* (21)—cases in which the monition was directed, not against specific acts, but against a general course of conduct.

Wills, Q.C. (*Jeune* with him), for the promoter.

Charles, Q.C., in reply.

Cur. adv. vult.

LORD BLACKBURN.—The appellant in the Queen's Bench Division obtained a rule calling upon the respondents respectively, as the Judge under the Public Worship Regulation Act, 1874, and the complainant in a representation made under the said Act, to shew cause why a writ of prohibition should not issue to prohibit Lord Penzance "from further proceeding in the matter of the said representation, or on the monition or inhibition obtained thereon, the said representation, monition and inhibition being matters in which he had no jurisdiction."

The Queen's Bench Division unanimously discharged this rule with costs, and on appeal the Court of Appeal unanimously affirmed this decision and dismissed the appeal with costs.

(9) 5 M. & S. 314.

(10) 13 Q.B. Rep. 389; 18 Law J. Rep. M.C. 56.

(11) 1 Phill. 282.

(12) 39 Law J. Rep. Eccl. 22; Law Rep. 3 Ad. & E. 58.

(13) Law Rep. 1 P. D. 130.

(14) 46 Law J. Rep. Q.B. 781; Law Rep. 2 Q.B. D. 558.

(15) Law Rep. 1 P. D. 316, 363.

(16) 2 Hag. Cons. 138.

(17) 2 Hag. Eccl. 566.

(18) 3 Ibid. 360.

(19) 1 Curt. 470.

(20) No. Ca. Eccl. & Mar. 542.

(21) Registry of Chancery Court of York, 1864.

(1) 11 Cl. & F. 155.

(2) Law Rep. 2 P.C. 106.

(3) 11 Q.B. Rep. 799; 15 Law J. Rep. M.C. 76.

(4) 13 Mee. & W. 816; 14 Law J. Rep. Exch. 196.

(5) 11 Ad. & E. 373; 9 Law J. Rep. Q.B. 47.

(6) 36 Law J. Rep. Exch. 225; Law Rep. 2 H.L. Cas. 239.

(7) 12 Ad. & E. 233, 265; 9 Law J. Rep. Q.B. 267; 10 Law J. Rep. Ex. Ch. 532.

(8) 1 Term Rep. 650.

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The present appeal is from the decision of the Court of Appeal. Since that decision this House has decided the case of *Green v. Lord Penzance* (22), and it was not disputed at the bar that the decision in that case disposed of most of the objections taken and argued before the Court of Appeal. The argument, therefore, was confined to the points not raised and disposed of in *Green v. Lord Penzance* (22), and I proceed to state what these are.

The 8th section of the Public Worship Regulation Act, 1874, provides that if persons (having qualifications which were possessed by the complainant in this case) shall be of opinion that any of the things mentioned in the sub-sections in that section have been done, they may represent the same to the bishop of the diocese, by sending to the bishop a form, as in schedule B of the Act, duly filled up and signed. That form requires that it shall "state the matter to be represented; if more than one, then under separate heads." It gives no further direction; but it is from the nature of the thing proper that the statement should shew with sufficient certainty what it is alleged that the person complained against has done, so that he may be able, if he desires it, to disprove his having done so. And the representation should be confined to those things which it is alleged that he has done, not extending to things which it is anticipated he may in future do.

In the present case the representation alleged under fourteen heads that the appellant had done things alleged to be within the different sub-sections of section 8. And it stated with distinctness that each of these were alleged to have been done in the church of the Holy Trinity, being the church of the said parish, and the times when each was done. And the second head alleged that the appellant had offended by having, "in the administration of the Holy Communion, worn certain unlawful ecclesiastical vestments other than and besides or instead of those appointed and allowed by law—to wit, a vestment known as an albe, a vestment known as a chasuble, and a vestment known as a biretta; and by having at the said mid-day service on

the 24th day of November, 1878, and at the said mid-day service on the 9th day of February, 1879, unlawfully permitted a curate or assistant minister when officiating in your said church in the Communion Service and in the administration of the Communion unlawfully to wear certain unlawful ecclesiastical vestments—to wit, a vestment known as an albe, a vestment known as a chasuble, and a vestment known as a biretta."

The 13th head alleged, "and also by having at the mid-day service commencing at 10.30 a.m., on the 21st day of April, 1878, the 29th day of September, 1878, and the 6th day of October, 1878, respectively, in your said church, immediately before but at the hour appointed for the commencement of the prayers appointed to be read at morning service, and without any break or interval, and as connected with and being the beginning of and a part of the rites and ceremonies of public worship on the said several occasions, and in the presence of the congregation assembled for such services, unlawfully caused to be formed a procession consisting of the choir and an 'acolyte' in a black cassock and white cotta, and which procession, with three banners and a processional cross carried therewith, proceeded from the vestry at the east end of the south side of the church down the south aisle, and afterwards up the nave of the church to the choir stalls, the choir singing a hymn during the said procession."

The representation was sent to the Bishop of Worcester, the bishop of the diocese, who transmitted it to the Archbishop of the province, who required Lord Penzance, as Judge, to hear the matter of the representation. Due notice was given to the appellant, who did not make any answer to the representation; and in default of such answer, by the express provision of section 9, "he was deemed to have denied the truth or relevancy of the representation." The appellant did not appear, though due notice had been given to him, and the Judge having heard the evidence proceeded, as required by section 9, "to pronounce judgment on the matter of the representation."

Up to this point the decision of this House in *Green v. Lord Penzance* (22)

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establishes that everything was rightly and formally done. As the appellant was to be deemed to have denied the truth or relevancy of the representation, which I think means to deny both, the Judge had to determine a question of fact on the evidence—namely, whether the representations, or any of them, were true. And he had also to determine a matter of law—namely, whether those representations which he found to be true were relevant; that is, whether the allegations were of “unlawful” practices, on which he must be guided by the general ecclesiastical law; and also whether they were such unlawful practices as to come within some of the sub-sections of section 8.

The judgment is not printed among the papers brought before this House, but it was produced at the bar, and is exactly as recited in the monition, which is printed in the appendix. It commences by pronouncing that the complainant had sufficiently proved the allegations contained in the representation, and that the clerk had offended against the statutes, laws, constitutions and canons of the Church of England in respect of the practices, acts, matters and things alleged in the said representation, “to wit, by having”—and it then proceeds to repeat each of the statements in the representation so as to pronounce that he had done those various acts at the time and place and with the particulars alleged. I do not know that such precise particularity in the findings was required, but such are the findings; and, at all events, no objection can be made to the judgment for not being precise and clear enough. So far if there had been anything wrong, it should be set right on appeal. Then the Judge pronounces that such matters, acts and things were respectively a decoration forbidden by law introduced into the said church, unlawful ornaments of the minister of the said church, failures on the part of the incumbent to observe and cause to be observed the directions contained in the Book of Common Prayer relating to the performance in such church of the services, rites and ceremonies ordered by the said book, or unlawful additions to or alterations of such services, rites and ceremonies.

Had this part of the judgment been

wrong, and had the Judge, misconstruing the statute under which he was acting, held that an act which was not within section 8 was, probably it might have been a ground for prohibition. I do not say that it would have been. But this part of the judgment was not impeached. And then the judgment proceeded to declare that it was requisite that the incumbent should be admonished to abstain and refrain for the future, when officiating in his said church, from doing each of those things, “and also from all practices, acts, matters and things of the same or a like nature to those hereinbefore particularly set forth or any of them, or from unlawfully permitting the same or any of them.” The monition precisely followed the judgment, and contained that clause.

The first objection raised arose on this. The 13th section of the Act provides that obedience to the monition shall be enforced if necessary by an inhibition, which shall not be relaxed until the incumbent shall, by writing under his hand in the form in rule 28, “undertake to pay due obedience for the future to such monition, and at all times to observe and do as therein ordered;” and it was argued that it was beyond the jurisdiction of the Judge to admonish the incumbent to abstain in future from all practices of the same or of the like nature, and that he could not be required as a condition of the relaxation of an inhibition to undertake to observe a monition containing such an admonition. In the Court of Appeal, Lord Justice James says that the monition in this respect was “in accordance with the well-established and reasonable practice of the Ecclesiastical Court.” And I understand that it had not been contested on the argument before the Court of Appeal that it was the established rule of the Ecclesiastical Courts, where the act charged was an instance of an unlawful practice, that the monition should be to abstain not merely from repeating the particular act, but from the practice itself. It was at your Lordships’ bar denied that such was the established rule. The respondents not having been aware that this was to be denied were not prepared to produce many instances, but they produced several in which it had been done.

The question here is whether the Judge

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had jurisdiction to do this. In *Mackonochie v. Lord Penzanoe* (23), the present Lord Chancellor said—"The ecclesiastical law, it must always be remembered, even in those proceedings which are called (and in some sense are) criminal and penal, has for its object not the punishment of individual offenders, but the correction of manners, and the discipline of the Church. 'Monition' (which is sometimes itself called an ecclesiastical censure) is described in the books as of a 'preparatory' nature, that is (as I understand the term), as a warning or command, to be followed in case of disobedience by some coercive sanction." Bearing this in mind, I think it is not only, as Lord Justice James says, "reasonable," but in some cases may be absolutely indispensable, to warn not merely against repeating the particular act, but against repeating the practice. I give no opinion either way as to whether such a warning should or should not have been given in the present case. The question is not before me on appeal, and any opinion on that would be (in the legal sense of the word) impertinent. But I think that your Lordships should hold that it was within the jurisdiction of an ecclesiastical Judge (subject to correction on appeal) to determine whether the case was such as to make it requisite to admonish not only against repeating the acts, but against repeating the practices of which those acts were instances.

There is one more point. The Act, by section 13, provides that obedience by an incumbent to a monition shall be enforced, if necessary, by an order inhibiting the incumbent from performing any service of the Church, or otherwise exercising the cure of souls within the diocese, for a term not exceeding three months; and at the expiration of the term, inhibition is not to be relaxed until the incumbent undertakes in writing to pay due obedience to the monition. And it is further provided that any question as to whether a monition, issued after proceedings before a Judge, has or has not been obeyed shall be determined by the Judge.

It having been formally alleged that the monition had been disobeyed, and the (23) 50 Law J. Rep. Q.B. 611; Law Rep. 6 App. Cas. 424.

appellant having had notice of the intention to move for an inhibition and of what were the allegations relied on, and a full opportunity of appearing and denying the allegations, and not choosing to appear, the allegations were proved, and the Judge made an order inhibiting him for three months, and "thereafter until the inhibition shall have been duly relaxed." The order is printed in the appendix. It begins by reciting the monition, and then proceeds—"And whereas it has been made to appear before us that the said monition was duly served on the said Reverend Richard William Enraght on the 30th day of August, 1879, but that he has failed to pay due obedience to the said monition in regard to the following matters, that is to say, by having" It then proceeds to find that the incumbent had in person repeated at times, after the service of the monition, five of the matters which in the representation he had been charged with having done, and which he had been specifically admonished not to repeat. It then proceeds—"And also by having permitted the Reverend Warwick Elwin, or other his curate or assistant-minister, whilst officiating at the Communion service, at the mid-day service, and the celebration of the Holy Communion which took place thereat in the said church commencing at 10.30 a.m. on Sunday the 16th day of November, 1879, aforesaid, to wear certain unlawful ecclesiastical vestments—to wit, a vestment known as a biretta, and a vestment known as a stole; and also by having at the said service permitted his said curate at the said service to"—do several acts which were specifically mentioned in the representation, and which the incumbent had been specifically admonished not to repeat; "and also by having suffered and permitted his said curate in the said service, between the conclusion of the prayer appointed to be read for morning service and the celebration of the Holy Communion, and as connected with and being part of the rites and ceremonies of public worship, and in the presence of the congregation assembled for such worship, unlawfully to cause to be formed a procession consisting of acolytes, some of whom were dressed in blue and others in black cassocks, and all of whom wore

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white cottas, with a processional cross and several banners, and of the clergy wearing coloured stoles, cottas and birettas, to proceed from the vestry down the south aisle and up the nave of the church to the choir stalls. . . . We do, therefore, humbly order that for such his disobedience he, the said Reverend Richard William Enraght, be inhibited for the term of three months from the time of the publication of this inhibition, and thereafter until the same shall have been duly relaxed. . . ."

Your Lordships will remember that in the passages which I have already read from the monition, the unlawful ecclesiastical vestments mentioned are an albe, a chasuble and a biretta, and that a stole is not named at all; and that the procession mentioned in the monition was one at the commencement of morning service, and before morning prayer, and not (as in the inhibition) between morning prayer and the Communion service, and that the latter procession seems to have been more ornate than the earlier one.

On these differences two objections were made—first, that the monition to abstain from all practices "of the same or a like nature, or from unlawfully permitting the same or any of them," could not properly be applied to wearing a different kind of unlawful vestment; nor, secondly, to an unlawful procession at a different period of the service and not identical in its details with the former. The Court of Appeal decided against these objections on the ground that the Judge, having to decide whether his monition had been obeyed, had jurisdiction to enquire and determine whether what was alleged or proved to be done was a practice of the like nature with what had been shewn by the representation to have been done before, and was specifically forbidden. And I think that this was not exactly a question of fact, but of law and fact combined, within the jurisdiction of the Judge; and, consequently, that even if he was wrong in his decision, it would afford no ground for prohibition.

But I think there is a further point even more clearly fatal to the appellant's case. For assuming that it was made out that the two supposed breaches of the monition, in permitting the wearing of a

stole and permitting this procession, were not breaches of the monition, yet it appears clearly on the face of the inhibition that the incumbent had in person committed at least five complete separate acts of disobedience, any one of which would have justified an order to inhibit for the full period of three months. It was argued that the Judge might have, and that it ought to be inferred by the prohibiting Court that he had, made the order for the full period of three months on account of the two matters which were not breaches of the monition, and that if they had been away he would not have made an order for so long a period. This, I think, would probably be an inference contrary to the fact; but it was argued that the decision of this House in *O'Connell v. The Queen* (1) compels us to draw that inference. I do not think so. It is true that in that case the judgment was one quite within the competence of the Court to pass, and one which would have been quite unimpeachable if a few words had been inserted on the record to the effect that the sentence was given in respect of each of the offences—which words, since that decision, have always been inserted. And it is also true that, on very technical reasoning, it was by a narrow majority held that the judgment must be arrested. But that was in a Court of error, and there is no authority that I am aware of for saying that a similar slip in the form of the judgment of an inferior Court would amount to an excess of jurisdiction, and so give a ground for prohibition; and I think it would be a cause of much mischief if it were so held.

I therefore beg to move that the order appealed from be affirmed, and the appeal dismissed with costs.

LORD WATSON.—The appellant has failed to satisfy me that he is entitled to have the writ of prohibition which the learned Judges of the Queen's Bench Division and of the Court of Appeal declined to grant.

The suit against the appellant was duly instituted before the Official Principal of the Arches Court of Canterbury, under the Public Worship Regulation Act, 1874, by representation transmitted from the bishop of the diocese, and it is not matter

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of controversy that in all subsequent proceedings in the suit the Judge of the Arches Court was bound to follow strictly the course of procedure prescribed by the Act, or by the rules framed in terms of it which are of statutory authority. But the statute and the rules do not dictate everything that is to be done in the suit; and they contain a variety of terms, of which no statutory definition is given, borrowed from the technical language of the Ecclesiastical Courts. It must also be kept in view that the jurisdiction created by the Act of 1874 is not conferred upon a newly constituted statutory tribunal, but is vested in a Judge who, by the express words of the Act, is declared to be the Dean of the Arches Court, with all the powers and privileges pertaining to that judicial office. It appears to me in these circumstances that, whilst the Judge must observe the statute and the rules in all points which these prescribe, he must attach to technical statutory words the meaning which they ordinarily bear in the Ecclesiastical Courts, and must in the absence of any statutory prescription be guided by the practice of that Court.

By his judgment, pronounced upon the 9th of August, 1879, Lord Penzance found it proved that the appellant had offended against the laws and canons of the Church in all the particulars alleged in the representation; one of these being that the appellant had permitted his curate, when officiating in the Communion service, and in the administration of the Holy Communion, to wear certain unlawful ecclesiastical vestments—to wit, a vestment known as an albe, a vestment known as a chasuble, and a vestment known as a biretta. Thereafter, in pursuance of an order to that effect embodied in the judgment, a monition was, on the 29th of August, 1879, issued under the seal of the Arches Court, enjoining the appellant to abstain for the future from each and all of the specific acts enumerated in the representation and judgment, and also "from all practices, acts, matters and things of the same or a like nature to those hereinbefore particularly set forth or any of them, or from unlawfully permitting the same or any of them."

It was argued at your Lordship's bar—although the point does not seem to have

been taken in the Courts below—that these general words of admonition are unwarranted either by the provisions of the Public Worship Regulation Act or by the practice of the Ecclesiastical Courts. Neither of these propositions appears to me to be well founded. The Public Worship Regulation Act expressly authorises the issue of a monition, but the statute and the rules are alike silent as to the precise character of the particulars which are to be inserted therein. These are matters in which, according to my apprehension, the Judge is left at liberty to follow the ordinary procedure of his Court. It is obvious that a monition not containing an injunction to abstain from *alia similia* might be substantially disobeyed otherwise than by a mere repetition of the identical acts found to be proved by the judgment; and the appellant's counsel did not dispute that general words might be competently introduced forbidding all practices which could reasonably be held to constitute a colourable imitation of any one or more of those acts. It is, however, unnecessary to rely upon general principles for the decision of this point. No authority has been shewn for the proposition maintained by the appellant. On the other hand, the observations of Lord Stowell in *Cox v. Goodday* (16), and the instances brought under your Lordships' notice by the respondents' counsel, are sufficient to shew that upon conviction of a specific act, the Spiritual Court has been in use to admonish the offender, in general terms, to desist from any similar breach of the law ecclesiastical.

On the 9th of March, 1880, an inhibition was issued which, after reciting the monition, sets forth that it had been made to appear to the learned Judge of the Court of Arches that the appellant had failed to pay due obedience to the said monition in respect of certain matters which are specified in detail, and it is therefore ordered that the appellant be inhibited for the term of three months from the time of publication of the inhibition, and thereafter until the same shall have been duly relaxed, from performing any service of the Church or otherwise exercising the cure of souls within the diocese of Worcester.

Amongst the matters in respect of which

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the appellant has thus been found to have disobeyed the monition, is his having permitted his curate or assistant-minister, whilst officiating at the Communion service and the celebration of the Holy Communion, "to wear certain unlawful ecclesiastical vestments—to wit, a vestment known as a biretta and a vestment known as a stole." That finding is said to convict the appellant of a new and substantive ecclesiastical offence different in kind from any of the offences charged in the representation, and dealt with by the judgment and the monition which followed upon it. The appellant accordingly maintains that it was incompetent for the Judge to try the offence except in a fresh suit duly instituted in terms of the Public Worship Regulation Act, and that in entertaining it as a matter of charge against the appellant, and in convicting him of it, the Judge has exceeded the limits of his statutory jurisdiction. The sentence of inhibition which has been pronounced against the appellant is a statutory punishment, and if it remain unrelaxed for a period of more than three years, the appellant's benefice will become vacant under the provisions of the Act of 1874. The appellant in these circumstances asserts his right to have prohibition not only against the conviction, as being *ultra fines* of the Judge's jurisdiction, but also against the sentence of inhibition. It is argued that the sentence, being a penalty awarded in respect of that conviction as well as in respect of the other practices which the learned Judge has competently held to be proved, is void upon the principle of *O'Connell's Case* (1), because it is impossible to divide the sentence or to ascertain the quantum of punishment inflicted in respect of those matters which the Court had no power to deal with or determine.

The learned Judge of the Arches Court found that the appellant had failed to obey the monition in respect of fourteen particular acts and practices. Of these, twelve are admittedly *ejusdem generis* with the acts and practices enumerated in the representation. Besides the finding which I have already referred to with regard to the wearing of a biretta and a stole, the appellant objects, on the ground of no jurisdiction, to one other finding in the

inhibition, which relates to an unlawful procession. It is, however, unnecessary to take special notice of this second objection, because if the argument which the appellant founds upon the first is unsuccessful, it is conceded that his whole case against the sentence of inhibition must fail.

Even if it were established that these two matters have been erroneously held to be breaches of the monition, and that they, in reality, constitute separate ecclesiastical offences so different in their nature from those alleged by the promoters of the suit that they could not have been made the subject of inquiry in investigating the charges preferred by the representation, it by no means follows that the sentence of inhibition is thereby invalidated. The offence which the Judge had to deal with at that stage of the suit was disobedience to the monition, and the twelve instances of disobedience in which the jurisdiction of the Judge is not challenged would in themselves have been amply sufficient to sustain the sentence. I do not think that these circumstances, either in fact or law, necessarily lead to the inference that in imposing a penalty within his competency, the Judge has exceeded his jurisdiction. The case of *O'Connell v. The Queen* (1)—the sole authority relied upon by the appellant—which was a judgment in error and not in prohibition, has, in my opinion, no bearing upon the present case; and I am not prepared to assume, and still less to infer, that, as a matter of fact, Lord Penzance would have pronounced any other sentence had the two findings in question been struck out.

But, being of opinion, as I am, that the *alia similia* clause was inserted in the monition in accordance with the practice of the Ecclesiastical Courts, I am unable to come to the conclusion that, in pronouncing the two findings of which the appellant complains, Lord Penzance was acting in excess of his jurisdiction. Whether the wearing of a biretta and a stole did or did not constitute an act of disobedience to a judicial order prohibiting the wearing of an albe, a chasuble and a biretta, or any act or practice of a like nature, is a mixed question of fact and ecclesiastical law very proper for the consideration of an Ecclesiastical Court; and

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the cognisance of all such questions appears to me to be committed to the Judge of the Arches Court by the 13th section of the Public Worship Regulation Act. Upon the merits of the learned Judge's decision I have formed no opinion and desire to make no comment. If the Judge has wrongly decided, his error may be corrected on appeal if the provisions of the statute permit that remedy; but, whether his decision be final or subject to review by a higher ecclesiastical tribunal, it cannot, in my opinion, be made matter of prohibition in a temporal Court.

I therefore concur in the motion which has been made to your Lordships.

LORD BRAMWELL.—I am entirely of the same opinion, and so much for the same reasons that I greatly doubted whether I ought to trouble your Lordships with any observations in this—to my mind—very unimportant case. I say “unimportant” because there is no question of doctrine, no question of vestment, no question whether Lord Penzance has exercised his mind upon this matter and has come to a wrong conclusion. The only question really is whether a slip has been made by the practitioners in this case. However, it is perhaps desirable when one has formed an independent opinion upon the matter to express it.

The first objection which was taken was this: it was said that the monition was wrong by reason of containing a clause admonishing the appellant “to abstain from all practices, acts, matters and things of the same or a like nature to those hereinbefore particularly set forth or any of them.” Now I have not the least doubt that that was not wrong. It is manifest from the decision of this House in the case of *Mackonochie v. Lord Penzance* (23), that the monition has a prospective effect, and it is clear, therefore, to my mind, that it should contain words of that nature. Besides, the authorities abundantly shew that those have been used—not necessarily perhaps, but that they have been used. When that is taken into consideration together with the prospective effect of the monition, it is impossible to suppose that there must not be a prohibition of practices to the like effect. It seems to me absurd

to suppose that any one could avoid the consequences of the judgment and disregard the monition by what has been called a colourable variation from the practices which were particularly in question upon the trial. For instance, take the case of profane swearing in a church; it is inconceivable that a man could avoid the effect of a monition by simply varying the oaths and imprecations of which he made use. I have no doubt, therefore, that those words were not improperly in the monition, not only as a matter of authority but as a matter of reasoning.

But then Mr. Charles contended before us that these were words which would prohibit, in effect, not the like practices, but practices varying and different; that is to say, he would ask us to read these words which order the appellant “to refrain from all practices, acts, matters and things of the same or a like nature,” as though they were “of a different nature.” Instead of reading the words as they really are in plain English, and attributing the natural meaning to them, he would ask us to attribute a different meaning. Interpreting them according to their ordinary and natural meaning as ordinary English words, I have no doubt that those words are rightly in the monition.

But a further objection was taken, and it was said that in the inhibition a new matter was introduced and that the appellant was inhibited from the use of a stole. Now whether the wearing of a stole is “a practice, act, matter or thing of the same or a like nature to those hereinbefore particularly set forth” is a matter upon which I am not competent at present to give an opinion. No doubt the words “chasuble,” “albe,” and “stole” are English words, and I suppose that one ought to know the meaning of them, and that one ought therefore to be able to say whether the wearing of a stole is “a practice of a like nature” to the wearing of a chasuble or of an albe; but I require to be more informed upon the meaning of those words than I am at present before I say that it is “a practice of a like nature,” or that it is not. But I will assume in the appellant's favour that it is not “a practice of a like nature,” and that consequently in respect of the wearing of the stole there ought to have

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been a fresh proceeding *ab initio*, and that it was not competent to the learned Judge to inhibit the wearing of the stole, the stole not having been mentioned in the original proceedings. Then it is said that if that is so, *O'Connell's Case* (1) in this House shews that the judgment was erroneous. Now it is not necessary to say that one perfectly agrees with *O'Connell's Case* (1). It was decided, and the principle of it would possibly be applicable to this case upon a writ of error or upon an appeal; that is to say, if on consideration the Court of Appeal should be of opinion that the wearing of a stole is not "a like practice" to the wearing of a chasuble or of an albe, it might be necessary that a new judgment should be given, and that that new judgment should be limited to those practices which were repeated, and should leave the wearing of a stole as a subject of fresh proceedings. But that is not the question which we have to consider here. We have not to consider whether the judgment would be reversed or altered before a competent Court of Appeal; what we have to consider is whether the learned Judge has exceeded his jurisdiction. And I wish, as I have made that remark, to say it has not been pretended before us that Lord Penzance's mind has been at all exercised upon this question. But still there is a judgment which has his authority, and which is questioned by this application for a prohibition.

Now I assume that it may be that a Court of Appeal would reverse or alter the judgment which so stands. But, to my mind, there clearly is not the subject-matter of a prohibition. The learned Judge had jurisdiction to do whatever the judgment assumes that he has done—he had jurisdiction to make the order which he has made—and if in the exercise of that jurisdiction he has made a mistake (and I must repeat that his mind has not been exercised upon the matter) that is the subject-matter of an appeal, if an appeal lies, and not of a prohibition. He has done nothing that he had not jurisdiction to do.

No doubt there are some cases in which an erroneous judgment may be the subject-matter either of an appeal, or of a writ of error, and of a prohibition; but there are

others (and this is one of them) in which the error, if there is one, is the subject-matter not of a prohibition, but of appeal only.

I am of opinion, therefore, that this appeal should be dismissed.

Order appealed from affirmed, and appeal dismissed with costs.

Solicitors—Brooks, Jenkins & Co., for appellants; The Solicitor to the Treasury for Lord Penzance; Tebbs & Sons, for the promoter, Perkins.

1882.
May 15, 16; } HARDING v. FREECE.
June 23. }

Bankruptcy — Bankrupt Assignee of Lease—Disclaimer—Liability of Lessee to Lessor—Liability of Surety for Bankrupt to Lessee.

The disclaimer of a lease by the trustee in bankruptcy of an assignee of the lease does not destroy the liability of the original lessee to the lessor, nor prevent the lessee recovering from the surety to him for the bankrupt rent due since the disclaimer, and paid by him to the lessor.

Special Case, stated in an action brought for 167*l.* 17*s.* 4*d.*, upon a covenant of indemnity by the defendant, in respect of rent payable under a lease.

On the 2nd of November, 1871, Messrs. Stoneham & Chance demised to the plaintiff Harding a farm in the county of Salop, for a term of fourteen years, from the 25th of March, 1871, at the annual rent of 335*l.*, payable half-yearly, and subject to certain covenants and conditions, amongst which were a covenant to pay the rent reserved, and also a covenant not to assign or part with the possession of the land without the lessors' consent, but during the tenancy to personally inhabit the mansion with his family and servants.

On the 12th of April, 1873, the plaintiff, with the consent of the lessors, given in writing on the 31st of March previous,

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but without prejudice to the landlords' rights for the recovery of rent and enforcing performance of the covenants, by deed assigned the farm to William Goodwin Preece for the residue of the term, subject to the rent, covenants and conditions, reserved and contained in the lease. The defendant, John Preece of Cressage, as well as John Preece of Lichfield, was a party to this deed, as surety for the assignee, and was a party to the following covenant contained in it:—

"And the said William Goodwin Preece, and the said John Preece, of Lichfield, and John Preece, of Cressage, as his sureties, do hereby for themselves jointly, and for their heirs, executors, administrators and assigns, and each of them doth for himself severally, his heirs, executors, administrators and assigns, covenant and agree unto the said John Harding, his executors, administrators and assigns, that they the said William Goodwin Preece and the said John Preece, of Lichfield, and John Preece, of Cressage, or some or one of them, their, or some of their executors, administrators or assigns, will at all times hereafter during the said term of fourteen years granted by the said indenture of lease, pay or cause to be paid the rent by the same indenture of lease reserved, which henceforth shall grow due in respect of the premises hereby assigned, at such times and in such manner as the same is thereby reserved; and also will observe and perform and keep all and singular the covenants, conditions and agreements in the said indenture of lease contained, and which henceforth, on the part of the tenant or lessee of the said leasehold hereditaments thereby demised, ought to be observed, performed and kept, and will from time to time and at all times hereafter save, defend, keep harmless and indemnify the said John Harding, his heirs, executors, administrators, and his and their lands and tenements, goods and chattels, against the payment of the said rent and the performance of the said covenants, conditions and agreements, and from and against all actions, suits, cause or causes of action, costs, charges, damages, claims and demands whatsoever, for or on account of the same, or in anywise relating thereto."

On the 14th of June, 1880, William Goodwin Preece presented a petition to the County Court of Shropshire for liquidation by arrangement or composition, and upon the 7th of July the statutory majority of creditors resolved that his affairs should be liquidated by arrangement, and trustees were duly appointed, and the resolutions were duly registered on the 10th of July following.

On the 27th of November, 1880, the lessors Stoneham & Chance, the plaintiff Harding and the defendant Preece met, either personally or by their authorised agents, when the defendant proposed to take possession of the premises in question, to occupy them as tenant, and to take upon himself all responsibility for rent and in respect of the covenants of the lease. This proposal was assented to by the plaintiff Harding, but was rejected by the lessors, who positively refused to allow the defendant to enter into possession or to occupy the land, stating that the defendant was not the kind of tenant which they desired to have.

After some delay, the trustees of William Goodwin Preece, having obtained the leave of the Court, on the 9th of July, 1881, by deed-poll, disclaimed and renounced the lease and assignment, and all right, title, interest and property vesting in them as such trustees in all the hereditaments comprised in the lease.

Shortly after the 29th of September, 1881, the lessors demanded from the plaintiff the half-year's rent due on the 29th of September, 1881, and threatened to bring an action for it in default of payment. The plaintiff gave notice to the defendant of the demand and threat, and after waiting a reasonable time, paid the same, and brought this action to recover the amount from the defendant under his covenant.

By section 23 of the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), it is enacted that "When any property of the bankrupt acquired by the trustee under this Act consists of land of any tenure, burdened with onerous covenants, of unmarketable shares in companies, of unprofitable contracts, or of any other property that is unsaleable or not readily saleable, by reason of its binding the possessor thereof to the performance of any onerous

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act, or to the payment of any sum of money, the trustee, notwithstanding he has endeavoured to sell, or has taken possession of such property, or exercised any act of ownership in relation thereto, may, by writing under his hand, disclaim such property, and upon the execution of such disclaimer, the property disclaimed shall, if the same is a contract, be deemed to be determined from the date of the order of adjudication; and if the same is a lease, be deemed to have been surrendered on the same date; and if the same be shares in any company, be deemed to be forfeited from that date; and if any other species of property, it shall revert to the person entitled on the determination of the estate or interest of the bankrupt; but if there shall be no person in existence so entitled, then in no case shall any estate or interest therein remain in the bankruptcy.

"Any person interested in any disclaimed property may apply to the Court, and the Court may upon such application order possession of the disclaimed property to be delivered up to him, or make such other order as to the possession thereof as may be just.

"Any person injured by the operation of this section shall be deemed a creditor of the bankrupt to the extent of such injury, and may accordingly prove the same as a debt under the bankruptcy."

Yate Lee (*J. Rose* with him), for the plaintiff.

W. G. Harrison, Q.C. (*English Harrison* with him), for the defendant.

The cases cited and arguments used fully appear from the judgments of the Court.

Cur. adv. vult.

MANISTY, J. (on June 23), after stating the facts, continued: The question raised by the Special Case is whether the plaintiff is, under the circumstances, entitled to recover the amount from the defendant.

The answer to that question depends upon the true construction of the 23rd section of the Bankruptcy Act, 1869, and the effect of the disclaimer by the trustees. I have carefully considered the numerous authorities cited in the course of the argu-

ment, as well as some others, and have come to the conclusion that the disclaimer by the trustees of the assignee of the lease does not affect the right of the landlords to recover from their lessee, that is, the plaintiff, the rent reserved by the original lease, and that the plaintiff has a right to recover it back from the defendant as one of the sureties of the bankrupt assignee.

Having regard to the decisions in *Smyth v. North*, in 1872 (1), *O'Farrell v. Stephenson*, in 1879 (2), *Smalley v. Hardinge*, in March, 1881 (3), and more especially *Ex parte Walton*, in May 1881 (4), *Ex parte The East and West India Dock Company; in re Clarke*, in June, 1881 (5) and *The East and West India Dock Company v. Hill* (6) decided by Vice-Chancellor Hall on the 4th of April, 1882, it must, I think, be taken, for the present at all events, to be the law (and I do not wish to be understood as doubting the correctness of the decisions), that a disclaimer under section 23 of the Act of 1869 by the trustee of an assignee of a lease operates as a surrender only so far as is necessary to relieve the bankrupt and his estate and the trustee from liability, and not so as otherwise to affect the rights or liabilities of third parties. That being so, it follows that the rights of the lessors in the present case, and the liability of the plaintiff as lessee, were unaffected by the disclaimer, and the lessors had a right to sue the plaintiff for the rent.

This brings us to the question whether the plaintiff has been deprived of his remedy over against the defendant as one of the bankrupt's sureties. I think he has not. I am unable to see any ground upon which it can be held that the remedy is gone, without also holding, contrary to the decisions to which I have adverted, that the disclaimer by the bankrupt's trustee does affect the rights and liabilities of third parties.

The very object of the lessee in requir-

(1) 41 Law J. Rep. Exch. 103; Law Rep. 7 Exch. 242.

(2) 4 Irish Law Rep. 715.

(3) 50 Law J. Rep. Exch. 367; Law Rep. 7 Q.B. D. 524.

(4) 50 Law J. Rep. Chanc. 657; Law Rep. 17 Ch. D. 746.

(5) 50 Law J. Rep. Chanc. 789; Law Rep. 17 Ch. D. 759.

(6) Law J. Notes of Cases, April 22, 1882.

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ing his assignee to find sureties was to protect himself against the risk of his assignee becoming unable, owing to any circumstance whatever, to pay the rent and perform the covenants in the original lease. It so happens that the circumstance, which has arisen, is the bankruptcy of the assignee, but it might have been otherwise.

The sureties will have the right to stand in the place of their principal, and if they sustain any loss by their suretyship they will have a right to prove for it against the bankrupt's estate, unless it has been caused by their own neglect.

It was contended on behalf of the defendant that the landlords (Stoneham & Chance) have refused to accept the defendant as tenant, and that consequently they have no right to insist upon payment of the rent or performance of the covenants in the original lease.

This contention is founded upon the finding contained in the sixth paragraph of the Special Case. [Reads the paragraph in reference to the meeting of the 14th of June, 1880.] I take the meaning of this paragraph to be simply that the landlords refused to acknowledge the defendant as their tenant, and in so doing I think they were quite right, but how that can affect the right of the landlords to sue their lessee for payment of the rent, or how it can affect the liability of the defendant as surety for the bankrupt assignee, I am unable to comprehend.

So long as the landlords do not enter and take possession of the farm, I am of opinion that they have the right to call upon their lessee (the plaintiff) to pay the rent and perform the covenants in the lease, and so long as the plaintiff does not enter and take possession I am of opinion that he has the right to call upon the defendant to indemnify him against payment of the rent and performance of the covenants, and the defendant being so called upon has, in my opinion, the right to possession of the farm, but he has no right to call upon the landlords to accept him as their tenant.

For the reasons assigned, I am of opinion that the plaintiff is entitled to judgment for 167*l.* 17*s.* 4*d.*, with costs.

WILLIAMS, J. — My brother Manisty

being of opinion that the plaintiff is entitled to judgment, my opinion becomes immaterial; but as I entertain doubts upon the correctness of some of the authorities, I have prepared a separate judgment.

The plaintiff, John Harding, was at one time the lessee for a term of years of a farm in the county of Salop, which he held at an annual rent of 335*l.* This lease he assigned to one William Goodwin Preece for the residue of the term, taking at the same time the covenant of the defendant John Preece as surety for the due payment of the rent to the lessors for the residue of the term. During the continuance of the term the assignee became bankrupt, or what was equivalent to bankrupt, and his trustee disclaimed all his estate and interest in the land. The plaintiff subsequently, and according to his original covenant, paid the rent to the lessors, and now sues the defendant upon his covenant as surety; and the question is, whether the defendant is, under the circumstances, discharged from this obligation, or whether he is still liable to the rent under the covenant of suretyship. This question depends partly upon the true construction of the 23rd section of the Bankruptcy Act, 1869, and in part upon the effect produced upon the defendant's contract of suretyship by the condition of things brought about by the disclaimer.

The question presents to my mind very great difficulties. The enactment in question for the purpose of relieving the bankrupt from all future liability, at the same time that he is deprived of all his property, provides that in a given event, a certain state of things which does not in fact exist shall be deemed to exist, and we have to apply this statutory fiction to a condition of things which probably was not directly present to the minds of the framers of the Act.

In such a case the simple application of the words in their primary and unqualified sense is not always sufficient, and will sometimes fail to carry out the manifest intention of the law-giver, as collected from the statute itself and the nature of the subject-matter, and the mischief to be remedied. When, therefore, the simple application of the words in an unqualified

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sense leads apparently to some injustice or absurdity at variance with, or not required by, the scope and object of the legislation, it becomes necessary to examine further, and to test by certain settled rules of interpretation, what was the real and true intention of the Legislature, and having ascertained it, then to apply the words, if they are capable of being so applied, so as to give effect to that intention.

The first thing is to ascertain the true circumstances to which the statute has to be applied. In the present case the material circumstances are as follows: [the learned Judge stated the facts as already detailed, adding, with regard to the meeting of the 14th of June, 1880, that the inference which he drew from it was that under no circumstances and at no time would the lessors permit the defendant to enter and beneficially occupy the farm so far as they had any voice in it.]

The surety on the one hand contends, that by the operation of the 23rd section of the Bankruptcy Act, 1869, under the above circumstances he is discharged from liability upon his covenant; and, on the other hand, the plaintiff contends that the liability of the defendant is, under the circumstances, unaffected by the disclaimer under that statute. The language of the 23rd section is as follows: [the learned Judge read the section] and the main question discussed before us was as to the effect of the disclaimer upon the lease, it being argued on one side that it put an end to the term, and extinguished all the covenants and obligations in the lease; and on the other, that its effect was merely to discharge the bankrupt and his estate from all liability to the rent and covenants of the lease, leaving all rights, interests and obligations, as between the lessor and third parties, untouched. There appear to be numerous *dicta* and opinions of learned Judges of great weight and authority on each side of the question.

It becomes necessary, therefore, in this conflict of opinion to examine carefully the cases in which these contradictory opinions have been expressed, and also to consider the application of the established canons of construction to the language of the statute which has been so differently interpreted.

The most direct and striking case is that of *Smyth v. North* (1), 1872.

That was an action brought by the plaintiff against a lessee for rent. The case of the defendant was that he had assigned the lease, that the assignee became bankrupt, that the trustee in bankruptcy had disclaimed the property, and that the claim accrued after the date of adjudication, though before the disclaimer.

Baron Martin and Baron Pigott held that this afforded no defence, upon the ground that the Act did not apply to the case at all, and that it only affected the question between the bankrupt and his trustee and the lessor, and that it did not destroy the estate nor divest it from the lessee. Lord Bramwell concurred in thinking there was no defence, but based his judgment upon the ground that as the rent had actually accrued due before the disclaimer, and as there was a vested cause of action for it, the subsequent disclaimer did not divest it, and he proceeds to express himself as follows:—"But for the contrary opinion of my learned brothers, I should have thought it quite clear that if the rent had accrued after the disclaimer, the defendant would have been entitled to judgment. The words of the Act are quite plain that upon the execution of the disclaimer, the lease shall be deemed to have been surrendered on the date of the adjudication. Now 'surrender' means the act of surrendering by the lessee, and the acceptance of that surrender by the lessor—the one cannot surrender unless the other accepts. Therefore, when the statute uses that word, it imports the whole transaction on both sides. But not only are the words plain, but if this were not so a sort of impossible consequence would follow. Who on this supposition is entitled to the land? Surely not the bankrupt. . . . If the landlord is entitled, then the absurdity follows that he has both the land and the rent. It cannot be said the lessee has it, for he has parted with all his interest, and there is no provision that it shall re-vest in him; the statute should, on this view, have said not that the lease shall be deemed to be surrendered, but to be assigned back to the original lessee. Not only the words of the statute, therefore, but the necessary consequences of the

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provision, are in favour of the construction which I have put upon it. It is said that the lessor may thus find himself deprived of the security of a solvent tenant to whom he let his premises at a high rent, and get his property thrown back on his hands when rents have fallen. That is a misfortune, but all we can say is, that the Legislature have not guarded against it, except by giving the lessor the right of proving against the bankrupt's estate for the loss which he has sustained."

In the present case the rent sued for became due after the disclaimer, and according to this opinion of Lord Bramwell the right of the lessor to sue is extinguished.

The above opinion, however, was not an actual decision, and was not necessary for the determination of the particular case, and there is ground for saying that Lord Bramwell shrank from the logical consequence of his own opinion when he decided in favour of the plaintiff.

In *Ex parte Walton* (4), 1881, Sir George Jessel, Master of the Rolls, and Lord Justice James expressed strong opinions tending in an opposite direction. In that case Walton, having granted a lease to one Levy of certain premises at 70% a year rent, Levy, in consideration of a premium, granted an underlease to one Michaelson at 55% a year rent. Levy became bankrupt, and his trustee being desirous of disclaiming his now valueless and onerous lease under the provisions of the 23rd section of the Act, applied for leave to the Court as required by rule 28 of the Bankruptcy Rules, 1871 (7). This application was opposed by Walton, the lessor, upon the ground that the disclaimer, by operating as a surrender of the head lease, would deprive him of all remedies for the rent originally reserved, and leave him entitled only to the rent reserved by the underlease. The Bankruptcy Court granted leave to disclaim. From this, Walton appealed. The Lords Justices affirmed the decision of the Bankruptcy Court, accompanying their decision with

a declaration of opinion that the disclaimer would not produce the injurious consequences to the lessor apprehended by him. Sir George Jessel, in his judgment, refers to what Lord Wensleydale called the golden rule for construing all written instruments—namely, that "the grammatical and ordinary sense of the words is to be adhered to unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified so as to avoid that absurdity and inconsistency, but no further"—and proceeds to consider whether a literal construction of the words would be absurd or inconsistent with the object of the Act. "The object of the Legislature," he says, "is plain. When a man becomes bankrupt he is not to remain liable to engagements attaching to his property when that property is taken away from him: the Legislature intended to set him free from personal obligations attaching to his property. That was one object of the section. Another object was that all his property should be vested in his trustee, . . . and that when the trustee finds that the property will not produce a surplus beyond the value of the liability affecting it, he may be able to disclaim it, and so get rid of the property and liability together. Of course, he is not to keep the property and at the same time to get rid of the liability. This was the object of the Legislature, and I conceive that it was their only object: it never could have been their intention to confiscate the property of any man without urgent reason for doing so. A construction of the section that would lead to such a result might well be described as an absurdity." He then gives as illustrations the cases of shares or contracts or leases deposited as security for advances, and proceeds: "If there had been a legal mortgage of the lease by way of underlease at a peppercorn rent, if section 23 is construed literally, the lessor would, by the disclaimer, practically lose his property for the benefit of the mortgagee, who would not only get his mortgage money, but would be able to keep the property free from the obligation of paying any rent for it. The results of a literal construction of the section would

(7) Rule 28: "Where any property of a bankrupt acquired by a trustee under the Bankruptcy Act, 1869, shall consist of a leasehold interest, the trustee shall not execute a disclaimer of the same without leave of the Court being first obtained for that purpose."

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be so monstrous that such a construction must be considered absurd. . . . Therefore it seems to me that the section must be read as meaning that the property is to be disclaimed *inter se*, so as not to interfere with the rights of third parties, and only for the benefit of the bankrupt and his estate. . . . The general words of the section are to be limited to the relief . . . of the bankrupt, his trustee, and his estate from liability." Lord Justice James expresses himself much to the same effect. He says that when the case was first mentioned he was startled at the consequences which would result from a literal construction of the section. "A lessor," he says, "has a double right—a right *in personam* on the contract, a right *in rem* by distress and by the power of re-entry. When a lessee makes a sub-demise, the sub-tenant . . . takes the property subject to all the lessor's rights *in rem*. . . . It would seem to be equally against principle and against common honesty that a lessee, by becoming bankrupt, should deprive the lessor of his remedies *in rem*, or release a sub-lessee from the legal liabilities and obligations to which the property was in his hands liable before the bankruptcy. Is it possible to conceive that the bankruptcy of the lessee should confiscate the lessor's right, and give the sub-lessee an absolute immunity from such distress and forfeiture? The object of the bankruptcy laws was merely to regulate the distribution of the bankrupt's assets between his creditors, and to relieve the bankrupt and his estate from future liability to his creditors. But it was never intended to affect rights and liabilities as between the creditor and a third party. A surety, for instance, is not discharged by the bankruptcy of his principal. But to revert to the position of lessor and lessee. Take the case of a lease with a surety for the payment of the rent. Could it ever have been intended that the bankruptcy of the lessee was to release the surety?"

The Lord Justice then puts other illustrations of third persons whose vested interests are supposed to be threatened if the surrender is construed literally; and, replying to the contention that the Court ought not to give its assent to the disclaimer unless satisfied that it can do so

without injustice to the lessor or to any one else, and without prejudice to any rights or remedies of or against any third person, he says: "Seeing that that would not give the trustee the immunity it is intended that he should have, the more complete and satisfactory solution of the riddle may be found in the following principle. When a statute enacts that something shall be deemed to have been done which in truth and fact was not done, the Court is entitled and bound to ascertain for what purposes and between what persons the statutory fiction is to be resorted to. Now the bankruptcy law is a special law, having for its object the distribution of an insolvent's assets equitably amongst his creditors and persons to whom he is under liability, and upon this *cessio bonorum* to release him under certain conditions from future liability in respect of his debts and obligations. That being the sole object of the statute, it appears to me to be legitimate to say that when the statute says that a lease which was never surrendered in fact is to be deemed to have been surrendered, it must be understood as saying so with the following qualification, which is absolutely necessary to prevent the most grievous injustice and the most revolting absurdity: 'Shall, as between the lessor on the one hand, and the bankrupt, his trustee and estate on the other hand, be deemed to have been surrendered.'"

Their Lordships made an order dismissing the appeal, prefacing it with a declaration of the opinion of the Court "that the disclaimer by the trustees will not affect the right of the lessors to recover the rent reserved by, and enforce the covenants contained in, the original lease by distress or entry."

It was contended before us that this declaration of the law by learned Judges, not only peculiarly conversant with the law of bankruptcy, but sitting in the Court of Appeal, was both decisive upon the question now before us, and binding upon us sitting in a Court of first instance.

In dealing with this contention I must point out, and I do so upon the authority of the Lord Chancellor (Lord Selborne) discussing this very decision in *The East and West India Dock Company's Case* (5), that this declaration of opinion as to the con-

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struction of the Act was wholly beside the question that was before the Court. The question before the Court was, whether the trustee should be refused leave to disclaim a leasehold property which he alleged was valueless and burdensome. The question whether the disclaimer would operate injuriously upon the rights and interests of the lessor had no bearing whatever upon this question. If the leasehold which devolved upon the trustee was in fact valueless and burdensome, it became equally the right and duty of the trustee, under the 23rd section of the Act of Parliament, to disclaim it without taking upon himself the duty of considering the effect upon the rights of others, and rule 28 could in no way affect this statutory right and duty, and was made, as alone it could be made, by the authority of the 78th section of the Act, in order to give the Court a control over the acts of trustees, and to prevent them from improperly exercising the power of disclaimer contrary to the objects and provisions of the Act. Indeed, it seems impossible to deny, and it was admitted by Lord Justice James, that even if the legal effect of the disclaimer would be to operate injuriously and unjustly upon the rights of the lessor or other persons, that would afford no ground or reason for withholding from the trustee leave to disclaim, if, in fact, the leasehold estate which had devolved upon him was valueless and burdensome. It comes therefore to this, that even if the opinions expressed by the Lords Justices as to the effect of the disclaimer are erroneous, their actual decision in dismissing the appeal in and refusing to withhold the leave to disclaim, would still remain untouched and unimpeached, and this is the view taken by the Lord Chancellor in *The East and West India Dock Company's Case* (5). In that case the dock company had granted a lease to one Hill for twenty-one years at 300*l.* a year. Hill assigned the lease to one Clarke; subsequently Clarke demised the premises by way of underlease to Truman, Hanbury & Co., by way of mortgage to secure an advance. Clarke subsequently filed a petition for liquidation, and the trustee applied for leave to disclaim, and the Registrar having granted leave, the dock company appealed. The Lord Chancellor in dis-

missing the appeal says, "The rule was evidently made, and indeed it only could be made, for the effectual execution of the 23rd section of the Act, and of the objects of that section. What were those objects? It appears to us that the object was to cut short by disclaimer all liability of the bankrupt's estate in the classes of cases which are referred to . . . leaving any person injured by the operation of the section to prove in bankruptcy for whatever he could establish to be the value of the injury done to him. . . . The power is to be exercised with a view to the administration in bankruptcy of the bankrupt's estate, and for the benefit of all the persons interested in that administration. Therefore, if in a particular case it appears clear that, looking at that object alone, the disclaimer ought to be allowed, the Court would be introducing considerations foreign to the purpose of the Legislature if, for collateral reasons connected with the position of other persons, it should refuse to allow it, and thus leave on the bankrupt's estate a burden which under that section might be got rid of, and ought to be got rid of, if those collateral considerations did not prevail."

It will be further observed that in the numerous illustrations given by the Lords Justices in their judgments in *Ex parte Walton* (4), no opinion is expressed as to the effect of a disclaimer upon the position of the original lessee where there has been a bankruptcy of the assignee of a lease. It is true that in the course of the argument Lord Justice James put this question to the counsel of the trustee—"Suppose a lessee assigned his lease, and then the assignee became bankrupt, and his trustee disclaimed the lease, what would be the effect upon the obligation of the lessee on his covenants?" to which the counsel replied that it would not affect the liability of the original lessee, for which he cited *Smyth v. North* (1); and this seems to be the only allusion in *Ex parte Walton* (4) to the case of the assignment of a lease and the bankruptcy of the assignee.

It seems to me, therefore, that *Ex parte Walton* (4) cannot be treated as an authority upon the question now before us.

So far, therefore, as these authorities are concerned, it still remained to be determined what was the meaning and inten-

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tion of the Legislature when it declared that the property of a bankrupt, if it is a lease, shall, upon the execution of a disclaimer by the trustee, be deemed to have been surrendered. Does it mean, and did the Legislature intend, that upon the disclaimer the term of years should cease and determine, and that upon such determination the estate in the land should revert to the lessor, as it would do upon an actual surrender in fact, and so release the bankrupt personally and his estate from all future liability, direct and indirect, to the rent and upon the covenants of the lease; or was it the intention merely to release the bankrupt and his estate by an operation short of an actual surrender, leaving the term and its obligations subsisting, so far as third persons were concerned, unless and until the lessor actually accepted the disclaimer and re-entered upon his estate?

This I conceive to be a correct way of stating the alternative views.

The canons and principles of interpretation of statutes are too well known and too well settled to require any lengthened statement or illustration. *Prima facie*, the ordinary and grammatical sense of the language, especially if the words used have a well known and technical meaning, is to be adhered to; but, as Lord Selborne says in the case of *The Caledonian Railway Company v. The North British Railway Company* (8), "The more literal construction ought not to prevail if it is opposed to the intention of the Legislature as apparent by the statute, and if the words are sufficiently flexible to admit of some other construction by which that intention will be better effectuated." The duty of the Courts of law is undoubtedly to ascertain the intention of the Legislature, and to give effect to that intention, if the language will admit of their doing so, adding nothing to the language and taking away nothing. "It is the internal sense," says Plowden, "that makes the law—the letter of the law is the body, and the sense and reason of the law is the soul." Where doubts and difficulties have arisen as to the real intention of the Legislature in using certain language, no sounder guide has been laid down than the resolutions arrived at by Sir

Roger Manwood and the Barons of the Exchequer in *Haydon's Case* (9)—namely, that regard should be had, first, to the previously existing state of the law; secondly, to the mischief and defects not provided for by that law; thirdly, to the remedy provided by the Legislature; and fourthly, to the true reason of that remedy. These, as Lord Coke says, "are the very lock and key to set open the windows of the statute." The intention of the Legislature is to be thus ascertained from the language actually used. "The Court," says Vice-Chancellor Wigram, "is not to allow conjectural interpretations to usurp the place of judicial exposition;" and although the spirit is to be regarded no less than the letter, yet the spirit is to be collected from the letter, and where Courts, in order to escape from hard and unjust consequences, decide that which they think the Legislature ought to have enacted rather than what it has expressed, they are not expounding but making the laws. The present statute of 1869 is declared in the preamble to be an Act to consolidate and amend the law of bankruptcy, and by a comparison of the previous statutes of 1809 (49 Geo. 3. c. 121), 1825 (6 Geo. 4. c. 16) and 1849 (12 & 13 Vict. c. 106), and the numerous decisions upon them, it will be apparent that a large and sweeping change in the law was intended, the main purposes being—first, the taking away from the bankrupt the whole of his available beneficial property, and its distribution equally amongst his creditors; and secondly, the complete discharge of the bankrupt from all his liabilities present and future. "The intention," says Lord Justice James—*Ex parte Llynvi Coal and Iron Company; in re Hyde* (10)—"was that every possible demand, every possible claim, every possible liability, except for personal torts, is to be the subject of proof in bankruptcy; the broad purview of this Act is that the bankrupt is to be a freed man—freed not only from debts, but from contracts, liabilities, engagements and contingencies of every kind; and with regard to onerous contracts, as to land or anything else, the trustee may disclaim them alto-

(9) 3 Coke's Rep. 7.

(10) 41 Law J. Rep. Bankr. 5; Law Rep. 7 Chanc. 28.

(8) Law Rep. 6 App. Cas. 114.

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gether, and if he disclaims them, the bankrupt is relieved from them and is no longer liable, and the creditor is entitled to prove for the injury." The question that now naturally arises is, what was the position of a bankrupt before this statute in relation to his leasehold property and its liabilities and obligations?

From 1809 to 1869 his position was this—that if his assignees in bankruptcy elected to take the land he could not be sued for the rent or upon the covenants in the lease, and if the assignees declined it the bankrupt could not be sued if within fourteen days he delivered up the lease to the person entitled to the rent. Under this law questions arose as to the liability of sureties for bankrupt lessees, and as to the liability of original lessees where the leases had been assigned and the assignee had become bankrupt; on the one side it was contended that the delivery up of the lease by the lessee operated as a surrender of the lease, and so discharged the lessee or surety, as the case might be. It was, however, decided that the statutes merely gave a personal discharge to the bankrupt, leaving original lessees and sureties liable on their personal covenants—*Manning v. Flight* (11), *Inglis v. Macdougall* (12), *Welsh v. Welsh* (13) and *Tuck v. Fryson* (14).

The practical effect of this state of the law was that on the one hand the lessor, if he accepted a lease so returned to him and retook possession of the land, was without any redress for loss or injury if the land were of less annual value than the rent reserved; and on the other hand, if he did not accept the land, the liability of the surety or of the original lessee, as the case might be, upon their personal covenants remained to the end of the term, and as they could not come in and prove under the bankruptcy in respect of the liabilities, they were entitled to sue the bankrupt, who, by this indirect and circuitous process, remained liable for the rent, although he had given up his lease.

The position of sureties for the payment of annuities granted by bankrupts was pre-

cisely similar to this under the statute of 1809, but was altered by the statute of 1825, by which it was enacted that an annuity creditor of a bankrupt should not sue the surety until the annuitant had proved under the bankruptcy for the value of the annuity, and if the surety paid the amount so proved, he was discharged, and if he did not pay the amount, then he could be sued for the accruing amounts of the annuity as they became due, until the annuitant should be paid the amount proved, together with interest at four per cent., and then the certificate should be a discharge to the bankrupt against all claims of the surety, who was throughout to be entitled to the benefit of the annuitant's proof upon the estate.

This was the position of things when the statute of 1869 was passed, and this Act having in view the objects already referred to, enacts that when any property of a bankrupt consists of a lease burdened with onerous covenants the trustee may disclaim the property, and, upon the execution of the disclaimer, the lease shall be deemed to have been surrendered, and any person injured thereby shall be deemed a creditor to the extent of the injury; and the question now arises whether it was the intention of the statute that it should or should not be any longer optional with a lessor to accept or reject the giving up to him of the land in the hands of a bankrupt tenant; on the one side it is said that it never could have been the intention of the Legislature that these words should be applied literally and in their simple and primary sense, because that would have the effect not merely of relieving the bankrupt and his estate but of destroying and confiscating the right of the lessor against third parties, which could not have been intended, and therefore the language of the Act in order to avoid such monstrous and absurd consequences must be read with a qualification. With regard to this argument I may point out that a large number of the unjust consequences alleged would not in fact follow from a strict application of the language in its technical and established sense—an actual surrender, in fact, of a lease never could have had any greater effect than a grant of the real and bene-

(11) 1 Law J. Rep. K.B. 95; 3 B. & Ad. 211.

(12) 1 Moore, 196.

(13) 4 M. & S. 333.

(14) 6 Bing. 321; 8 Law J. Rep. C.P. 10.

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ficial interest which it was in the power of the surrenderers to surrender; it operated merely as a grant, and the surrenderee came in under the grant; all vested rights and interests carved out of the surrendered lease would remain unaffected by the surrender.

The best illustration of this is the case of *Bradshaw v. Davenport* (15), which was an action of *quare impedit* of the vicarage of Orton, which was appendant to the rectory of Orton, in Leicestershire, and the case was this. The Earl of Huntingdon, being possessed of the rectory for a term of fifteen years, granted the next presentation of the vicarage, if it should happen to become void during the term, to the plaintiff. The earl died, and his successor surrendered the residue of the term in the rectory to the Bishop of Oxford then in reversion, and the bishop then demised the rectory to the defendant, and afterwards, but within the fifteen years, the vicarage became void. It was held that although the term was *in rei veritate* determined before the vicarage became void, yet, according to the real meaning of the grant, the vicarage was vacated during the term. To return to the position of the lessor, he in fact would have his land, and if he was injured he would be entitled to claim upon the estate for the amount of his loss, and could hold the surety responsible to the same amount.

On the other hand, if the disclaimer is not to operate as a surrender in the full sense of the word, this consequence follows—that after a disclaimer a surety would be responsible for the rent and upon the covenants for the whole residue of the term, and would be entitled to prove as a creditor for the capitalised value of this liability; and thus the bankrupt's estate, although deprived of the property, would be liable to a proof not merely for the amount of injury sustained by the lessor, but for the capitalised value of the rent for the whole residue of the term, a result which might make it more disastrous for the trustee to disclaim a burdensome and valueless property than to accept it with its burdens. Nor does it appear to me that the power of the Court to order possession of disclaimed property to be delivered up

to persons interested in it extends to delivering up a disclaimed lease to a surety. I think that provision only applies to cases where the applicant is entitled to possession.

From these considerations I should have thought that it was still an open question for determination whether or not the surrender intended by the statute was not a surrender in its well known and proper meaning with all its logical consequences; but my attention has, since I have entered upon the consideration of this question, been called to a very recent and still unreported decision of Vice-Chancellor Hall in a case of the *East and West India Dock Company v. Hill* (6), in April, 1882, in which he appears to have directly decided the point, and has held the lessee liable for rent accruing due after the date of the disclaimer, holding that the surrender is of a limited and qualified character only.

Under these circumstances I do not consider that I am at liberty to treat the question an open one, and that I am bound in obedience to the decision of a Court of co-ordinate jurisdiction to hold that the surrender has not discharged the plaintiff or the defendant from their obligations upon their covenants.

Judgment for the plaintiff.

Solicitors—Chester, Mayhew, Broome & Griffiths, agents for Peele & Peele, Shrewsbury, for plaintiff; Sole, Turner & Knight, agents for Cooper & Haslewood, Bridgnorth, Salop, for defendant.

1882. }
June 12. } CLARKSON v. MUSGRAVE AND SON.

Practice—County Court—County Courts Act, 1875 (38 & 39 Vict. c. 50), s. 6—Employers' Liability Act, 1880 (43 & 44 Vict. c. 42), s. 7—Notice of Injury, Sufficiency of.

At the trial of an action in the County Court the Judge took a note of the evidence, and gave the defendants leave to move on one point, no other question of law being raised:—Held, that on the appeal the defen-

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dants could not be heard on a point of law which had not been raised before the County Court Judge at the trial.

A notice of action under the Employers' Liability Act, 1880 (43 & 44 Vict. c. 42), s. 7, is good which in substance states the cause of injury, and which, although inaccurate or defective, does not, in the opinion of the Judge who tries the action, prejudice or mislead the defendant in his defence.

This was a motion to shew cause why the verdict obtained in the County Court should not be set aside and judgment entered for the defendants, or a new trial had, on the ground of the insufficiency of the notice of action under the Employers' Liability Act, 1880 (43 & 44 Vict. c. 42), and that there was no evidence of liability under that statute.

The action was brought in the County Court of Lancashire, holden at Bolton, by Jane Gertrude Clarkson, suing by her next friend Thomas Clarkson, against the firm of John Musgrave & Sons, in whose employ the plaintiff was.

It appeared that the plaintiff, a child of thirteen, was employed in a mill belonging to the defendants as a doffer, and that on the 13th of December, 1881, she was sent by the doffing mistress down to the cellar to fetch some bobbins, and that on her return in the hoist, while stooping to pick up some bobbins, her foot slipped and was caught between the hoist and the wall, and she was injured. It was the duty of the doffing mistress to accompany the girls in the hoist.

Notice was given, in accordance with section 7 of the Employers' Liability Act, 1880 (43 & 44 Vict. c. 42), in the following terms:—

"I do hereby, as solicitor for and on behalf of Jane Gertrude Clarkson, of 53 Lyon Street, Little Bolton, in the county of Lancaster, doffer, being at the time hereinafter mentioned in your employment at your Doubling Mill in Marsh Fold, Halliwell, in the said county, as a doffer, give you notice, according to the form of the statute in such case made and provided, that on the thirteenth day of December last, the said Jane Gertrude Clarkson was injured in consequence of your negligence

in leaving a certain hoist in your warehouse unprotected, whereby the said Jane Gertrude Clarkson had her foot caught in the casement of the said hoist, and her foot and leg were severely injured, and the said Jane Gertrude Clarkson will claim compensation for such injuries.

"Dated this 14th day of January, 1882.

"M. Fielding,

"7, Fold Street, Bold Street,

"Solicitor for the said Jane Gertrude Clarkson.

"To Messrs. J. Musgrave & Sons,

"Marsh Fold Doubling Mill,

"Marsh Fold, Halliwell."

At the trial of the action in the County Court, it was objected by the defendants that the above notice was insufficient, and did not comply with the provisions of section 7 of the Employers' Liability Act, 1880 (43 & 44 Vict. s. 42), and the learned County Court Judge, upon the application of the defendants, took a note of the point.

The jury found for the plaintiff 20*l.* damages, and upon being asked as to negligence, said that there was no negligence in the construction of the hoist, but that it was negligent of the doffing mistress to allow the plaintiff to go in it unaccompanied.

Bosanquet, for the plaintiff, shewed cause.—The notice is good, and complies with section 7 of the Employers' Liability Act, 1880 (43 & 44 Vict. c. 42) (1). That section prescribes that the notice shall state, in ordinary language, the cause of the injury and the date at which it was sustained. Ordinary language is all that

(1) By the 7th section of the Employers' Liability Act, 1880 (43 & 44 Vict. c. 42), "Notice in respect to an injury under this Act shall give the name and address of the person injured, and shall state in ordinary language the cause of the injury and the date at which it was sustained, and shall be served on the employer, or if there is more than one employer, upon one of such employers. . . . A notice under this section shall not be deemed invalid by reason of any defect or inaccuracy therein, unless the Judge who tries the action arising from the injury mentioned in the notice shall be of opinion that the defendant in the action is prejudiced in his defence by such defect or inaccuracy, and that the defect or inaccuracy was for the purpose of misleading."

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the Act requires, and mere inaccuracy does not invalidate the notice. It would be otherwise if the notice was framed for the purpose of misleading, but this is not. As to the second ground upon which this rule was obtained, it is not competent to the defendants to raise the point now. *Rhodes v. The Liverpool Commercial Investment Company* (2) shews that the point must be taken before the County Court Judge at the trial and a note taken of it, and with that decision *Morgan v. Rees* (3) agrees. The other side will rely upon *Seymour v. Coulson* (4); but when that case is examined it is not contradictory of the others, and in reality is not upon the same point.

Crompton, Q.C., in support of the rule.—*Seymour v. Coulson* (4) practically overrules *Rhodes v. The Liverpool Commercial Investment Company* (2). If that is not so, the latter case is a decision against the defendants. There is nothing in the County Courts Act, 1875 (38 & 39 Vict. c. 50) (5), to shew that it is a condition precedent to call the attention of the County Court Judge to the point; and it is submitted that the Judge having in fact taken a note enables this Court to deal with the point.

As to the second point, upon the sufficiency of the notice, it is to be observed that the jury found that the condition of the hoist was not the cause of injury, but that the accident was due to the negligence of the doffing mistress, in allowing the plaintiff to go alone. The notice is

therefore bad, for it alleges a cause of injury which the jury have in effect negatived by their verdict. He quoted *Keen v. The Millwall Dock Company* (6).

FIELD, J.—This rule must be discharged. It was obtained on two grounds. The first one raises the question of notice under the Employers' Liability Act, 1880; and the second one as to the sufficiency of the evidence at the trial. Now, with regard to the first point, it is to be observed that the Employers' Liability Act, 1880 (43 & 44 Vict. c. 42) (1), has given a remedy, local and cheap. It is a condition precedent that some notice should be given; and if Mr. Crompton's contention is good, he is obliged to say that this is no notice at all. It may be a defective notice; but there can be no doubt that it was a notice, and, what is more, it is in the very language of the Act of Parliament. The object of the Act is to give a remedy to injured workmen, who generally are unlearned persons, and when the Act provides that a notice shall be given to the employer, so that he may enquire into the alleged cause of injury, it expressly provides that such notice "shall state the cause of injury in ordinary language."

As to the second point, that there was no evidence of negligence, it seems to me there was abundant evidence of negligence; but that we cannot now consider, for Mr. Bosanquet's objection that the point not having been taken at the trial cannot be discussed in this Court, is good. Now before the passing of the County Courts Act, 1875 (38 & 39 Vict. c. 50), the appeal from the County Court was by Special Case, stated by the Judge; and such appeal could only be upon a question of law. But by the Act of 1875 (38 & 39 Vict. c. 50), an appeal is given by motion, "to any person aggrieved by the ruling, order, direction or decision of the Judge"; and it is provided that at the trial the Judge shall, at the request of either party, make a note of any question of law raised at such trial, and of the facts in evidence in relation thereto, and of his decision thereon. Therefore an appeal still can only be upon a question of law which has been

(2) Law Rep. 4 C.P. D. 425.

(3) 50 Law J. Rep. Q.B. 491; Law Rep. 6 Q.B. D. 508.

(4) 49 Law J. Rep. Q.B. 604; Law Rep. 5 Q.B. D. 359.

(5) By the County Courts Act, 1875 (38 & 39 Vict. c. 50), s. 6, at the trial or hearing of any cause in a County Court on which there is a right of appeal, "the Judge, at the request of either party, shall make a note of any question of law raised at such trial or hearing, and of the facts in evidence in relation thereto, and of his decision thereon, . . . and he shall, at the expense of any person or persons being party or parties in any such cause . . . requiring the same for the purpose of appeal, furnish a copy of such note, . . . and he shall sign such copy, and the copy so signed shall be used and received on such motion and at the hearing of such appeal."

(6) *Ante*, p. 277; Law Rep. 8 Q.B. D. 482.

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raised at the trial. The object of the section is—first, to give the other side notice of what the point relied upon is, and that the Judge may have his attention directed to the point, and may take a note with a view to it; and, secondly, that this Court may have a clear record of what the point was in the County Court, and of the evidence upon it.

The intention of the Legislature seems to be that the point should be raised before the County Court Judge at the trial. Then, is there any authority against this view of the section? The case of *Rhodes v. The Liverpool Commercial Investment Company* (2) is distinctly in favour of it. It has been argued that the case of *Seymour v. Coulson* (4) has overruled *Rhodes v. The Liverpool Commercial Investment Company* (2); but when that case is examined, it rather supports my construction of the Act of Parliament. The Court, in *Seymour v. Coulson* (4), expressly guard themselves from saying that it is unnecessary to raise the point before the County Court Judge. Lord Justice Brett says, "We are not called upon to decide what may be the effect in a case where no note has been taken and no request has been made to the Judge to take it." To the same effect, moreover, is the language of Lord Bramwell in *Morgan v. Rees* (3). I am therefore fortified by the authorities in the construction of the section at which I have arrived.

CAVE, J.—I am of the same opinion. The first point is as to the sufficiency of the notice under section 7 of the Employers' Liability Act, 1880 (43 & 44 Vict. c. 42). The notice here given by the plaintiff seems to me to comply with the provisions of the section, and to state the cause of injury. Even if it were defective, the section provides that the notice shall be deemed invalid only where the Judge who tries the action shall be of opinion that the defendant in the action is prejudiced in his defence by the defect or inaccuracy, and that such defect or inaccuracy is for the purpose of misleading. Now, as to the second point, a question of law was raised at the trial as to the sufficiency of this notice, and the Judge being asked to take a note of it, did so. But Mr. Crompton now asks to be heard upon a ques-

tion of law which was never raised at the trial, and upon which application for a note was never made. The cases cited seem to me to shew that this is contrary to the principles of the County Courts Act, 1875 (38 & 39 Vict. c. 50). *Rhodes v. The Liverpool Commercial Investment Company* (2) and *Seymour v. Coulson* (4) recognise the necessity for the point to be raised at the trial before the party can rely upon it on appeal. It is only fair to the County Court Judge and to the other side that the point should be taken at the hearing in the County Court, and should not be taken afterwards.

The rule must be discharged.

Solicitors—Chester, Mayhew, Broome and Griffiths, agents for R. M. Fielding, Bolton, for plaintiffs; Johnston & Harrison, agents for R. & T. H. Winder, Bolton, for defendants.

1882. } SMITH AND OTHERS v. THE
June 24, 26. } ASSESSMENT COMMITTEE FOR
LAMBETH AND OTHERS.

Poor—Rating—Occupation—Bookstalls in a Railway Station.

[For the report of the above case, see 51 Law J. Rep. M.C. 106.]

1882. }
May 2. } *Ex parte ELADON.*

Metropolis Management Acts (18 & 19 Vict. c. 120, and 25 & 26 Vict. c. 102)—*Practice—Right of Appeal—Order made under 25 & 26 Vict. c. 102. s. 75—Demolition of Building—Appeal in respect of Penalties and Forfeitures—Meaning of Forfeiture.*

[For the report of the above case, see 51 Law J. Rep. M.C. 94.]

[IN THE COURT OF APPEAL.]

1882. } BROWN v. THE GREAT WESTERN
May 15. } RAILWAY COMPANY.*

Railway Company—Passengers' Fares—Great Western Railway Company's Acts—Equalisation of Fares over the whole system of Amalgamated Railways—"Rates, Tolls and Charges"—Absence of Mile Posts on Railway—Railway Clauses Consolidation Act, 1845 (8 Vict. c. 20), ss. 94 and 95.

By their original Act a railway company had a scale of authorised charges for passengers according to distance. By a subsequent Act the company were empowered to make a short extension line, and charge a lump sum for passengers over that extension. A still later Act allowed the company to amalgamate with another existing company, on condition of their reducing their charges to the same scale as that of the other company. That scale was 1d. a mile for each third-class passenger. The plaintiff travelled over the company's line, including the short extension, and was charged a sum which was at the rate of more than 1d. per mile calculated over the whole distance travelled, but of not more than 1d. per mile over the distance exclusive of the extension, assuming that the company could also charge the lump sum for the latter piece. To this fare the company added five per cent. for Government duty. On action brought to recover the excess above 1d. per mile over the whole distance,—Held, on appeal, that the effect of the later Act was to restrict the charge of the company as carriers to the same charges over the whole line as the amalgamated company could make, and therefore the plaintiff was entitled to recover. Held, further, that the company were entitled to add the Government duty.

By the original Act authorising the construction of a railway the company were empowered to demand certain tolls for the carriage of passengers and goods, and upon payment of the tolls demandable all persons should be entitled to use the railway. The company were required to set up mile posts along the whole line at the distance of one quarter of a mile from each other, and it was enacted that "no tolls should be demanded

or taken by the company during any time at which the mile posts should not be set up and maintained." The plaintiff having travelled in one of the company's trains along their line at a time when two of the mile posts had been removed, sued to recover the fare which he had been compelled to pay for his journeys, on the ground that it was not, by reason of the above-mentioned enactment, demandable:—Held, that he could not recover, because the provisions as to mile posts applied to tolls strictly so called, and not to passenger rates.

These were cross appeals from the judgment of the Queen's Bench Division (Field, J., and North, J.), reported *Ante*, p. 156.

The action was brought to recover either the whole or a portion of two sums which the plaintiff had paid, under protest, as fares for being carried as a passenger in a train of the defendants from London to Bristol and back.

By their original Act of 1835 (5 & 6 Will. 4. c. cvii.), the line of the Great Western Railway Company extended only to Acton, and the fares were regulated according to a certain scale. By an Act of 1837 (1 Vict. c. xcii.), the company were empowered to extend their line to Paddington, a distance of 5½ miles, and to charge a lump sum of 2s. for that distance. By an Act of 1847 (10 & 11 Vict. c. cxxxvi.), the company were allowed to amalgamate with the Birmingham and Oxford Junction Railway, but on condition of reducing their tolls to the same scale as that railway—namely, to 1d. a mile.

By section 177 of the Act of 1835 the company were required to put up lists of tolls and to put mile posts at every quarter of a mile, and were prohibited from taking any rates or tolls for any article or passenger carried along the railway except during the time the boards and posts should be affixed. The same is in effect enacted by the Railway Clauses Consolidation Act, 1845 (8 Vict. c. 20), ss. 94 and 95.

The facts shortly were that the distance from Paddington to Bristol is nearly 118½ miles, and the plaintiff was charged a fare which was at the rate of more than 1d. per

* *Coram* Jessel, M.R.; Brett, L.J.; and Cotton, L.J.

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mile over the whole distance travelled, but of not more than 1*d.* per mile over the distance exclusive of that between Acton and Paddington, assuming the company could charge a lump sum for the latter piece. To the fare the company added five per cent. for the Government duty, such duty being calculated not merely on the fare but on the additional five per cent. itself. At the time when the fare was taken there was no mile post at the 118th mile, and none at the quarter mile beyond the 118th mile from Paddington.

The plaintiff in the Court below contended—first, that in consequence of the absence of the mile posts he was entitled to recover the whole of the fare; secondly, that if not entitled to recover the whole, he was entitled to recover the difference between 1*d.* a mile and the sum paid.

In the result judgment was given for the plaintiff on the second point for 2*d.*

From this decision both parties appealed. The defendants' appeal was heard first.

R. E. Webster, Q.C., and *R. S. Wright*, for the defendants.

The plaintiff appeared in person, but was not called upon.

The arguments were, in substance, the same as in the Court below.

JESSEL, M.R.—I think the judgment of the Court below was right. The simple question is, What is the meaning of the expression "The Great Western Railway" when used in the Act of 1847? The Act of 1835 makes provision for the payment of rates and tolls. By section 163 of that Act any person may use the railway on payment of the rates and tolls. By section 164 the company were entitled to take a toll strictly so called, that is, for people using their own carriages and locomotives for the carriage of goods. Then section 165 provided a similar toll for passengers, beasts, cattle and animals. Section 166 empowered the company to provide locomotive power for those persons who supplied their own carriages and waggons, and, as regards the locomotive power, they were to supply it on any terms they thought proper. That had nothing to do with the mileage rate. Then by section

167 the company were authorised to be carriers, and to provide both locomotive power and carriages, and then they were not limited as to charges except that they were to make reasonable charges. The Act of 1837 enabled the company to extend the line from Acton to Paddington, and it is called "An Act to enable the Great Western Railway Company to extend the line of such railway." The first clause enacts that certain recited Acts referring to the railway shall, except such of them as have been repealed, &c., extend and be construed to extend to the new piece of line, and then it empowers the company to make the extended piece of line. Section 41 says that whereas the company will incur great additional expense in extending the said railway to Paddington, they shall be entitled to charge for that 5½ miles of the line, in lieu of the rates authorised to be demanded by the first recited Act, lump tolls, as they are called, for the whole distance. Section 43 entitles them to make a reasonable charge for supplying locomotive power; but I think it is clear, under the general words of the first section, that the Great Western Railway Company have a right beyond question to act as carriers between Acton and Paddington—that is, they might still therefore make any charge they thought fit to make or could obtain payment of under the provisions of the first Act.

The result, therefore, of a consideration of the Acts seems to be this, that the Great Western Railway main line is extended to Paddington; that as to the part of the line between Acton and Paddington they had a right to charge a lump sum for toll—any sum they could get when they acted as carriers, and any sum that might be reasonable when they supplied locomotive power; but that as regards the rest of the line, they were limited as to tolls and mileage rates, but that the other two matters were chargeable in the same way. I believe the fact to be that, in strictness, the mileage charges never came into action, and that the company from the beginning acted as carriers, so that at the time when this Act of Parliament was passed the provisions of the Act were that they were to charge what was reasonable.

Now it must be remembered there was

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no other limit at that time on their rate of charges when they acted as carriers, and, as I said before, I think they always did act as carriers. Practically there was no limit, except that they should charge what was reasonable.

Now that being so, the Act of 1847 enabled them to amalgamate themselves with two other railways on the terms that their tolls should be reduced—that is, that they should not charge more than those railways charged. Now, recollecting what I have said, we must turn to their other Acts. The Great Western Railway Company had power to charge what they thought reasonable as carriers, and they had then the power to charge mileage rates, so that if the argument were to prevail that this would only apply to tolls which could be charged according to mileage, that would not affect the Great Western Railway Company who always acted as carriers. But it is plain, to my mind, that that applies to the whole line, and it was to prevent them, even when acting as carriers, from charging what they liked. The words of section 47, it appears to me, are reasonably open to that construction. It recites that they are not to amalgamate unless and until the tolls and charges on the Great Western Railway shall have been reduced to a scale not exceeding the tolls and charges authorised to be taken under the Birmingham and Oxford Junction Act, 1846. For tolls there was a maximum, but for charges there was none, and I read it “maximum tolls, and charges.” There were no maximum charges. They might charge anything that was reasonable when they acted as carriers, and anything at all which might be agreed upon when they acted as furnishers of locomotive power. When I say “anything reasonable,” of course the law would make a carrier charge a reasonable sum, but there was no other limit. Then section 47 proceeds to enact that, “The scale of tolls and charges by this Act authorised to be demanded and taken on the Great Western Railway shall be, and be deemed and held to be, the reduced scale referred to in the said Acts.” I have no doubt that the expression “the Great Western Railway” there means the whole line from Paddington to Bristol. There is no other description to be found

anywhere, and it is not a mere reference. The piece of the line from Acton to Paddington is never called anything else, and I have no doubt that that is the proper meaning of the term. But the section contains a negative clause—“and that from and after the transfer of the said undertakings or any part thereof to the Great Western Railway Company, it shall not be lawful for the Great Western Railway Company to demand and receive in respect of the use of the Great Western Railway and the branch railways by this Act authorised to be made by parties using the same, either with their own carriages and engines employed by them thereon, or with their own engines only (in cases where the company as hereinafter provided may consent to supply carriages),” certain tolls which are mileage tolls. Then section 48 says, “That the toll which the company may demand for the use of engines for propelling the carriages of other parties on the said railway shall not exceed one penny per mile.” So that mileage rate is here substituted for that which was not a mileage rate. Then section 49 says that “the maximum rate of charge to be made by the company for the conveyance of passengers along the said railway, including the tolls for the use of the said railways, and of carriages, and for locomotive power, and every other expense incidental to such conveyance as aforesaid except Government duty, shall not exceed the following sums.” Now that is a carriage charge which was a mileage charge on the other railway, but was not a mileage charge on the Great Western Railway. Is it conceivable that it is not to apply to the whole of the Great Western Railway? The argument, if it is worth anything, goes too far, because as it was not a mileage charge on any part of the Great Western Railway they would be left out altogether; and as in practice they only acted as carriers, it would have no effect at all upon them. That appears to me impossible, and I think that the Act was intended to restrict their charges as carriers under this section to the same charges as the other railway companies could make as carriers. I entirely agree with the decision of the Court below on the construction of the Act. I wish to add that I think there is a limit as to the charge for carrying

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passengers under the first Act, though not as to animals and goods.

BRETT, L.J.—I think it cannot be denied that if in the Act of 1847 the phrase in section 47, "in respect of the use of the Great Western Railway," and that in section 49, "the said railway," include the line from Acton to Paddington, then the other words of those two sections deal with the sum which may be paid under the Act of 1837 as a lump sum in respect of the conveyance of passengers between Acton and Paddington. If those two phrases include that part of the line, then inasmuch as there is that enactment in the Act of 1837, although the lump sum is there called a toll, and certainly is a rate or charge, then in section 47 that toll is included, although it is a lump sum, and in section 49 that toll is included in the words "rate or charge." And it is upon that view, which was hardly contested, that Mr. Webster founded his contention, which was that the part of the line between Acton and Paddington was not included in the term "the Great Western Railway" in section 47, nor in the term "the said railway" in section 49; therefore his argument was that the term "the Great Western Railway" really means only the Great Western Railway from Bristol to Acton; although he admits that it includes more than the original Great Western Railway, and includes everything that has been amalgamated with it, whatever the name formerly might have been; the only part of the whole system that he desires to exclude from that term is the piece between Acton and Paddington.

Now this term "Great Western Railway" first appears in the title of the original Act—"An Act for making a railway from Bristol to join the London and Birmingham Railway near London, to be called 'The Great Western Railway.'" I do not think there is any particular section in the Act which says that that shall be the name of that railway, but it seems to me that it is treated throughout the whole Act as the name of the railway which was then to belong to the Great Western Railway Company.

Now if that was the name of the railway under the Act of 1835, what is the

name of the railway which is constituted by the Act of 1837? The very first section recites the title of the Act of 1835, and then goes on to enact that all "the powers, authorities, provisions, matters and things contained in the said recited Acts, shall be construed to extend to this Act." It seems to me, under those words, if it was one provision, as I think it was, of the Act of 1835, that the railway constituted under that Act had the name of the Great Western Railway, that that was a provision which was carried on by the Act of 1837, and applied to the railway constituted by that which was the original railway extended from Acton to London. So that by the very first section of the Act of 1837 the Great Western Railway is extended to and forms that part of the line which goes from Acton to London, and is made one whole line. Moreover, if there had been nothing to the contrary, all the powers which were given to the railway company with regard to the line to Acton are given to them in respect to the line from Acton to London, and if there had been nothing to the contrary in the Act of 1837, it seems to me that they would have been entitled to apply the same toll to the new part of their line as they were entitled to demand in respect of the former part, because the new line would have become part of the old line. But then came the section in the Act of 1837, which altered that power and gave another; and the section shews what was intended, and that it was thought that unless that power was put in in lieu of the other powers, they would both exist together; it was therefore provided that in lieu of exercising the powers over this part of the line given by the first Act, they should in respect of that part be entitled to charge a maximum rate of 2s. The line was therefore treated as a whole line. The construction of the Act is, for all parts up to Acton, a mileage rate; but for the use of that part of the line from Acton to London, a lump sum. If it be true that in that Act the whole part up to London is to be called the Great Western Railway, it seems to me to follow that in every part of the Act of 1847 where reference is made to the Great Western Railway it includes this part from Acton to London. It is admitted

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that that term includes everything else, even the two railways which the company are enabled to purchase and amalgamate by that very Act—it includes them, and includes everything which they have incorporated or amalgamated before, yet it is said it does not include this particular piece from Acton to London. It seems to me that that is not so upon a consideration of the whole matter, and that, therefore, the reference to the Great Western Railway includes those five miles; and if it does, it is hardly contended but that this uniform sum of 2s. is included both in section 47 and in section 49.

COTTON, L.J.—The question we have to consider is, whether the Great Western Railway Company are still entitled to charge the sum they are allowed to charge under the Act of 1837 for carrying passengers from Acton to London, and that turns upon the construction of sections 47 and 49 of the Act of 1847.

The argument of Mr. Webster, as I understand it, was this: the object of those sections was to alter the mileage scale existing under the original Act of the Great Western Railway Company, and therefore when the charge was made not under a mileage scale, but under the powers of an Act giving the railway company a right to charge a lump sum for passengers carried only a hundred yards on the particular line of railway, that power is not taken away by the section. Undoubtedly the object was to amalgamate the scales, but that might have been done by providing that, after the amalgamation, the mileage scale of the Great Western should be that which had been the scale of the other railway companies with which they were going to be incorporated, or of which they were going to take a transfer. But it does not stop there. There is a special provision that, after the amalgamation, not only shall the mileage scale be the same, but the Great Western Railway Company shall not charge more than a certain sum for the carriage of passengers over their line. That is ambiguous, and the only way in which, as it seems to me, Mr. Webster could get out of section 49 was by saying the railway there referred to does not include the bit of railway between Acton

and Paddington. In my opinion the words of section 49 cannot be so restricted. The piece of railway between Acton and Paddington had been constituted under the Act of 1837, which gave them power to extend their line of railway—that is, the line of the Great Western Railway, or the line of the Great Western Railway Company. The line of the Great Western Railway Company up to that time had been the Great Western Railway, and when Parliament gave them powers to extend their line, but did not give it any particular name, it was, in my opinion, rightly described as, and must be included within and become part of, the “Great Western Railway”; and, therefore, there being that express provision in section 49 that they shall not charge more than the sum therein specified for carriage over the railway, that, in my opinion, cannot allow the special provision of the Act of 1837 still to remain in force over what is, in my opinion, part of the Great Western Railway, and must come within the description in the Act of Parliament of “the said railway”—that is, the Great Western Railway, as determined in section 47. In my opinion, therefore, the decision of the Court below was right.

On the plaintiff's appeal, the argument was the same as in the Court below, with the additional contention that the defendants were not entitled to add the Government duty to the fare.

Webster, Q.C., and *R. S. Wright*, were not called on.

JESSEL, M.R. — As regards the point about the milestones, the decision in the Court below was, no doubt, founded on the very simple objection that it only applied to tolls and not to passenger rates. These are passenger rates. Then as regards the other point about the Government duty, it is plain that, by section 49 of the Act of 1847, the Government charge is excepted. It says, “Every other expense incidental to such conveyance as aforesaid, except Government duty, shall not exceed the following sums”—that is, every expense except the Government duty shall be included in the sum charged. In the second part of the section it is equally plain—“except a

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reasonable sum for loading, conveying and unloading of goods, and for delivery and collection or any other services incidental to the business or duty of a carrier, where such services or any of them are or is performed by the company, shall not exceed the following sums." That is left out, because the company is charged for them, so the Government duty is left out because the company is charged for it.

BRETT, L.J., and COTTON, L.J., concurred.

Judgment affirmed.

Solicitor—R. R. Nelson, for defendants,

[IN THE COURT OF APPEAL.]

1882.
May 20, 25, 26. } THOMPSON v. FARRER.*
July 1. }

Merchant Shipping Act, 1876, ss. 6 and 10—Detention of Ship—Duty of Board of Trade to provisionally detain Ship apparently unsafe—Reasonable and Probable Cause for Detention—Direction to Jury.

By 39 & 40 Vict. c. 80. s. 6, the Board of Trade are empowered to provisionally detain, for the purpose of being surveyed, any British ship, in any port in the United Kingdom, which, by reason of certain defects mentioned in the section, is unfit to proceed to sea without serious danger to human life, having regard to the nature of the service for which she is intended. By sub-section 1, the Board, if they have reason to believe, on complaint or otherwise, that a British ship is unsafe, may provisionally detain her for the purpose of being surveyed; and by sub-section 3, the Board, on receiving the report of such survey, may either release the ship or, if in their opinion she is unsafe, order her to be finally detained, either absolutely or until the performance of such conditions as the Board, under the provisions of the statute, may think necessary to impose for the protection of human life:—Held, that the existence of the conditions which render a ship unsafe,

mentioned in section 6, although a condition precedent to a perfect right in the Board to detain a ship either provisionally or finally, is not a condition precedent to a duty on the part of the Board to provisionally detain a ship; and the Board are bound to provisionally detain a ship if they have reason to believe that she is unsafe, notwithstanding that in the result it may be proved that such detention was in fact unjustifiable as against the owner, because the ship was not unsafe within the meaning of the section. Held also, that a ship, although unsafe in fact, cannot be justifiably detained either provisionally or finally, under section 6, unless she is unsafe for one of the reasons therein stated. Held also, that the consideration whether a ship is safe or unsafe, within the meaning of section 6, extends to the homeward as well as to the outward voyage.

By section 10, the Board of Trade are made liable in damages to the owner of a ship which has been provisionally detained, "if it appears that there was not reasonable and probable cause, by reason of the condition of the ship or the act or default of the owner," for such detention:—Held, that the question of "reasonable and probable cause" was one to be decided, not by the Judge, but by the jury, with the assistance of expert evidence; and that the proper question to be left to the jury was not whether it was reasonable in the Board of Trade to detain a ship for survey without a direct affirmation by the surveyors that she was unsafe, but whether the facts in connection with the ship, which would have been apparent to a person of ordinary skill who had had and had used all means of examining and enquiring about her, would, in the opinion of the jury, have given such person reasonable and probable cause so far to suspect the safety of the ship on her outward and homeward voyage as to give him reasonable and probable cause to detain her for survey. Held also, that evidence of the previous history of the ship as to her antecedent behaviour was admissible at the trial of an action for damages; and that the Board of Trade at the trial might give evidence of deficiencies in the ship other than those stated in the notice of detention, provided that fair notice thereof was given to the shipowner before the hearing.

* *Coram* Brett, L.J.; and Cotton, L.J.

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Argument of a rule *nisi* for a new trial, which had been refused by the Divisional Court, but granted to the defendant by the Court of Appeal, on the ground of misdirection and that the verdict was against the weight of evidence.

The action was brought by the owner of the iron steamship, the *City of Limerick*, against the secretary of the Board of Trade, under the provisions of 39 & 40 Vict. c. 80, to recover damages for the detention of the plaintiff's ship.

The facts and material sections of the statute are fully set out in the written judgment of Brett, L.J.

C. Russell, Q.C., and *Gainsford Bruce*, for the plaintiff, shewed cause.—The question is whether there was in fact reasonable and probable cause for the detention of the ship; the evidence shews that there was not. Lord Coleridge, C.J., held that the question was whether facts were laid before the Board which would lead the Board to the conclusion that the ship ought to be detained; and although that question was found in favour of the plaintiff, yet the real question is whether in fact there was reasonable and probable cause for the detention. That is a question, not for the Judge, but for the jury. The Board has power, under 39 & 40 Vict. c. 80. s. 6, to provisionally detain a ship only where there is reasonable ground in fact for considering that the ship is unfit to proceed to sea. Even assuming that under section 6 the question is whether it is reasonable for the Board upon facts stated to them to detain a ship, yet here the facts laid before them did not justify the detention, but were only matters of opinion. There must not be merely an expression of opinion, but a representation of facts which shew a reasonable and probable cause for detention. There is no analogy as regards the meaning of the expression "reasonable and probable cause" in an action brought under section 10 of 39 & 40 Vict. c. 80, and in an action for malicious prosecution. In the latter case the question of reasonable and probable cause is one to be determined by the Judge—*Hicks v. Faulkner* (1), *per* Hawkins, J.—but under section 10 the question is matter

(1) *Ante*, p. 268; Law Rep. 8 Q.B. D. 167.

of inference to be drawn from the facts, and that is a question for the jury. The question was properly left to the jury, and their findings in favour of the plaintiff are not against the weight of evidence.

The Attorney-General (Sir H. James, Q.C.), and *Gully, Q.C.* (with them *R. S. Wright*), for the defendant, in support of the rule.—The real question for the jury was whether the Board of Trade had reasonable grounds for detaining the ship for the purpose of enquiry. That question depends upon the materials laid before the Board of Trade by their officers. The documents and reports made to the board shew what was brought to the knowledge of the Board for the purpose of enquiry, namely, that the ship from her unusual proportions was apparently unsafe, having regard to the service for which she was intended. The object of the statute was to protect the lives of the seamen, and it would apply to both the outward and the homeward voyage. The proper time to provisionally detain a ship is when she is about to proceed to sea, because, if the question of the safety of the ship depended upon the manner of loading, that question could only be determined when the ship is ready to proceed to sea. The Board gave due notice to the plaintiff that the ship would be detained if certain alterations were not made; but as these were not made, the Board acted properly in detaining the vessel under the powers given to them by the statute. It is only necessary for the Board to shew that there was reasonable and probable cause for detaining the ship for the purpose of enquiry. The verdict of the jury cannot be supported.

Cur. adv. vult.

The following judgments were delivered on July 1:—

BRETT, L.J.—In this case the plaintiff was the owner of an iron steamship, the *City of Limerick*. In the autumn of 1880 the ship was at Sunderland preparing to proceed with an ordinary cargo to America, and to return with a cargo partly consisting of cattle. Whilst the ship was thus preparing to carry out such purposes, the officials at Sunderland of the Board of Trade communicated with the Board in

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London. In the result, the ship was provisionally detained under the Merchant Shipping Act Amendment Act, 1876, by an order of the Board of Trade. Afterwards, under the same statute, a Court of Survey was held before Mr. Rothery and others, who held and reported as follows: "The conclusion, then, to which we have come is, that whether we look to the outward or to the homeward voyage, this vessel is not unfit to proceed to sea without serious damage to human life, having regard to the nature of the service for which she is intended, and that consequently the Board of Trade had no right to detain her. Under the circumstances, we have no option but to order the vessel to be released forthwith." The vessel was accordingly released. The present action was then brought by the plaintiff in order to recover compensation for the loss to him by reason of the provisional detention. The case was tried before the Lord Chief Justice and a special jury at Liverpool. The jury found for the plaintiff. A motion was made in a Divisional Court for a new trial for misdirection, and also on the ground that the verdict was against the weight of the evidence. Mr. Justice Field and Mr. Justice North refused to grant a rule. A rule *nisi* was afterwards granted in this Court, and, upon shewing cause, the case was exhaustively argued before my brother Cotton and myself.

At the trial before Lord Coleridge it was admitted for the purpose of that trial that the ship was, in fact, a safe ship for the proposed voyages, both out and home. The following facts, amongst others, were given in evidence: first, as to the construction and former user of the ship evidence in accordance with the statement of facts contained in the judgment or report of Mr. Rothery; then certain letters from officers of the Board of Trade at Sunderland to officers of the Board in London to the following effect: On the 21st of April, 1881, Mr. Mills, a surveyor of the Board stationed at Sunderland, wrote to the assistant-secretary in London:—"City of Limerick—An application has been made for a passenger certificate. She has been until recently a vessel with two decks and a spar deck. Her present owners have now fitted her with an additional awning

deck about four-fifths of her length. The ship presents a curious and abnormal appearance, and a question arises in the minds of the surveyors and with myself how far such a superstructure on a vessel of already great depth and small breadth detracts from her seaworthiness. I therefore beg to submit that it is a case wherein the opinion of the consultative staff should be taken. The case is urgent, as the vessel is soon to leave Sunderland for America." A minute was made on this report by Captain Sir Digby Murray, an official of the Board: "I should advise that we absolutely decline to grant this vessel a passenger certificate. There still remains the question whether we are to permit her to proceed to sea or whether we ought not to detain her as unsafe. We should send Mr. Wimshurst . . . to survey." On the 28th of April Messrs. Mills and Wimshurst made a joint report:—"We have now inspected this vessel. . . . Above the spar deck is now being added the frames, beams, planks, &c., for a further deck covering or platform, extending about four-fifths of the vessel's length, for the conveyance of cattle, &c. The following considerations arise: . . . as to whether, from the great depth to breadth, and the danger of the top structure getting partly filled with water, the ship is in such a condition as that she may be allowed to sail on a sea voyage. We think it is possible, with special loading and provisions, that she may be made safe to leave the United Kingdom, but she will without doubt be dangerous when loaded in a usual method, or with cattle upon the upper deck. We therefore suggest the desirability of the Board leaving the responsibility of such an altogether exceptional case upon a Court of Survey." Upon this the following minutes were made in London: "Our duty is clear. Instruct Mr. Mills that we have received his joint report, and we understand that he will detain this ship if she attempts to proceed to sea. That being so, he should take care that the steps he takes are effectual." And by the President of the Board: "I approve of what has been done. The owner may be told that the Board of Trade will not take the responsibility of allowing a ship of such unusual dimensions to go to sea without

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further enquiry." On the 2nd of May Mr. Mills wrote: "May I respectfully suggest that others of the Board staff who have experience of the trade this vessel is intended for should be sent to see her at once. The case is a heavy one for me to be left with alone; besides, the opinion of Mr. Wimshurst and myself, as given in our report, might not be in accord with that of others." Evidence was given that the ship had formerly brought cattle on deck from America covered or protected by a movable wooden awning or shed, and that shortly before May, 1881, the plaintiff had replaced this by a permanent structure, said to be lighter, made partly of iron and partly of wood, to act as a shed or an awning for cattle, and that the ship was intended to bring cattle on deck in such shed from America to England on a homeward voyage. The ship was provisionally detained on the 14th of May. By a report dated the 16th of May, signed by Mr. Wimshurst, principal surveyor of iron vessels, by Laslett, Brown & Paxton, shipwright surveyors, and by Vyvyan, nautical surveyor, the grounds of the provisional detention were stated to be "improper construction—namely, unusual proportions." And after giving the length, breadth and depth of the ship, there was a statement that "these formed a proportion unknown in the merchant service in any other vessel." The Lord Chief Justice left the following questions to the jury: 1. Had the Board of Trade, when the detention order was issued, reason to believe that the *City of Limerick* was unsafe for the outward voyage or for the homeward voyage? Answer, no, to both branches of the question. 2. Was she unsafe, in point of fact, on the voyage to New York? Answer, no. 3. Was the *City of Limerick* unsafe for the voyage from New York to England if loaded with an ordinary cargo of American produce, including as part of the cargo 500 head of cattle on the main or upper deck? Answer, no. 4. Was there an absence of reasonable and probable cause, by reason of the condition of the ship or the act or default of the owners, for the past detention of the ship by the Board of Trade? Answer, yes. 5. From what date was the ship, in point of fact, detained? Answer, from the 14th of May

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to the 11th of June. The Lord Chief Justice, in summing up the case to the jury, thus explained the fourth question: "You would expect to find, as in my judgment you do find, that where there is a *bona fide* and honest action on the part of that great department of the State, if that action is wrong, and in a particular case inflicts hardship upon an individual, that individual, if the action of the Board of Trade is *bona fide* and has been upon reasonable grounds for the general benefit, must suffer. And again: "The true question for you to consider is, had the Board of Trade, at the time when the vessel was detained, reason to believe, when they so acted, that the vessel was unsafe for her outward or her homeward voyage? . . . The true question is, what was present to their minds when they did detain?" And still more clearly: "As I understand it, and I think rightly understand, therefore, Mr. Mills was wrongly informed, and Mr. Mills wrongly informed the Board of Trade; but remember, in my view the question is not whether he wrongly informed the Board of Trade, but whether he did inform the Board of Trade, and whether it was reasonable for the Board of Trade to believe what he informed them. . . . The Board can only go by the reports of their people, and so long as they have reason to trust those people, and those people do not give them reasons to doubt the trustworthiness of their report, or give them reason to doubt that they can be relied on, I do not see why they should be held blameworthy or responsible under this particular Act of Parliament." The learned Judge then left it to the jury to say whether the letters and reports of Mr. Mills and Mr. Wimshurst did give the Board reasonable ground to detain the ship. And he further said that if the question of the absence of reasonable cause was for him, he was of opinion that there was an absence of reasonable cause. The ground of this view of the learned Judge, and a ground which he left to the jury to consider in order to determine their verdict, was that the report and letters did not express a determined opinion of Mr. Mills and Mr. Wimshurst that the ship was unsafe; but rather seemed to avoid, and, in his view, did avoid, giving such an opinion; and that it was not reasonable for the Board

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to detain the ship without having at least a definite opinion that the ship was unsafe.

The same view is expressed by Mr. Justice Field: "I think there can be no doubt that if the statements of the surveyors had been direct and pointed statements of fact, even although mistaken, and although they had erroneously supposed that that was a deck which was not a deck, and that that which was merely a supplementary alteration was a new construction, or that that which they thought added seven feet to the depth of the ship was, with reference to the question whether she was stable or not, erroneous, still, if all that had been positively stated to the Board of Trade by their respective officers, whose competency was not at all doubted, and they had taken it all into consideration, however unfounded or erroneous the views or statements of fact might have been, we should have thought that there would have been very strong evidence indeed to shew that there was no absence of reasonable and probable cause." But, relying on the same point as the Lord Chief Justice—namely, that the surveyors declined to pledge their opinion that the ship was unsafe—he states that he cannot disagree from the finding that, even subject to the manner of leaving the question to the jury, there was an absence of reasonable and probable cause.

Upon the argument before us many points were raised. In order the better to express my views on them, I think it well to state, in the first place, my opinion on the construction of the statute. The first section with which in this case we have to deal is section 6. That section gives power to the Board of Trade—a high executive State department—to interfere with the rights of private subjects over their private property. It would be anticipated that the exercise of such a power, so as to be absolutely justified in the end, would be expressly confined to certain limited cases. In other words, that such a power, so as to be justified, would only be given on the existence of certain conditions; and so we find that it is not given in respect of every British ship, but only where certain conditions exist with regard to a British ship: "Where a British ship, being in any port of the United Kingdom, is, by reason of the defective condition of her

hull, equipments or machinery, or by reason of overloading or improper loading, unfit to proceed to sea without serious danger to human life, having regard to the nature of the service for which she is intended, any such ship (hereinafter referred to as 'unsafe') may be provisionally detained for the purpose of being surveyed, and either finally detained or released." This is the part of the enactment which *gives the power*. The remainder of the section deals with the manner in which the power thus given is to be exercised. The power, then, is not given with regard to every British ship. The enactment is not that an absolutely justified power is given to provisionally detain every ship which the Board of Trade has reason to believe is unsafe. If that be the construction, then all this first part of the section has no effect, and therefore no practical meaning. The only ships which can justifiably in the end be provisionally detained, according to this preliminary part of the section, are those which satisfy the condition that for one or other of the reasons mentioned they are unsafe. But by sub-section 1, "The Board of Trade, if they have reason to believe, on complaint or otherwise, that a British ship is unsafe, may provisionally order the detention of the ship, for the purpose of being surveyed." Here a power is given to the Board to order the provisional detention, *if they have reason to believe, &c.* This must, if possible, be read so as not to destroy the immediately preceding enactment. The only way to read the two enactments together, so as to give effect to both, is to say that the Board *may* detain a ship, if they have reason to believe she is unsafe; they would, in my opinion, be *bound* by their duty to the State to detain a ship if they had reason to believe that she was unsafe; but that the Board will be proved by the result to have detained the ship unjustifiably—as against the owner—if, in fact, the ship was not, by reason of one of the mentioned causes, unsafe within the meaning of the section. I would remark here that it is perhaps possible that a ship may be unsafe within the meaning of the section for some cause other than one of the causes mentioned in the section and if so, such a ship, though unsafe

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could not properly be provisionally detained.

A question was raised as to whether the consideration of safety, or want of it, must be confined to safety or the want of it on an outward voyage. It was urged that it must be by reason of the words "unfit to proceed to sea," and "from a port in the United Kingdom." But it seems to me that the words "having regard to the nature of the service for which she is intended," enlarge the area of consideration. If, for any part of the service for which the ship is intended when she is about to leave a port in the United Kingdom, such service to be fulfilled before her return to the United Kingdom, she would be unsafe, it seems to me she ought to be provisionally and finally detained. If a British ship were about to sail in ballast to the Chinha Islands, to there load and bring back a cargo of guano, and she would be unsafe to human life to bring back such a cargo, it seems to me that she would be proceeding to sea for a service for which she was destined at the time of proceeding to sea, and for the performance of which service she would be an unsafe ship. Or if a British ship were under charter to leave a British port in ballast to proceed to Spain to load ore, and thence to proceed to some other country, it seems to me that it would be far too narrow a construction of the protection of human life intended by this statute, if such a ship might not be detained, if with a cargo of ore she would be unsafe to human life. She would be about to proceed to sea destined to perform a service for which she would be unsafe.

Sub-section 3 gives power to the Board of Trade to order "the ship" to be finally detained, either absolutely or until the performance of certain conditions. But "the ship" which may be so detained is a ship satisfying the conditions mentioned in the first part of the section. The conditions in the first part of the section are therefore conditions precedent to a *perfect right* to detain a ship either provisionally or finally. But they are not conditions precedent to a *duty* on the part of the Board of Trade to provisionally detain. The Board is bound to perform a duty to the State, which is hazardous to this ex-

tent—that the performance of it may be shewn by a result which at the time the Board could not foresee to have been an unjustifiable act as against an individual. All the difficulty pressing upon the Board, by reason of its duty to act on information which it cannot sift in time, and on its grave responsibility to the State if it allow an unsafe ship to go to sea, must be admitted. Nevertheless, in my opinion, the duty to act under such difficulties is imposed. Now, although the action of the Board, unless justified by the result of enquiry, is an unjustifiable act as against the shipowner, yet if no particular remedy were given to him by this or some other statute, he would have no remedy. The wrongful act would be a wrongful act done by the members of a public department, acting gratuitously, and in the performance of a public duty. Yet the injury done to a shipowner by the detention of his ship at the moment of her proceeding to sea is usually so enormous, that if it were allowed to be done with impunity against one whose ship was not in fact unsafe, and more than that, was not in truth liable, if the true facts were known, to a just suspicion of being unsafe, such legislation would seem to be legislation of the highest injustice. A perfectly innocent individual would by legislation be grievously injured without redress. The Legislature was placed in a position of great delicacy: it was anxious to protect certain subjects; it was bound not too arbitrarily to injure others. The result was section 10. By it, "If it appears that there was not reasonable and probable cause, by reason of the condition of the ship, or the act or default of the owner, for the provisional detention of the ship, the Board of Trade shall be liable to pay to the owner of the ship his costs of and incidental to the detention and survey of the ship, and also compensation for any loss or damage sustained by him by reason of the detention or survey." Several questions arise as to the meaning of this enactment. It clearly does not go so far as to say that the shipowner shall be compensated if in fact his ship was not unsafe. So to hold would strike out the words "that there was not reasonable and probable cause." Does it say that he shall not be compensated if there was reason-

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able and probable cause *present to the minds of the Board from information before them*, though there was not reasonable and probable cause, if the true state of facts had been before them? It seems to me that so to hold would strike out the words "by reason of the condition of the ship, or the act or default of the owner." In order to justify the suggested interpretation, the section should have been, "if it appears that there was not reasonable and probable cause for the provisional detention of the ship," &c. Then, although neither the apparent condition of the ship, nor any apparent act or default of the owner, would have given to any person of ordinary skill any reason to doubt the safety of the ship, yet if incorrect facts had been stated to the Board of Trade, either through want of skill to appreciate them, or through negligence, or even fraudulently, such facts, if they had been true, being sufficient to raise a reasonable doubt, the shipowner would be without remedy. A shipowner so absolutely innocent that not even by misfortune could his ship be an object of suspicion to a person of ordinary skill, would have been deeply injured without remedy. Such legislation would have inflicted frightful injustice. It may be hard, but it is not unjust to say that if, by misfortune or otherwise, a ship does fairly present a suspicious aspect, the shipowner must bear the consequences. It seems to me that the words of the enactment, if effect be given to all of them, carry out the intermediate view—the hard view, but not the unjust one. The true interpretation seems to me to be that if upon the evidence given at the trial of what, by all means of examination possible under the circumstances in which the ship then was, and all reasonable enquiries, might have been made known, though it was not, to the Board of Trade, a person of ordinary skill would have had reasonable and probable cause so far to suspect the safety of the ship as to make it reasonable to detain her for the purpose of enquiry, the shipowner has no remedy given to him, though his ship was in fact a safe ship; but if upon such evidence a person of ordinary skill would have had no reasonable and probable cause to suspect the ship, then compensation is given

to the shipowner, although the facts erroneously stated to the Board of Trade would, if correct, have given to a person of ordinary skill reasonable and probable cause to suspect, and consequently detain the ship. This reading is, in my opinion, fortified by considering the next part of the section, which seems to be an enactment of reciprocal liability imposed on the shipowner, and which liability clearly depends upon the result in fact, and not upon any statements or appearances of facts. It seems to me to be also fortified by section 11. That section assumes that the Board of Trade may be liable to the shipowner, and may yet have a remedy over against a complainant. That would hardly have been enacted if upon the facts asserted to the Board there would be an absence of reasonable and probable cause to detain a ship, and yet the Board should detain her. It is clear that if the ship was in fact unsafe, no question can arise as to whether the information laid before the Board was or was not sufficient to give reasonable and probable cause to detain the ship. In such case the shipowner can have no right to compensation.

A question was raised as to whether the Board of Trade could rely upon any other deficiency than the one stated in their notice of detention, and of the reasons for it. As, for instance, if the reason given for the provisional detention were a leak in the bows of the ship, could evidence be given at the trial that, although there was no such leak, there would have been apparent to any ordinary skilful observer a defect in the engines, or in the rudder or in the masts? Putting upon section 10 the interpretation stated above, which seems to me to be the right one, I think that the suggested evidence could be given, subject no doubt to fair notice being given of it to the shipowner before the hearing.

Another question raised was whether the question of reasonable and probable cause ought to be left to a jury or be decided by the Judge. In my opinion the question of reasonable and probable cause, if material, is never a question for the Judge, except in the cases of a charge of malicious prosecution or false imprisonment. It is not unnatural that in those cases it should be left to him, because the

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question in those cases is whether there was reasonable and probable cause to set the law in motion, or to act personally on it. But however that may be, it seems clear to me that from the very nature of the case the meaning of this statute must be that it is a question for the jury, to the solution of which they may be assisted by expert evidence. To ask a Judge whether, upon certain measurements of length, depth and breadth, a ship would have sufficient stability, or whether with a cargo loaded in a given form she would be safe, is on the face of the proposition, to my mind, absurd.

Another point raised was whether among the facts which might be proved in order to raise the question above stated as the question to be tried by the jury, the previous history of the ship as to antecedent behaviour might be proved. In my opinion it might. No reasonably skilled and careful enquirer would, if anything struck him as amiss in a ship, fail, in my opinion, to ask whether what he observed had existed in previous voyages, and whether it had affected the behaviour of the ship. The previous behaviour of the ship under the same conditions as would affect her on her proposed going to sea, would, in my mind, be an obvious and necessary fact to be considered in determining whether she would be safe or unsafe.

An objection was taken to the view of the statute, which I think is the right one, on the ground that the Legislature would be imposing a duty on the Board of Trade, and obliging them to pay damages in respect of the performance of that duty; but this objection seems to me to be more formal than accurate. If the members of the Board of Trade were made by the decision personally liable, this objection would be formidable indeed; but, in fact, the duty is imposed on the Board, the damages are paid by the State.

Upon the view thus expressed of the true interpretation of this statute, it follows that, in my opinion, the right question was not left to the jury. The verdict of the jury was taken upon the question whether it was reasonable in the Board of Trade to detain the ship for survey without a direct affirmation by the surveyors that in their opinion the ship was unsafe. The

attention of the jury was not drawn to this question—namely, whether the facts with regard to this ship as she lay at Sunderland, which would have been apparent to a person of ordinary skill if he had had all means of examining her possible under the circumstances in which she lay at Sunderland, and of enquiring about her, and had used those means, would have in the opinion of the jury given to such person reasonable and probable cause so far to suspect the safety of the ship for her outward or homeward voyage, as to give him reasonable and probable cause to detain the ship for survey and enquiry.

I am sorry to say under these circumstances that, in my opinion, there must be a new trial if the Board of Trade think it advisable. The appeal must, in my opinion, be allowed.

COTTON, L.J.—I agree with the judgment which has been delivered by Lord Justice Brett.

The action is brought under section 10 of the Merchant Shipping Act, 1876. The question to be decided turns primarily upon the proper construction of that section, but there are other sections which must be considered. The earliest section to be considered is section 6, which is open to some difficulty. It has been contended that the vessel being in fact unsafe is a condition precedent to the exercise of all the powers given by the section. But this cannot, in my opinion, be the true meaning of the earlier part of the section which gives rise to this argument. For if this is the true construction, a vessel could not lawfully be detained even for the purpose of being surveyed unless it is in fact unsafe. This is inconsistent with the first sub-division, which expressly gives power to detain provisionally if the Board of Trade have reason to believe the ship is unsafe; and the contention is inconsistent with the first part of the section itself which assumes that a ship coming under the provisions of this part of the section may be released, which in the case of a ship in fact unsafe would not be right.

The section is not very correctly framed, but I think its meaning is that a ship which the Board of Trade have reason to believe to be unsafe may be detained, and,

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after such investigation or enquiry as by the section is binding on the owner, either released or finally detained. The first part of the section, in my opinion, sums up, though not very accurately, the subsequent detailed provisions of the section.

But though as a matter of public policy it was thought right that power should be given to the Board of Trade to detain provisionally ships reasonably believed by the Board to be unsafe, it was obvious that this might produce great hardship to owners of some vessels; and the 10th section gives in certain cases to owners of vessels which have been detained, and which in fact are not unsafe, compensation by way of damages for their detention; this compensation being payable not by the officers of the Board, but by the State out of the public purse. In this section the language used differs from that of sub-section 1 of section 6. It is not "if the board had not reasonable cause," but "if there was not reasonable and probable cause," that is, if in fact there was not such cause—and it must exist by reason of the condition of the ship, or the act or default of the owner. This, in my opinion, means that the existence of the cause is not to be decided on the representations made to the Board of Trade, on which they acted, but is to be decided on the actual condition of the vessel, or on what has in fact been done by the owner, so as to prevent the owner being injured by reason of inaccurate representations made to the Board of Trade either by its officers or by strangers, even in cases where the Board has publicly discharged the public duty which the Act enables and requires the Board to discharge; and this is supported by section 11.

Then comes the question, by whom is the existence of reasonable and probable cause to be decided—by the Judge or by the jury? This does not depend on matters of which a Judge has any special knowledge, as is the case where the question is whether there was probable cause for a criminal prosecution. In my opinion, therefore, it must be decided by the jury, and I think the question for the jury—when a vessel is said to be unsafe by reason of its conditions—is whether a reasonable man with a competent know-

ledge of ships would have believed from the actual condition of the ship that she was unsafe. In some cases the construction of the vessel without any reference to her previous history may be sufficient to enable the jury to decide this question, and, in my opinion, it cannot be said that in all cases evidence ought to be given as to the history of the vessel; but I think that evidence as to the actual history of the vessel is admissible to shew that she is or is not unsafe, or that there was or was not reasonable and probable cause for believing her to be unsafe.

The only other question is whether in deciding whether there was reasonable and probable cause for believing the ship to be unsafe, regard is to be had to the outward voyage only. In my opinion where the contemplated employment of the vessel is for a purpose which involves more than the outward voyage, as in the present case the bringing of cattle home from the United States—or, in other words, employment in the foreign cattle trade—this employment after the end of the outward voyage is part of "the service for which she is intended," and must be taken into consideration. Full protection would not otherwise be secured to seamen employed in British ships, and having regard to the words quoted from section 6 it is within the fair interpretation of the Act. The result of my opinion is that in the present case the proper question was not left to the jury, and that the verdict cannot stand. The defendants desire to contend before a jury that the ship was not in fact safe—that is, to question the finding of the Court of Enquiry. This they did not on the previous trial do, in consequence of an expression of opinion by the Lord Chief Justice that the question was whether the Board of Trade had reasonable ground on the statement submitted to them for believing that the vessel was unsafe, and the Board ought, if they desire it, to have an opportunity of raising the question.

There must, therefore, be a new trial.

Rule absolute.

Solicitors—Botterell & Roche, agents for W. Pinkney, Sunderland, for plaintiff; The Solicitor to the Board of Trade, for defendant.

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June 15, 16. } DUDLEY.

Master and Servant—Employers' Liability Act, 1880 (43 & 44 Vict. c. 42), s. 1—Injury to Workman—Contract by Workman against Act applying—Lord Campbell's Act (9 & 10 Vict. c. 93), s. 2—Widow's Right of Action where Husband has contracted himself out of the Employers' Liability Act, 1880 (43 & 44 Vict. c. 42).

A workman may contract for himself and his representatives in case of death not to claim compensation under section 1 of the Employers' Liability Act, 1880 (43 & 44 Vict. c. 42).

That section does not render such contract invalid, but removes the legal presumption of an implied contract between employer and employed that the former should not be liable to the latter for injuries caused by the negligence of a person in the common employment.

Such a contract by a workman is not contrary to public policy, and binds his widow suing under Lord Campbell's Act (9 & 10 Vict. c. 93).

This was an appeal by way of motion from a decision of the Judge of the County Court of Worcestershire, holden at Dudley.

The following were shortly the facts:—

The defendant is the owner of extensive collieries, and the plaintiff sued under Lord Campbell's Act (9 & 10 Vict. c. 93) and the Employers' Liability Act, 1880 (43 & 44 Vict. c. 42), as the widow of Henry Griffiths, for compensation in respect of her husband's death, which resulted from injuries caused while in the employment of the defendant.

It appeared that up to the date of the passing of the Employers' Liability Act, 1880 (43 & 44 Vict. c. 42), there existed upon the defendant's estate a *quasi* club or benefit society, called the "Field Box," which was maintained by levying weekly contributions from the workmen, in some cases directly, in some cases indirectly, through the agency of the contractors under whom they worked. The defendant contributed to the "Field Box" a gross sum equal to the total contributions levied from the workmen.

The Employers' Liability Act, 1880 (1) (43 & 44 Vict. c. 42), came into operation on the 1st of January, 1881, and on that day the defendant, by his agents, circulated throughout the collieries a printed notice of which the material part is as follows:—

"Conditions of Employment

"At the Earl of Dudley's collieries, and works connected therewith, &c.

"For all persons employed, directly or indirectly, who have heretofore had, or may have, claims upon the Colliery Club Box at the respective collieries and works.

"1. The persons employed at the colliery, directly or indirectly, must be, and continue to be during such employment, ordinary members of the Colliery Club or Permanent Relief Society under its present or any future name.

"3. The employer shall be, and continue to be, an honorary member of the said society, and shall subscribe thereto, and not less than heretofore.

"4. In consideration of such payment by the employer, and of being employed at the colliery, and as part of the terms of employment, every person so employed un-

(1) By section 1, "Where after the commencement of this Act personal injury is caused to a workman (1) By reason of any defect in the condition of the ways, works, machinery or plant connected with or used in the business of the employer; or (2) By reason of the negligence of any person in the service of the employer who has any superintendence entrusted to him whilst in the exercise of such superintendence; or (3) By reason of the negligence of any person in the service of the employer to whose orders or directions the workman at the time of the injury was bound to conform and did conform where such injury resulted from his having so conformed; or (4) By reason of the act or omission of any person in the service of the employer done or made in obedience to the rules or byelaws of the employer, or in obedience to particular instructions given by any person delegated with the authority of the employer in that behalf; or (5) By reason of the negligence of any person in the service of the employer who has the charge or control of any signal, points, locomotive engine, or train upon a railway, the workman, or in case the injury results in death, the legal personal representatives of the workman, and any persons entitled in case of death, shall have the same right of compensation and remedies against the employer as if the workman had not been a workman of, nor in the service of the employer, nor engaged in his work."

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dertakes for himself and his representatives, and any person entitled in case of his death, to look to the funds of the said society alone, under the rules and constitution thereof, for compensation in case of injury sustained in the course of such employment, whether resulting in death or not; and neither the employer, nor any other person in his employment, whether a fellow-servant or not, shall be liable in respect of any defect, negligence, act or omission, under 'The Employers' Liability Act, 1880,' or otherwise, in respect of any negligence occasioning such injury.

"This contract shall remain in full force, and operate as a contract between the workman and owner for the time being of the colliery, so long as the workman continues to be employed at the colliery."

To the terms of this contract the learned County Court Judge found that the deceased had assented. It was admitted that the deceased was a workman within the meaning of the Act, and that owing to the negligence of the engine-driver and machinery inspector of the pit where he worked he met his death.

The County Court Judge held that the deceased could not contract himself out of the Employers' Liability Act, 1880, so as to defeat the claim of his widow for compensation; that the contract was void for want of mutuality and consideration, and was contrary to public policy, and accordingly gave judgment for the plaintiff.

A rule *nisi* having been obtained,

Jelf, Q.C. (*Kettle* with him), for the plaintiff, shewed cause.—The plaintiff is entitled to bring this action, and the deceased could not by his contract with the defendant deprive her of her right to compensation under the Employers' Liability Act, 1880 (43 & 44 Vict. c. 42). She sues under Lord Campbell's Act (9 & 10 Vict. c. 93), which gives her a right which up to the date of that Act was unknown to the common law, and the later statute, 27 & 28 Vict. c. 95, establishes a new mode of asserting that right. *Read v. The Great Eastern Railway Company* (2) is not in agreement with

Leggott v. The Great Northern Railway Company (3). Besides, even if the deceased could have contracted not to claim under the Employers' Liability Act, 1880, he could not contract so as to deprive his widow of her remedy in case of his death, for such a contract would be contrary to public policy. The Employers' Liability Act, by section 1, prevents a workman depriving himself of the benefits given by the Act; and as the section gives him a right to sue for compensation as if he had not been a workman of the employer, the contract of service in effect is swept away by the Act. It might be otherwise if the contract related to something *dehors* the contract of service, for example, where a workman employed during the day agrees to sleep on the premises, he might contract that the master should not be liable in case of an accident during the night.

[FIELD, J.—Does not the section only aim at the doctrine of *Priestley v. Fowler* (4) and *Wilson v. Merry* (5)?]

It is submitted that it is capable of a larger construction than that, and that as the policy of the Act is to protect workmen, so it is meant that the employer shall not bargain away the benefit of it from the workmen. The Legislature has in other instances imposed restrictions on freedom of contract.

(The point as to want of consideration and mutuality was abandoned.)

R. T. Reid, in support of the rule.—Where the Legislature has restrained freedom of contract, it has done so in express terms—for example, in the Truck Act (1 & 2 Will. 4. c. 77), the Ground Game Act (43 & 44 Vict. c. 47), and the Land Law (Ireland) Act, 1881 (44 & 45 Vict. c. 49); and it would be strange if the Legislature had in this case done inferentially that which it has done expressly in others. If the contention of the other side is correct, it follows that although by arrangement a workman has received 5s. a week extra wages to cover the risks of the employment, he may in the event of injury recover damages from his employer,

(3) 45 Law J. Rep. Q.B. 557; Law Rep. 1 Q.B. D. 599.

(4) 3 Mee. & W. 1; 7 Law J. Rep. Exch. 42.

(5) Law Rep. 1 H.L. Sc. 326.

(2) 37 Law J. Rep. Q.B. 278; Law Rep. 3 Q.B. 555.

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who would thus pay twice over. This cannot have been the intention of the Legislature. All that the Act intended to do was in five specified cases to sweep away the implied term which had been imported into the contract of service by the decision in *Priestley v. Fowler* (4), and this view gives full effect to the language of the section and to the policy of the Act.

FIELD, J.—This is a very important case, and one about which no uncertainty as to what is the law should prevail. The plaintiff sues as the widow of her husband, who was in the employment of Lord Dudley, the defendant, and is entitled, under Lord Campbell's Act (9 & 10 Vict. c. 93), to recover damages for the pecuniary loss occasioned to her by her husband's death. Lord Dudley is the owner of extensive collieries, and on his estate a system prevails by which a fund, subscribed to by both employer and employed, is resorted to in case of injuries happening to the workmen in the course of their employment. The system, no doubt, tends to make the workmen prudent. Now, the Employers' Liability Act, 1880 (43 & 44 Vict. c. 42), was passed with a view to prevent what was thought to be an injustice to workmen—that the employer should escape liability in cases where injury occurred to workmen through the negligence of a person having superintendence. Where the employer was himself guilty of negligence he was clearly liable before the passing of the Act; while it is equally clear that since the Act the negligence of a person not coming within the specified class of persons mentioned does not impose liability upon the employer to make compensation. But before the passing of the Act the House of Lords had decided, in the case of *Wilson v. Merry* (5), that where the injury was caused to the workman by a person in superintendence employed by the same master, the workman could not recover damages from the common master. The intention of the Legislature in the Employers' Liability Act, 1880 (43 & 44 Vict. c. 42), was, in the five specified cases, to get rid of the mere inference established in *Wilson v. Merry* (5). Therefore, but for the con-

tract which was entered into by the workmen on Lord Dudley's estate, the plaintiff would have been undoubtedly entitled to recover in her action against the defendant. The effect of that contract is that the workmen agree not to look to Lord Dudley for compensation in case of injuries occasioned in his employment, and to those terms the deceased in the present case assented, and upon those terms he worked. There is no allegation that fraud or duress was used in making the contract; nor can it be said that it is a mere *nudum pactum*, and without consideration, for Lord Dudley contributed to the fund an amount equivalent to the total contributions of the workmen. Under these circumstances I cannot agree with the learned County Court Judge. First, he held that the contract was void for want of mutuality; but that point was not argued before us by the learned counsel for the plaintiff. Secondly, he held that it was a contract against public policy. I have always thought that by public policy was meant the policy affecting all society, and of which the marriage laws are an illustration. But here the only policy is that of the employed. It was argued that the Legislature meant to protect workmen from entering into foolish bargains; but I fail to see why workmen are not competent to understand their own business. Thirdly, the learned County Court Judge held that the deceased could not contract as against his widow, and bar her right to sue. Has the widow, then, under Lord Campbell's Act, a new right given to her? There is no doubt that, by 27 & 28 Vict. c. 95, she is enabled to sue independently of her character as representative of her husband; but all the statute establishes is a new mode of procedure, and she gains no new cause of action—*Read v. The Great Eastern Railway Company* (2).

The last point argued by Mr. Jelf was suggested by myself; but I think that construction of the section is too narrow. At the time when the Act passed the law stood thus: In contracts between employers and employed, it was an implied term that the latter should not look to the former for compensation when the injury was caused by some person in the common

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employment. The effect of section 1 of the Employers' Liability Act, 1880 (43 & 44 Vict. c. 42), is in five specified cases to remove that implied term. The contract of service still remains, and upon that the workman must rely; otherwise he would have no right of action at all; and it is only in virtue of that contract that he comes upon the employer's premises.

It is better to take a broad view of the Act, and in that view we are not obliged to adopt the construction that the express contract of the deceased shall not take effect. When the Legislature has said that such a contract shall not operate, express words have been used which are not found in this Act; and as a general rule the law of this country imposes no restriction upon freedom of contract, except to prevent great public injustice. I think great public injustice would result if we were to allow the contention of the plaintiff to prevail; and if that is the case it is unlikely the Legislature intended that construction. As Mr. Reid says, a workman might obtain an increased rate of wages for many years to cover the risk of injury, and then, when he was injured, be entitled to receive full compensation.

The strongest argument is that it was the intention of the Legislature to protect workmen. Such protection has been given them by Acts of Parliament dealing with hours of work, unfenced machinery, and in other instances. If it could be shewn in the present case that the effect of our decision would be to deprive large classes of workmen of protection which it had been intended by the Legislature should be given them, I admit that would be a strong argument. But that cannot be shewn. The rule must be made absolute, and judgment entered for the defendant.

CAVE, J.—I am of the same opinion. The main point in the case is this—Can a workman contract himself, or his representatives, out of the provisions of the Employers' Liability Act, 1880? The plaintiff's husband did so contract, and it is said that the contract cannot be enforced on four grounds: First, because it was without consideration; but that argument was given up, as, indeed, it was, untenable. Secondly, because it was against public policy; but in support of that no autho-

rity has been cited, and I can see no reason for the proposition; for to hold that it was against public policy would be to interfere with freedom of contract, which Judges will not narrow unless the case is clearly brought within the principle of those decisions as to contracts which are against public policy. Thirdly, it was argued that, although a workman may contract as to his own rights, he cannot bargain away those of his representatives, under Lord Campbell's Act. Now, Lord Campbell's Act was passed to obviate the hardship that it was felt existed in the case of a man having died through injuries, and having obtained no compensation, and leaving behind him persons in certain degrees of relationship who were not entitled to bring an action. *Read v. The Great Eastern Railway Company* (2) has decided that no new cause of action is given by the Act. By that decision we are bound, and no cases have been cited that conflict with it. As to the last point arising on the language of the section, I do not think that language has been happily chosen. [His Lordship read the section.] If the words are taken in their literal sense, the deceased was a mere stranger, and he simply came upon the defendant's premises as a mere licensee, and would not, therefore, in the majority of cases, be entitled to maintain an action. What the Legislature meant was, I think, to remove in certain cases the effect of the decision in *Priestley v. Fowler* (4), which had laid down the law that a workman could not recover damages for injuries caused by the negligence of a fellow workman, and that this was an implied term in the contract of service. The Courts of common law have always had doubt as to whether any right of action existed other than one arising out of contract or tort, and they accordingly adopted the doctrine of implied contracts. This doctrine was subsequently extended by the House of Lords in the case of *Wilson v. Merry* (5), which decided that no action lay at the suit of a workman injured by a person in a position of superintendence in the same employment. The Employers' Liability Act, 1880, has removed the effect of the decision in *Wilson v. Merry* (5), and a workman injured may, consequently, bring an

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action in the five cases specified in the section; and it is no longer open to the employer to say, in answer to such action, that the workman has impliedly contracted to bear the consequences of the employment. That, in my opinion, is the natural meaning of the statute. The rule must be made absolute.

Solicitors—Stokes & Robinson, agents for W. Waldron, Brierly Hill, for plaintiff; Benbow, Saltwell & Tryon, for defendant.

1882.	}	
June 28, 29.		WALL v. TAYLOR.
August 3.		WALL v. MARTIN.

Copyright — Musical Composition — Sole Liberty of Performing—Place not of Dramatic Entertainment — 5 & 6 Vict. c. 45. s. 20.

A musical composition was publicly performed without the consent of its proprietor: — Held, that the performance, although not at a place of dramatic entertainment, was contrary to 5 & 6 Vict. c. 45. s. 20.

Rules *nisi* obtained on behalf of the plaintiff for a new trial.

The facts and arguments appear in the judgment.

Cripps, for the defendant Taylor.
Wilberforce, for the defendant Martin.
Fillan, for the plaintiff.

Cur. adv. vult.

The judgment of the Court (1) was delivered (on August 3) by

CAVE, J.—These are two actions, brought by the assignee of the author of a musical composition or song called "Will o' the Wisp," against the defendants, to recover damages for the performance by them of such musical composition at a place of public entertainment; and the question in these cases is whether the sole liberty of performing a musical composition conferred by 5 & 6 Vict. c. 45. s. 20,

(1) Field, J., and Cave, J.

on the author thereof, extends to the performance of such musical composition at all places of public entertainment, or is confined to its performance at a place of dramatic entertainment. It has, indeed, been argued that at both the entertainments in question pieces of a dramatic nature were represented so as to give to the entertainments the character of dramatic entertainments; but we think it better to give our decision upon the more important question first stated.

Previously to 1833 the liberty of performing dramatic pieces was not the subject of property; but by 3 & 4 Will. 4. c. 15, after reciting that it was expedient to extend the provisions of 54 Geo. 3. c. 156, relating to copyright in printed books, it was enacted that the author of any tragedy, comedy, play, opera, farce or any other dramatic piece or entertainment, or his assignee, should have, as his own property, the sole liberty of representing, or causing to be represented, at any place of dramatic entertainment any such production not printed and published by the author or his assignee, and should be deemed and taken to be the proprietor thereof for the term therein mentioned. Section 2 enacted that if any person should, during the continuance of such sole liberty, represent, or cause to be represented, without the consent in writing of the author, or other proprietor, at any place of dramatic entertainment any such production, or any part thereof, every such offender should be liable for each and every such representation to the payment of an amount not less than 40s., or to the full amount of the benefit and advantage arising from such representation, or the injury or loss sustained by the plaintiff therefrom, whichever should be the greater damages, to the author or other proprietor of such production.

By 5 & 6 Vict. c. 45. s. 20, after reciting that 3 & 4 Will. 4. c. 15 was passed to amend the law relating to dramatic literary property, and that it was expedient to extend to musical compositions the benefit of the Act in recital and also of that Act, it was enacted that the provisions of 3 & 4 Will. 4. c. 15 and of that Act should apply to musical compositions, and that the sole liberty of repre-

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senting or performing, or causing or permitting to be represented or performed, any dramatic piece or musical composition should endure and be the property of the author thereof and his assigns for the term therein mentioned. Section 21 provided that the person who should at any time have the sole liberty of representing such dramatic piece or musical composition should have and enjoy the remedies given and provided in 3 & 4 Will. 4. c. 15 during the whole of his interest therein as fully as if the same were re-enacted in that Act.

In *Russell v. Smith* (2) the same question which we have now before us arose, but was not decided. It was, however, held in that case that a room in which a dramatic piece is performed, and to which persons paying for tickets are admitted for the purpose of hearing it, is for the time a place of dramatic entertainment within the meaning of the statutes, although the room is ordinarily used for different purposes, or, in other words, that the epithet "dramatic" in the clause "place of dramatic entertainment" has in 3 & 4 Will. 4. c. 15 no particular signification.

In the present case, it is contended that the words "place of dramatic entertainment" in the earlier statute are incorporated in the later one, and that the right of performing musical compositions given by that Act is confined to the right of performing them in places of dramatic entertainment. No sensible reason was or, as it seems to us, could be given why the right of performing a musical composition thus given should be so limited. The object of the statute seems to be that one man shall not make money by performing a musical composition of which another person is the author without the leave of the author; and it is to us impossible to conceive any ground for a distinction between performing the musical composition at a place of dramatic entertainment or at a place of entertainment of any other kind. The 5 & 6 Vict. c. 45. s. 20 gives to the author or his assigns the sole liberty of performing a musical composition, and does so, as was pointed out in *Russell v. Smith* (3), without repeating in terms the re-

(2) 12 Q.B. Rep. 217; 17 Law J. Rep. Q.B. 225.

(3) 15 Sim. 181; 15 Law J. Rep. Chanc. 340.

ference contained in the former Act to a place of dramatic entertainment; and the subsequent provision in the same section that the first public performance of a musical composition shall be deemed equivalent to the first publication of any book seems to us to point out the true restriction which we ought to adopt, and to shew that the right of representing a dramatic piece, or performing a musical composition, which is by these statutes conferred on the author is the right of representing or performing them in public. If, as is contended by the defendants, the right of performing musical compositions given by these statutes is restricted to the right of performing them at a place of dramatic entertainment, and if, as the jury have found, the places where these songs were performed were not places of dramatic entertainment, the judgment should in each case have been entered for the defendants, for the proprietor of a musical composition has no other right of performing them than that given by the statute. But if, as we think, the right conferred is the right of performing them in public, the plaintiff was entitled to a verdict for 40s. in each case; and, as there are no facts in dispute which render a new trial necessary, judgment must now be entered for him for that amount in each action, with costs, including the costs of this application.

Judgment for the plaintiff.

Solicitors—T. L. Allen, for plaintiff; Wilkinson & Howlett, for defendant Taylor; G. Lucas, for defendant Martin.

[IN THE HOUSE OF LORDS.]

1882. } BURNAND AND OTHERS v.
July 10, 11. } RODOCANACHI AND OTHERS.

Marine Insurance—Valued Policy—Total Loss—Alabama Claims—Compensation paid by State for Difference between Real and Insured Value—Right of Underwriters to recover.

The valuation in a valued policy is conclusive between the parties only for the pur-

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pose of the contract itself and of the rights arising from it.

Compensation paid aliunde to the assured, in respect of loss not covered by a valued policy, cannot be recovered by an underwriter who has paid as for a total loss; since the loss insured against is not diminished by the compensation, and the assured is not estopped from alleging that there was an excess in value above the amount agreed in the policy.

This was an appeal from a judgment of the Court of Appeal which reversed one of Lord Coleridge, C.J. The case is reported in the Courts below 49 Law J. Rep. C.P. 732; 50 *ibid.* C.P. 284; Law Rep. 5 C.P. D. 424; *ibid.* 6 Q.B. D. 633.

The respondents had insured with the appellants a cargo of tobacco by two valued policies of the aggregate amount of 15,000*l.* The insurance included war risks; and on the insured voyage the cargo was destroyed by the *Alabama*, a man-of-war belonging to the Confederate States of America. The underwriters thereupon paid the 15,000*l.* as for a total loss.

A sum of money was afterwards awarded, by the arbitrators appointed under the Treaty of Washington, to be paid by Great Britain to the United States for damages caused by the *Alabama* and other cruisers.

In June, 1874, an Act of Congress of the United States was passed constituting a Court for the distribution of this sum among American subjects injured by Confederate cruisers.

The 12th section of the Act was as follows: "No claim shall be admissible or allowed by said Court for any loss or damage for or in respect to which the party injured, his assignees or legal representatives, shall have received compensation or indemnity from any insurance company, insurer or otherwise, but if such compensation or indemnity so received shall not have been equal to the loss or damage so actually suffered, allowance may be made for the difference. And in no case shall any claim be admitted or allowed for or in respect to unearned freights, gross freights, prospective profits, freights, gains or advantages, or for wages of officers and seamen for a longer time than one year next after the

breaking up of a voyage by the acts aforesaid. And no claim shall be admissible or allowed by the said Court by or on behalf of any insurance company or insurer, either in its or his own right, or as assignee or otherwise in the right of a person or party insured as aforesaid, unless such claimant shall shew to the satisfaction of the said Court that during the late rebellion the sum of its or his losses in respect to its or his war risks exceeded the sum of its or his premiums or other gains upon or in respect to such war risks; and, in case of any such allowance, the same shall not be greater than such excess of loss; and no claim shall be admissible or allowed by the said Court arising in favour of any insurance company not lawfully existing at the time of the loss under the laws of some one of the United States. And no claim shall be admissible or allowed by said Court arising in favour of any person not entitled at the time of his loss to the protection of the United States in the premises, nor arising in favour of any person who did not at all times during the late rebellion bear true allegiance to the United States."

The respondents made a claim for 6,557*l.* 7*s.* 3*d.*, being the difference between the actual value of the cargo and the 15,000*l.* received from the appellants. The Court awarded 2,803*l.* 17*s.* 2*d.*

The appellants claimed to recover this sum from the respondents upon the ground that having paid the agreed value of the cargo as upon a total loss they were subrogated to all the rights of the respondents in respect of the cargo.

Lord Coleridge, C.J., who tried the case without a jury, gave judgment for the plaintiffs; but his decision was reversed by the Court of Appeal.

The plaintiffs appealed.

Butt (Cohen and Hollams with him), for the appellants.—The appellants paid the full agreed value as for a total loss, and thereupon were subrogated to all the rights of the assured—*The North of England Insurance Association v. Armstrong* (1), *Darrell v. Tibbits* (2), *Simpson v. Thomson*

(1) 39 Law J. Rep. Q.B. 81; Law Rep. 5 Q.B. 244.

(2) 50 Law J. Rep. Q.B. 33; Law Rep. 5 Q.B. D. 560.

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(3), where Lord Cairns speaks of "the well-known principle of law, that where one person has agreed to indemnify another, he will, on making good the indemnity, be entitled to succeed to all the ways and means by which the person indemnified might have protected himself against or reimbursed himself for the loss," *Stewart v. The Greenock Marine Insurance Company* (4). The distribution of the fund in the hands of the United States Government was not so pure an act of grace as has been contended. There was a moral obligation to apply it in compensation for losses occasioned by the *Alabama*. The case falls within the principle of *Randall v. Cockran* (5) and *Blaauwpot v. Da Costa* (6). The respondents cannot say that the compensation was paid for loss not covered by the policies; they are estopped from doing so by the valuation, which is conclusive between assurer and assured for all purposes except for the purpose of deciding whether there has been a constructive total loss. Nor can the Act of Congress affect the rights of the parties under the contract, or make that which is in fact salvage not to be salvage.

He also cited *Mason v. Sainsbury* (7) and *Gracie v. The New York Insurance Company* (8).

The Attorney-General (Sir H. James) and *Gaythorne Hardy*, for the respondents, were not called upon.

THE LORD CHANCELLOR (LORD SELBORNE).—This is a short but interesting and important question. Your Lordships have heard a very able argument, and have had the benefit of considering the able opinions of the learned Judges in both the Courts below, and I believe there is no doubt in the minds of any of your Lordships that the judgment under appeal is right.

Now, if I may venture to do so, with that sincere respect which I always feel for everything which falls from Judges so eminent as Lord Coleridge and Lord

Justice Baggallay, I will indicate what I think is the fallacy in the reasoning of those learned Judges. It is this: they have taken the valuation of the policy as conclusive, and as operating, by way of estoppel, between these parties for a purpose for which, as it appears to me, it is not conclusive, and does not estop them. For the purpose of the contract of insurance, and for the purpose of all rights arising from that contract, it may well be that the valuation in a valued policy is conclusive, and that the effect of it may be that, for those purposes, the assured is not entitled to say, "My loss has been greater than that which was covered by the policy." He cannot say that for the purpose of withholding from the insurer any indemnity or right, by way of subrogation or substitution, to which, by the true legal result of the contract, the insurer is entitled.

Whenever it is sought to set up an estoppel founded upon the valuation for any purpose going beyond that which I have endeavoured to indicate, the law does not justify such a use of it. It is admitted that that is the English law when it is attempted to use the valuation for the purpose of determining what is and what is not a constructive total loss.

Now it appears to me that, for every other purpose collateral to the contract, for the purpose of every question as to whether a particular claim to something which has arisen *aliunde* is or is not within those rights which result in law from the contract, there is no more reason for holding the valuation to be conclusive between the parties, or to operate by way of estoppel, than there is in the case in which it is admitted that in England it does not so follow. The title to a particular indemnity, granted in particular terms out of a particular fund at the disposal of the United States of America, by an Act of the Supreme Legislature of the United States, is not a title which, I think, can possibly result in law from the contract itself. If such a right exists it must exist by the combined effect of the contract between the assurer and the assured and the Act of Congress. It cannot follow from the contract of insurance alone, without the Act of Congress.

(3) Law Rep. 3 Sc. App. 279.

(4) 2 H.L. Cas. 159.

(5) 1 Ves. sen. 98.

(6) 1 Eden, 130.

(7) 3 Doug. 61.

(8) 8 Johnson, N. Y. Rep. 183.

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If the Act of Congress is consistent with such a right, having regard to the contract of insurance; still more, if the Act of Congress, fairly and equitably interpreted, confers such a right, there is no reason whatever why the right should not receive full effect. But how is it possible that such an effect can be produced as to a right which could have no existence apart from the Act of Congress if the Act of Congress itself expressly excludes it? I cannot for a moment understand the doctrine of moral right and obligation or implied trusts affecting supreme Governments and independent States as applied to a question of this kind. The rights resulting from the contract must be such as, in point of law, the contract makes; the rights resulting from the Act of Congress must be such as, according to its true construction and legal effect, the Act of Congress makes; and the rights resulting from both together must be such as are consistent with and flow from the legitimate operation of the whole. Here it is admitted that there is in the Act of Congress everything said and done which a supreme Legislature could possibly say or do for the purpose of excluding the present claim, and attributing that fund which has been appropriated in this case to the sufferers by the capture, not to the valued part, but to the unvalued part, of the loss. That distinction, which in my opinion does exclude for this purpose the part covered by the valuation of the policy of insurance, is made by the Act of Congress upon the facts which are admitted between the parties in the case. It was a true and *bona fide* valuation, but it did not cover the actual loss. The fund awarded by the Act of Congress of the United States is only for that part of the actual loss which the valuation did not cover and which the insurers have not paid.

Now I think, whatever views of moral obligation may be entertained with regard to the Act of Congress, that for all the inferences to be drawn from the passing of that Act, it is correctly described by Lord Justice Brett as an act of pure gift from the American Government. We cannot go behind it and enquire into the motives for an Act of a supreme Legis-

lature on a matter within their legislative powers, and, that being so, I am entirely unable, for any practical purpose, to distinguish this case, in which the supreme Government of the United States, having absolute power of disposition over this fund, have by a solemn Act of their Congress declared that it should be given, not in respect of the loss which had been indemnified as between the assurers and the assured, but in respect of the loss which the assured had suffered beyond that amount, from the case of a voluntary gift by an individual in the same terms. Mr. Butt, in his able argument, which was as candid, I think, as it was able, admitted that, if a member of the family of the shipowners who had suffered the loss, or the owner of the cargo had, after the insurers had paid the loss, made a will in the precise terms of this Act of the Congress of the United States, and had given a fund, over which he had absolute control, for the purpose of indemnifying his relatives or his friends for that portion of the loss which the insurance had not covered, the insurers could not have claimed the gift. I am unable to see, for any legal purpose, a distinction between such a case and the present.

Now, it is a satisfaction to me to find that, in taking that view of the matter, I only differ from Lord Justice Baggallay so far as this. He thought that the cases which he mentioned, before Lord Hardwicke and Lord Northington—*Randall v. Cockran* (5) and *Blaauwpot v. Da Costa* (6)—under the Order in Council of the 18th of June, 1741, were authorities in point and covering the present case. With the greatest respect for that very learned Judge I am unable to agree in that conclusion. I should not have had any difficulty at all in this case in upholding the claim of the appellants if the Act of Congress of the United States had been in terms similar to the terms of that proclamation. Whatever language may have been used by Lord Northington as to the sort of analogy to the right of a British subject who had suffered from Spanish depredations to pursue a remedy against Spain in this country, I am disposed, notwithstanding that, to think that, up to the point of time at which the Spanish

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Government paid compensation to the British Government, and at which the King of Great Britain issued his proclamation as to the way in which the money was to be distributed, there is a similarity between the present case and the cases before those two learned Judges. But the difference is here: that when the King of Great Britain came to distribute the fund which arose from the seizures of goods which had been taken, by way of reprisal, from Spain, the Crown directed it to be divided into moieties: one moiety was to go to the officers and sailors of the ships that had made the captures, but the other moiety was to be paid to and amongst such of his Majesty's subjects as had suffered by the unjust seizures and depredations of the Spaniards. There was no such exclusion of insurers as there is in the present case. In point of law, and of equity, too, the true result of the contract of insurance was that the insurers had taken the loss upon themselves, and were entitled to all indemnities received in respect of the loss. They were sufferers, in equity, at all events, if not in the strictest legal sense, from those depredations. They were to take the place of the original sufferers, and to have all their rights, and, therefore, according to the true effect of that proclamation, it was a grant by the Crown in their favour. If anything of the same sort had been done by the Act of Congress in the present case it would be very probable that your Lordships would come to the same conclusion. I see that Lord Justice Brett expresses some hesitation upon that subject. It is not necessary for me to say more about it, excepting that I do not myself share that hesitation. I put the matter entirely upon the ground that the terms of the grant, in the cases which have been referred to, not only impliedly but actually, according to their fair and legitimate construction in law and equity, operated in favour of the insurers, who, having paid the loss, were entitled to be recouped.

Well, then, those cases appear to me to be clearly and broadly distinguishable from the present case. Upon other points I think that the view taken by the majority of the Court of Appeal is correct,

and therefore I move your Lordships to dismiss this appeal with costs.

LORD BLACKBURN.—I am of the same opinion. The point is one which, when one comes at it (and I think I should say in justice to Mr. Butt that he has avoided making any false points or anything which would prevent our coming at it, and has brought us to it very well and clearly) is a very short and clear one, and one upon which I myself have no doubt at all at present.

The general rule of law (and it is obvious justice) is that where there is a contract of indemnity (it matters not whether it is a marine policy, or a policy against fire on land, or any other contract of indemnity), and a loss has happened, anything which tends to reduce or diminish that loss reduces or diminishes the amount which the indemnifier is bound to pay; and if the indemnifier has already paid it, then, if anything which tends to reduce or diminish the loss comes into the hands of the person to whom he has paid it, it becomes an equity that the person who has already paid the full indemnity is entitled to be recouped by having that amount back. The obvious justice of that makes me think that it is not necessary to say more than that it is, as I understand it, the law distinctly laid down.

The first question which arises here is this—There had been a policy of insurance, and a total loss by capture and destruction of the property insured, and a payment of the full value insured—a payment of the total loss under that policy. Subsequently to that (for I see upon looking at the proceedings that it was subsequently to that payment) there came the Treaty of Washington; and afterwards, in consequence of an Act of Congress, a sum of money was paid to the person who had recovered and received payment under the policy; and the question, I apprehend, comes to be, was that sum paid so as to be a reduction or diminution of his loss? in which case it clearly belongs, in my mind, to the plaintiffs; or was it not paid in reduction of that loss for which the plaintiffs had indemnified him?

Now the cases which have been cited,

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namely, *Randall v. Cockran* (5), and *Blaauwpot v. Da Costa* (6), bear this resemblance to the present case, that after the loss had occurred there was a sum of money coming, in those cases, into the hands of the English Government; and the king was pleased (for I think it is clear that he was not bound) to say that half of that money should be applied to those who had suffered from the captures. It was certainly, I think, a voluntary gift on the part of the Crown, and was for the benefit of the sufferers. But then, I think, that gift being made, as it was made, for the benefit of those who had suffered from the captures, and the money being paid for that purpose, it did diminish the loss, and consequently the benefit of it enured to the persons who were bound to indemnify; and it was so decided in those two cases. It was not because the king was bound to pay the money—he was not; it was not because there was a moral obligation to pay it, as if it had been said that our Government would have been shabby if they had not done it, it was because *de facto* there was a payment which prevented or diminished, *pro tanto*, the loss against which the insurers were bound to indemnify the assured.

There was a subsequent case, which has not been cited, which proceeded upon an error, and has been since reversed—I mean the case of *Godsall v. Boldero* (9)—where a person had insured the life of Mr. Pitt, having no other interest in his life than as a creditor of Mr. Pitt, which gave him an interest, and the House of Commons voted, out of pure grace and favour, a large sum of money to pay Mr. Pitt's debts, and they paid this debt. The Insurance Company set up the defence that this was a contract of indemnity, and that Mr. Pitt's debt having been paid, there could not be a right to recover against them, and they could not be made liable. Lord Ellenborough, falling into a blunder which has been since corrected, thought that the contract of life assurance was a contract of indemnity, and accordingly held that that was a good defence on the part of the insurance company. I have been told by people connected with

insurance companies, and other people with whom I have been brought into contact in the course of my professional experience, that no sooner had that been done than there was such an outcry that every one said he would never insure with a company which was capable of doing such a shabby thing. Consequently, the company (the Pelican Insurance Company), of which Mr. Boldero was the chairman, instantly paid the whole loss and the whole of the costs, and published everywhere that they had done so (10). Nevertheless, Lord Ellenborough's decision stood, until it was decided in the Exchequer Chamber in a case, the name of which I have forgotten [*Dalby v. The India and London Life Assurance Company* (11)], that that case went altogether upon a mistaken idea that a contract of life insurance was a contract of indemnity, whereas it was nothing of the sort; and therefore the case of *Godsall v. Boldero* (9) went upon a wrong ground altogether. But if it had been a contract of indemnity, the grant of Parliament to pay Mr. Pitt's debts would have prevented the man's sustaining any loss by the death of Mr. Pitt, and consequently the decision would have been right. I mention this merely to shew that the question is not whether the money was voluntarily paid or not voluntarily paid, but whether *de facto* the money which was paid did reduce the loss.

Now, in the present case the Government of the United States did not pay it with the intention of reducing the loss. Lord Coleridge says in his judgment, and says very truly, that the Government of the United States cannot by any action of theirs deprive a man suing in this country of any right which he has. I quite agree in that; but I think that Lord Coleridge, if he had taken the same view as I do of the matter, would have seen that an Act of the Congress of the United States might effectually prevent any such right arising. If once the right had vested to recover any

(10) In *Barber v. Morris*, 1 Moo. & R. 62, evidence was given that the business of the Pelican Company had suffered in consequence of *Godsall v. Boldero* (9), and that their practice was not to act on that decision.

(11) 15 Com. B. Rep. 365; 24 Law J. Rep. C.P. 2.

(9) 9 East, 72.

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such sum, of course an Act of Congress could not take it away; but when Congress in express terms say, "We do not pay the money for the purpose of repaying or reducing the loss against which the insurance company have indemnified, but for another and a different purpose," it effectually prevents the right arising. Lord Justice Bramwell in his judgment has used the phrase, "It was not paid as salvage." I should myself prefer to use my own phrase, expressing the same idea, and to say that it was not paid in such a manner as to reduce the loss against which the plaintiffs had to indemnify the defendants; it is the same thing, but slightly differently expressed.

Now that, I think, would dispose of the case, if it were not for a point which Mr. Butt has urged, or rather submitted (for I do not think he argued very strongly in favour of it), namely, that because this was a valued policy of insurance, the value being put at 15,000*l.*, the defendants could never, under any circumstances, as against the plaintiffs, set up the fact, which is a fact, that the value of the property exceeded 15,000*l.* I think that contention does look so exceedingly artificial when it is applied to these facts, that one might almost rest there and say, "It cannot be." I think it is plain that the reasons for which the value has been held to be conclusive extend no further than this, that for the purposes of the contract between the parties, the policy may be valued at so much. Whether the principle was rightly applied in the case of *The North of England Insurance Association v. Armstrong* (1), it is not necessary now to say. I own that if I had a similar case to decide, sitting in the Court of Error, I should pause before I said that it was rightly decided; but whether that decision was right or wrong it is not at all necessary to consider here. It is plain to my mind that, the valuation being only for the purpose of the policy of insurance, and for the purpose of binding the defendants to admit it in favour of the plaintiffs, this sum was not paid in such a way as to reduce the loss against which the plaintiffs had contracted to indemnify them, because by agreement between the parties the amount they had contracted to pay was not to exceed 15,000*l.* That cir-

cumstance appears to me quite immaterial.

For the reasons which I have stated, I quite agree in thinking that the judgment as it stands is right, and ought to be affirmed.

LORD WATSON.—I have come to the same opinion as your Lordships upon this point, which is one of novelty but not of great difficulty, and which arises, I think, entirely upon the terms of the Act of Congress. If compensation has, under that statute, been awarded by the American Congress to the respondents in respect of their losses, then I take it that the same rule would be followed as was adopted by the Courts in the two cases which have been referred to of *Randall v. Cockran* (5) and *Blaauwepot v. Da Costa* (6). In that case, the money voted would have been received by the respondents towards indemnification for the loss against which they were insured; and upon the principle that one who has been already indemnified against that loss must impart to those who have indemnified him any benefits which he subsequently obtains of that description, the appellants would have been entitled to a decree. But in this case, the Act of Congress declares in very express terms, when you take the whole of section 12 together, in the first place that no compensation is to be given by the Commissioners on account of loss which has been insured against or covered by insurances; and secondly, that underwriters are not to receive any benefit from the funds distributed under the Act, and that the compensation given to any claimant must be given to compensate him for any loss either from want of insurance or from being under-insured. In the present case it is perfectly obvious, from the statements made by the parties upon which they agree, that compensation was awarded to the respondents upon the second of these grounds, namely, in respect that the insurance which they effected fell short of protection against the whole loss which they sustained.

Now it is conceded that compensation might be given to the respondents in these very terms and upon this footing by any benevolent individual who, being under no

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obligation to give it, chose to indemnify the respondents; and it is conceded that in the event of his doing so, no claim would lie to that money at the instance of the underwriters, the appellants. Why the American Congress were not in a position to do the same as any third party might have done, not being under any obligation to do so, I have not been able to understand in the course of this argument; and I do not think that any cause whatever has been shewn why they should not do so. Legal obligation is out of the question, but we have heard something about moral obligation. I do not at all understand what that means. I think that this fund was entirely at the disposal of the Legislature of the United States, that it was an act of grace on their part to assign it and give it either to one or to the other of the losers by the acts of the *Alabama*, and that in giving it as they have done, subject to a condition, they were certainly not violating any moral obligation whatever, but were attaching a condition to that compensation which they gave, which condition was not only entirely within their power, but which they might, according to the view that I take of it, attach to the gift without violating any legal responsibility or moral obligation.

Those being my views, I entirely concur in the disposal of this case in the manner in which your Lordships suggest.

LORD FITZGERALD.—I concur in the judgment pronounced by the noble and learned Lord on the Woolsack, and in the reasons he has expressed for that judgment. I adopt also his criticisms on the authorities cited, and his limitation to the rule which was contended for by the appellant as the result of some of those authorities—namely, that on a valued policy the value agreed on was as between the parties conclusive under all circumstances and for all purposes, whether incidental to the contract, or collateral and subsequent. I hope that I am not exceeding my province in saying that I should have thought this a very plain case if it had not been that I was induced to hesitate on reading the judgments of the Lord Chief Justice and Lord Justice Baggallay,

whose opinions are of such weight and justly entitled to so much respect.

The case presented itself to my mind thus—This is really the old action for money had and received. The parties have expounded by their pleadings the facts on which they respectively rest. The plaintiffs allege that the defendants have received a sum of money which in equity and good conscience they ought not to retain, but should pay over to the plaintiffs. The defendants admit they received the sum in controversy through the judgment of the American tribunal, but deny the plaintiff's equity.

I have been wholly unable to discover on what the plaintiffs' supposed equity rests.

I agree with Lord Justice Brett that the United States Government might have done as it pleased with the whole 3,500,000*l.*, and that when it was devoted to the purposes specified in the Act of Congress it may be regarded as a free gift for those purposes.

The 12th section prohibits its application to such a claim as the plaintiffs. The whole matter is well expressed by Lord Justice Bramwell when he says in effect that the defendants received the money under the Act of Congress and judgment of the American Court to keep for themselves, and not to pay it over to the plaintiffs.

Order appealed from affirmed, and appeal dismissed with costs.

Solicitors — Walton, Bubb & Co., for appellants; Markby, Stewart & Co., for respondents.

[IN THE COURT OF APPEAL.]

1882. }
 July 7. } MORGAN v. THOMAS.*

Will—Construction—Devise to A for life, and after his death to "his issue and their heirs."

A testator, who died in 1834, devised land to his son L. for life, "and after his decease to his lawful issue and their heirs for ever, if any; if he should die without leaving any children," then over:—Held, that L. took an estate for life only, and not an estate tail.

This was an appeal from a decision of Cave, J., reported *Ante*, p. 289, where the facts and the arguments are fully stated.

Upjohn, for the appellant.

Anstie, for the respondent, was not called upon.

JESSEL, M.R.—This case has been argued in the only way it could be argued, namely, that we were utterly to disregard the ordinary rules of construction with respect to this will, and, without any reference to reason, to hold ourselves bound to construe it contrary to its pretty obvious meaning, by reason of certain cases on other wills which have settled the law in such a way that we must so construe it. That may be. There are cases with reference to real property that are binding and have that effect; and, therefore, in stating that is the mode in which it was argued, and the only mode in which it could be argued, I am by no means reflecting on the arguer.

The first point to be considered is, what does the will mean? We must look at the words very carefully. It is a will under the old law, and I may say in passing that these questions cannot arise under the new law at all. The testator gives to his son Lewis all his freehold property whatsoever and wheresoever situate "during his natural life." Now, although those words have been somewhat disregarded, and especially in cases which come under the rule in *Shelley's Case* (1), they are words of great importance in con-

struing the will, and must not be disregarded. Then he goes on, "and after his decease, to his lawful issue and their heirs for ever, if any,"—the words "if any," of course refer to the issue; therefore, the gift is not to "their heirs," but the "issue":—"if he shall die without leaving any children born in wedlock, I give the said freehold property to my son Evan and his heirs for ever." Now, the first observation to be made is, it is to "the lawful issue and their heirs for ever." Now, "their heirs for ever" are technical words in use at the time for describing an estate in fee. Therefore, *prima facie*, the gift is to the issue and their heirs for ever, which will give them an estate in fee; and the gift is to the lawful issue and "their heirs," which shews that "lawful issue" is plural. It is obvious on reading the will that the testator thought they would take together; and it is not consistent with that word "their" to read the gift as made to the first son of Lewis, and then to the second son, and then to the third son, and so on, which is the way an estate tail would devolve, unless the sons left children; and if they left children, it would be to the first son, and his eldest son, and so on. It does not fit naturally. Then we come to this, "if he shall die without leaving any children born in wedlock," the property is given to the son Evan and his heirs. We must consider, therefore, what he means by "issue," and what he means by "children." Now what does the word "issue" mean? "Issue" has a popular meaning, meaning "children," and a legal meaning, that is to say, a technical meaning, meaning "descendants." It is a term of flexible meaning, and the question is, in which sense is it used by this testator? "Children," again, has a popular meaning, meaning the offspring of the first generation, and it has a legal meaning, which is the same. But it is quite true that you may have a context which shews that "children" was not used in the sense of "children"; and you can have a context of that kind with respect to almost any word in the language. I have often commented on this, and I have used a rather ridiculous example in the Rolls Court that I will repeat here for the benefit of all concerned, to shew that the way in which we deal with words is

* *Coram* Jessel, M.R.; Sir James Hannen; and Lindley, L.J.

(1) 1 Rep. 94.

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an erroneous method of applying the rules of construction. You will find it said in some cases that "or" means "and"; but "or" never does mean "and." There is a context which shews it is used for "and" by mistake. The example I have given is this. Suppose a man said, "I give the black cow on which I usually ride to A. B.," and he rode on a black horse. Of course the horse would pass, but I do not think that even a modern annotator of cases would put in the marginal note "cow" means "horse." You correct the wrong word used by the testator by the context. When you find it was an animal on which he daily rode, you would say he meant the horse. It is not that the word has a different meaning from that which it usually bears, but the context shews that the testator has been mistaken in using one word for another. In this case, in treating the words "issue" and "children," I apply their different meanings. As I have said, the word "children" has both at law and in common parlance only one meaning, though you may by a context shew it is improperly used by mistake for "descendants," or something else. But the word "issue" has two meanings. It may mean "descendants," and it may mean "children"—the common meaning of the word in ordinary parlance being "children," though in legal parlance its proper meaning is "descendants." Now, you require a context of a different character to shew that the testator has made a mistake in writing one word for another from what you do when you wish to ascertain which of the two meanings the word properly bears is to be affixed to it. Therefore, it appears to me that we should read "issue" here as meaning "children," and "children" as being used in no other sense than its ordinary meaning. Looking at it like that, it appears to me tolerably plain that in this case "issue" means "children," and nothing else. If so, of course the appellant fails.

Now is there anything else? There is a long series of authorities quoted by Mr. Upjohn, with a research that does him credit, which shews this—that every one of the words I have referred to standing alone will not do; that there are cases in which express estates-for-life have been held not

to be sufficient indication of intention to prevent the general rule being carried out by giving the first devisee (the tenant-for-life) a larger estate than an estate-for-life; there are cases in which the word "issue" occurs; there is one case in which "their heirs" occur, and that is followed by a general gift over on death without issue, which probably determined the case; there are cases in which "if any" are used, which will not do; and I have no doubt there may be a case in which a gift over on death "without any children" will not do. But still there is no case that I am aware of where all these things combined have been held insufficient; and, therefore, we are not overruling or interfering with any decision which says, when we find this particular combination, we may not give effect to what appears to be the fair meaning of the words of the will and carry out the expressed intention of the testator. It is unnecessary for me, after the elaborate judgment of Mr. Justice Cave, to refer to what Lord St. Leonards says, but I agree with the learned Judge in the Court below that there is enough in *Montgomery v. Montgomery* (2), and the cases there cited, to cover this case, if we wanted technical authority for that purpose. In my opinion, the appeal must be dismissed with costs.

SIR JAMES HANNEN.—So far as I have been able to examine the authorities, I find the general result to be that though "issue" is, *prima facie*, a word of general meaning, it may mean "children" and become a word of purchase. Here, in the first place, it is followed by the words "and their heirs for ever," which, according to the *dictum* of Lord St. Leonards in *Montgomery v. Montgomery* (2), will make the issue take as purchasers; so that the first devisee takes an estate for life only, and not an estate of inheritance. And this is the view of Lord Hatherley in *Kavanagh v. Morland* (3). But further, it appears to me that the gift supplies a context which tends to shew that "issue" in the passage in question means "children." The gift over is to take effect if the son

(2) 3 Jo. & Lat. 47.

(3) Kay, 16; 23 Law J. Rep. Chanc. 41.

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Lewis should die without leaving any children; and, as Lord St. Leonards says, the testator translates his own language and shews that by "issue" he meant "children." For these reasons, I concur in the appeal being dismissed.

LINDLEY, L.J. — I am of the same opinion.

Solicitors—J. H. Wrentmore, agent for James & Co., Merthyr Tydvil, for appellant; Crowder, Anstie & Vizard, agent for Thos. Rees, Cowbridge, for respondent.

[IN THE COURT OF APPEAL.]

1882. }
May 25, 26. } ; FORD v. KETTLE.*

Bill of Sale—Registration—Affidavit of Execution and Attestation—Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), ss. 8 and 10.

The affidavit of execution and attestation filed on the registration of a bill of sale is not sufficient if it merely verifies the signature of the attesting solicitor to the attestation clause; it must state clearly that the attesting solicitor did, in fact, attest the deed—that is, that he was present when the grantor executed it.

Sharpe v. Birch (Ante, p. 64; Law Rep. 8 Q.B. D. 111) followed.

By a bill of sale, dated the 19th of December, 1881, W. H. Hooper mortgaged his stock-in-trade, furniture and other chattels to Richard Ford, to secure the sum of 422*l.* and further advances. The witnesses to the execution of this deed were one Burbidge, a solicitor, and Symonds his clerk. The attestation clause stated that the deed had been executed by Hooper in the presence of the solicitor, by whom the effect had first been explained to him.

The affidavit filed on registration of the bill of sale was made by Symonds, and ran as follows:—"The paper writings hereunto annexed are a true copy of a bill of sale, and of every schedule or inventory thereunto annexed or therein referred to, and

of every attestation of the execution of such bill of sale. I was present, and saw W. H. Hooper, in the said bill of sale named, who resides at No. 66 Broad Street, Portsmouth, and carries on business at Nos. 50 and 66 Broad Street, Portsmouth, and is an optician, execute the said bill of sale, and the same was made originally by him on the 19th of December, 1881. The names or signatures 'A. C. Burbidge' and 'J. G. Symonds' subscribed as the attesting witnesses to the said bill of sale, are respectively in the proper handwritings of the said A. C. Burbidge and of me, this deponent; and I say that the said A. C. Burbidge is a solicitor of the Supreme Court of Judicature in England. Before the execution of the said bill of sale the effect thereof was explained to the said W. H. Hooper by the said A. C. Burbidge."

On the 4th of January, 1882, the defendant Kettle, who had recovered a judgment against Hooper, seized in execution the goods comprised in the bill of sale. The goods were then claimed by Ford, the grantee, and the sheriff issued an interpleader summons.

Upon the trial of an issue on the 18th of April, 1882, in which Ford was plaintiff and Kettle defendant, Field, J., on the authority of *Sharpe v. Birch* (1), directed the jury that the registration of the bill of sale was invalid, by reason of the insufficiency of the affidavit of Symonds, and a verdict was found for the defendant.

An application by the plaintiff for a rule for a new trial, on the ground of misdirection by the Judge, was refused by a Divisional Court, consisting of Grove, J., and Lopes, J. The plaintiff then applied to the Court of Appeal, who granted him a rule *nisi* for a new trial, which now came on for argument.

Herbert Reed (A. Charles, Q.C., with him), for the defendant, shewed cause against the rule.—The affidavit does not state that the solicitor attested the execution of the deed, or that he was present at the execution; therefore, under section 10 of the Bills of Sale Act, 1878, it is insufficient. The Act must be strictly followed. Sections 8 and 10 are to be read toge-

(1) *Ante*, p. 64; Law Rep. 8 Q.B. D. 111.

* *Coram* Jessel, M.R.; and Lindley, L.J.

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ther—*Davis v. Goodman* (2); and the combined effect of the two sections is that the affidavit must shew that the deed was duly attested under the Act.

Crump and J. E. Bankes, for the grantee, in support of the rule.—We submit that the affidavit which was made by one of the attesting witnesses fairly shews that the solicitor attested the execution of the deed. The affidavit does state that the bill of sale was duly executed, which was not the case in *Sharpe v. Birch* (1). There has been due attestation under the Act.

[JESSEL, M.R.—In *Blake v. Blake* (3) we assumed that attestation implies the presence of the attesting witness.]

The affidavit states in effect that the deponent was present at the execution of the deed, and that he heard the solicitor explain the effect of the deed to the grantor before the execution, and all this must be taken to have happened at the one particular time referred to by the affidavit.

[JESSEL, M.R.—The difficulty is that the witness does not say that he saw the solicitor attest the execution, nor does he say that the solicitor did attest, nor that he was even present when the grantor signed.]

In *Ex parte The National Mercantile Bank; in re Haynes* (4) it was decided that the Act does not require that in point of fact the effect of the bill of sale should be explained to the grantor by the solicitor, but only that the solicitor should state that he had done so.

Presumably, the statement of a solicitor was considered by the Legislature to be sufficient. So here it is stated in the attestation clause that the solicitor did attest, and the signature of the solicitor is verified by the affidavit, which is all that is necessary. If this affidavit had been made in an action it would have been accepted as sufficient evidence of attestation by the solicitor. It is only by putting a narrow construction upon the affidavit that it can be said that it does not clearly appear that the solicitor was present at the execution.

(2) 49 Law J. Rep. C.P. 344; Law Rep. 5 C.P. D. 128.

(3) 51 Law J. Rep. P., D. & A. 37; Law Rep. 7 P. D. 102.

(4) 49 Law J. Rep. Bankr. 62; Law Rep. 15 Ch. D. 42.

JESSEL, M.R.—I think I may without impropriety say that I much regret the conclusion at which I feel myself compelled to arrive. I am always exceedingly loth to allow a purely technical objection to prevail. Here the objection which is taken is a purely technical one: the affidavit has two or three words omitted from it. At the same time a Judge must not allow hard cases to make bad law. When we have, as in this case, an Act which was intended to be very strict in its provisions, and we find that, on a fair interpretation of the words, a condition which is imposed for insuring the validity of the execution has not been complied with, we are not at liberty to depart from the meaning of the Act. Now section 8 of the Act requires that every bill of sale shall be "duly attested, and shall be registered under this Act," otherwise it shall be deemed fraudulent and void as against a trustee in bankruptcy and an execution creditor of the grantor. No form of attestation is given in the Act, but the substance of the attestation is given in section 10, which provides that "the execution of every bill of sale shall be attested by a solicitor of the Supreme Court, and the attestation shall state that before the execution of the bill of sale the effect thereof has been explained to the grantor by the attesting solicitor."

Section 10 also provides that the bill of sale, and a true copy of it and of every attestation of its execution, "together with an affidavit of the time of such bill of sale being made or given, and of its due execution and attestation," shall be presented to, and the copy and affidavit shall be filed with, the Registrar. The Registrar has no option in the matter, he must take the copy of the bill of sale and the affidavit as they are presented to him, and must file them. This is the registration itself, not a mere preliminary to it. The question is whether the affidavit which has been filed in the present case is in compliance with the Act. The Act says it is to be an affidavit of the "due execution and attestation" of the bill of sale. I do not think it much matters whether the word "due" is there or not, for no mode of execution is pointed out. The word "due" cannot, therefore, affect the meaning of the word "execution," and it follows that it cannot affect that

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of the word "attestation." I think we may, therefore, throw the word "due" out of consideration in construing the clause. What, then, does "attestation" mean? It is a well-known legal term. The ordinary form of attestation is "signed, sealed and delivered" by the person who executes in the presence of the attesting witness. That is what "attestation" means. The thing must be done in the presence of the man who in the future will be able to testify that it was done. The authorities shew that there is no attestation unless the thing is done in the presence of the attesting witness. Does the affidavit in the present case satisfy the test? Does it shew that the solicitor who is the attesting witness was present when the grantor executed the deed? Clearly it does not. It says that the signature which purports to be his is in his proper handwriting, but it is quite consistent with this that he may have come into the room half an hour after the grantor executed the deed. It is not sufficient that the attestation clause should state that the solicitor did attest the execution of the deed; the Act requires an affidavit of the attestation, and here there is no affidavit that the solicitor attested the execution of the deed, or that he was present when it was executed, or anything equivalent to this. I quite agree with Mr. Crump that if at the trial of an action such an affidavit by a solicitor were tendered as evidence of the execution of a deed it could not be objected to, and we should infer that no solicitor would have the courage to make such an affidavit if he had not been present when the deed was executed. But that only comes to this, that if there was no Act of Parliament on the subject, you might infer that that was done which the affidavit does not say was done. If the Act requires a certain safeguard we cannot dispense with it. It appears to me, though I confess I come to the conclusion reluctantly, that the affidavit in the present case was insufficient. Consequently the registration was invalid, and the rule must be discharged.

LINDLEY, L.J.—I am of the same opinion. We must see what it is which the Act requires to be done. Section 8 says that every bill of sale shall be duly

attested and registered under the Act, and section 10 explains what is meant by the registration which is referred to in section 8. As I understand it, registration means the presenting to the Registrar of the original bill of sale, and the filing with him of a copy of it and a certain affidavit. If this is not done, the bill of sale is not registered. What is the affidavit which is required by the Act? It is an affidavit of the due execution and attestation of the bill of sale. What is an affidavit of the attestation? I agree that the word "due" may be left out. What is attestation? The being present when a thing is done, and seeing it done, so as to be able to give testimony that it was done. The presence of the attesting witness is essential. The affidavit must be worded in such a way as to shew that the person who attests the execution was present when the execution took place. The affidavit in the present case does not shew this, and we cannot strain the words of the Act. This is a highly technical objection, but we must follow the words of the Act.

Rule discharged.

Solicitors—F. R. Wright, for execution creditor; Ford & Ford, agents for R. W. Ford & Sons, Portsmouth, for grantee.

1882. }
April 4. }

REECE v. MILLER.

Jurisdiction of Justices—Reasonable Claim of Right—Tidal River—Fishery.

[For the report of the above case, see 51 Law J. Rep. M.C. 64.]

1882. } THE QUEEN v. THE JUSTICES OF
Feb. 24. } MONTGOMERYSHIRE.

Bastardy—Appeal—7 & 8 Vict. c. 101. s. 4—8 & 9 Vict. c. 10. s. 3—Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), ss. 31, 32, 54 and 55.

[For the report of the above case, see 51 Law J. Rep. M.C. 95.]

[IN THE COURT OF APPEAL.]

1882. } PITMAN AND ANOTHER v. THE
 April 24. } UNIVERSAL MARINE INSUR-
 June 6. } ANCE COMPANY.*

Marine Insurance—Partial Loss—Sale of Ship without Repairing—Liability of Underwriter to Owner—Measure of Loss.

An insured ship was damaged during the continuance of the risk by perils insured against, and was sold by the owners without being repaired. The amount required to restore her to the same condition as she was in at the commencement of the risk would have exceeded her value when repaired so that no reasonable uninsured owner would have repaired her. The owners, having done some slight repairs for the purposes of sale, sold the ship, and then claimed to recover from the underwriters two-thirds of the cost of the repairs estimated as necessary to put the ship in the same condition as she was before the injury:—Held, by JESSEL, M.R., and COTTON, L.J., dissentiente BRETT, L.J., that the plaintiffs were not entitled to recover the amount claimed, and that the underwriters were only liable to pay the amount of the difference between the value of the ship at the port of departure and the amount of the net proceeds of the sale after deducting the sum spent on repairs.

By BRETT, L.J., that the estimated cost of repairs was the subject-matter of the insurance, and that the plaintiffs were entitled to recover the amount claimed.

Appeal from the judgment of Lindley, J., on further consideration.

The statement of claim alleged that the plaintiffs were the owners of the barque *Thracian*, that they insured that ship on the 3rd of June, 1875, for twelve months, by a policy for 3,700*l.*, that the defendants underwrote the policy for 1,000*l.*, and that it was agreed that the insurance should run from the 23rd of March, 1875.

The ship sailed on the 6th of May in that year from New South Wales, and arrived at Singapore in June, 1875, and on the 16th of June she was chartered to proceed to Moulmein to take in cargo

* *Coram* Jessel, M.R.; Brett, L.J.; and Cotton, L.J.

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and then to proceed to England; while passing up the river to Moulmein the ship grounded, and being got off after four days she was towed up to Moulmein. The plaintiffs gave notice of abandonment, which the underwriter declined to accept. The plaintiffs then did some repairs and sold the ship and stores for 3,897*l.* The plaintiffs alleged that the value of the ship at the time of making the policy was 4,000*l.*, and claimed 781*l.* 7*s.* 10*d.* from the defendants as for a partial average loss caused by perils within the policy.

The defendants paid 245*l.* into Court.

The action was tried before Lindley, J., who delivered the following judgment on further consideration.

LINDLEY, J. (on July 4, 1881).—This is an action on a time policy for a partial loss; and the question I have to decide is the principle upon which the loss is to be ascertained, it being agreed that all questions of figures shall be referred to some gentleman versed in adjustments.

The facts which are material are few and simple. It appears upon the pleadings that the plaintiffs were the owners of the barque *Thracian*, and by a policy of insurance, dated the 3rd of June, 1875, they caused the vessel to be insured for twelve months from the 23rd of March, 1875, the vessel being therein valued at 3,700*l.*, and her actual value at the commencement of the risk being 4,000*l.*, and the defendants subscribed the policy for the sum of 1,000*l.* The vessel sailed on March 23 from Launceston, in Tasmania, for Newcastle, New South Wales, and sailed thence to Singapore, arriving there in June, 1875, and being thus at Singapore when the policy was signed. Then the vessel was chartered to proceed to Moulmein and take in a cargo of teak. Arriving off the port of Moulmein on the 10th of August, 1875, the vessel grounded on her way up to Moulmein, and, after remaining aground four days in some peril, she was got off and towed to Moulmein. She was there examined, and was found to be seriously injured. The plaintiffs resolved to abandon her to the underwriters, and gave notice of abandonment. The underwriters, however, declined to accept her, and required the plaintiffs to repair her. The plaintiffs

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did not insist on their abandonment, but, acting on the best advice they could obtain, determined not to repair her, but to sell her; and, after making some slight repairs, they accordingly did sell her and her stores for 3,897*l*. Upon the evidence before me, and having regard to the want of proper dock accommodation and appliances at Moulmein, and the high charges there, I have come to the conclusion that the cost of repairing her so as to make her as good as she was before she grounded would have been about 5,500*l*., which is more than her value when repaired, such value being 4,500*l*. or thereabouts. I have further come to the conclusion that it was not practicable to examine her bottom and to repair her temporarily so as to enable her to continue her voyage in safety without docking her and expending much more upon her than such temporary repairs would justify. In other words, I find as a fact that a prudent uninsured owner would have done what the plaintiffs did, and that they did what was best for all interested in selling her in her damaged state, and substantially as she was, when brought into a place of safety.

Under these circumstances, the plaintiffs have brought an action against the defendants to recover the amount of the loss sustained by the plaintiffs by reason of the injury to the ship by her stranding. The plaintiffs are clearly entitled to recover something, and the question is how much? The plaintiffs claim 781*l*. 7*s*. 10*d*. The defendants have paid into Court 245*l*. The difference between the parties is attributable not to any dispute about figures, but to the circumstance that they differ entirely as to the principle upon which the calculations are to be based. The plaintiffs contend that the loss to be made good is to be measured by what it would have cost to repair the ship and make her as good as she was before she was injured, but deducting one-third of that cost so as to allow for new materials instead of old; whilst the defendants contend that this is an entirely erroneous principle, and that the loss to be made good is to be measured by the difference between the value of the ship when sound and what she sold for when damaged. The

question for my decision is, which of these two principles is correct.

It is certainly remarkable that the question thus raised should never have been yet decided. But such seems to be the case, and it consequently becomes necessary to consider the question on principle.

The first thing which strikes the mind on a consideration of the foregoing statement is that, apparently at least, if not really, the plaintiffs are contending for a right to be indemnified against a loss which they have not in fact sustained. The repairs, the cost of which the plaintiffs seek to make the measure of their loss, were not in fact made. It becomes necessary, therefore, to be careful before a hypothetical as distinguished from an actual loss is held to be the loss in respect of which the plaintiffs are entitled to indemnity. The plaintiffs' contention is based upon the following assumptions: (1) that they might have repaired if they had chosen; (2) that if they had repaired the cost of repairs would be the measure of their loss; and (3), that it is immaterial to the defendants whether the repairs were actually effected or not. The first of these assumptions I take to be well founded: the assured is never bound to abandon; it is for him to determine whether he will do so or not; he can always repair if he chooses, and refrain from insisting on a total loss. This has been decided long ago, and I may refer, amongst other cases, to a discussion on this subject in *Peele v. The Merchants' Insurance Company* (1), a case in which the rights of an assured in the event of stranding were elaborately examined by Mr. Justice Story. The second assumption is also well-founded if the repairs are made *bona fide* and with reasonable discretion. Nothing can be stronger than the language of Mr. Justice Story on this point, in the case just cited. He says (p. 63): "The assured is in no case bound to abandon. He may in all cases elect to repair the damage at the expense of the underwriters; and, if he acts *bona fide* and with reasonable discretion, there is no decision yet pronounced which declares that he shall not be entitled to a full compensation,

(1) 3 Mason, 27.

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however great it may be, even if it should equal or even exceed the original value of the ship; and until such a decision is made the direct terms of the policy seem strong enough to justify such a claim." See also 2 *Arn. Ins.* 1022, 3rd ed.; and 2 *Phil. Ins.* s. 1426. But although this unquestionably is true, still, if the repairs are so extensive and so out of proportion to the value of the ship when repaired as to shew a want of *bona fides*, or a total disregard of what is reasonable, it is by no means clear that their cost could be thrown on the underwriter. In fact it is tolerably plain that it could not. The language of Mr. Justice Maule on this head in *Stewart v. Steele* (2) is extremely cogent and valuable. He said: "As to the supposed duty of the underwriters to pay for the repairs, that is a mere fallacy; and the frequent statement of the proposition will not make it less fallacious; the law casts no such duty upon them. The assured is entitled to recover the amount by which the ship is deteriorated in consequence of the accident." This appears to me to be perfectly accurate, and I adopt it accordingly. The third assumption—namely, that, as the plaintiffs had the right to repair the ship and to recover the cost from the underwriters, it is immaterial to them whether the right is exercised or not—is in my opinion entirely erroneous and opposed to the true principles of contracts of indemnity. Against what do the underwriters agree to indemnify the assured? Surely against such loss as he may in fact sustain by reason of the perils insured against. That this is so is plainly proved by those cases which decide that, where a ship has been injured and not repaired, the assured must wait until the expiration of the risk before he can sue the underwriters for the loss he has sustained. The assured has no vested right of action when the injury is sustained. If in such a case the ship is lost whilst the policy is running by a peril not insured against, the assured has no right of action at all; and if she is lost by a peril insured against the assured can only claim for a total loss; he cannot claim both for a total loss and for the previous partial loss, as he may if the damage

(2) 5 Sc. N.R. 927, at p. 950; 11 Law J. Rep. C.P. 155, at p. 160.

has been actually repaired. Compare *Stewart v. Steele* (2), *Livie v. Janson* (3) and *Lidgett v. Secretan* (4). These cases are conclusive to shew that the events which have happened, and not those which might have happened, are to be regarded. Apart from all authority, I should have thought it plain that a loss actually sustained under circumstances which did happen is to be preferred, as a measure of indemnity, to a loss which would have been sustained under circumstances which did not happen; and the cases to which I have referred shew that this principle is recognised as well in cases arising under marine insurance policies as in other cases of indemnity. Upon principle, therefore, it appears to me that the plaintiffs' contention cannot be supported.

It is, however, said to have authority and practice in its favour. The authorities referred to are *Knight v. Faith* (5) and *Lidgett v. Secretan* (4); the practice is that of underwriters.

In *Knight v. Faith* (5) the ship was damaged and sold unrepaired for 72*l.* 10*s.* The assured claimed for a total loss, but as there was no destruction of the ship, and no notice of abandonment, it was held that the assured could only recover for a partial loss. The proper mode of ascertaining the amount of this loss was not discussed, but there is a passage in Lord Campbell's judgment (6) which I will read: "We therefore think that in this case the ship insured sustained a partial loss from which the assured ought to be indemnified. But they have left us entirely in the dark as to the amount of that indemnity. Their counsel has contended that even on the footing of a partial loss the verdict ought to stand for the full amount of the sum insured and interest. However, if there has not been a total loss of the ship, actual or constructive, with notice of abandonment, it lies upon them to shew the extent of the injury which the ship sustained

(3) 12 East, 648.

(4) 40 Law J. Rep. C.P. 257; Law Rep. 6 C.P. 616.

(5) 15 Q.B. Rep. 649; 19 Law J. Rep. Q.B. 509.

(6) 15 Q.B. Rep. at p. 669; 19 Law J. Rep. Q.B. at p. 519.

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from the accident, together with the sum which would be required for repairing, and from this there would be the usual deduction of one-third new for old. There having been no notice of abandonment, although the ship subsisted as a ship, we cannot proceed upon the supposition that she could not be repaired, and the partial loss must be calculated on the same principles as if she had actually been repaired and proceeded on her voyage, or had foundered at sea without having been repaired soon after the policy expired. 'Such a calculation,' says Benecke, vol. 2. p. 449, 'cannot be governed by any general rule, but must be decided according to circumstances, and upon a casual estimate, in which no great precision can be expected, since it is extremely difficult after the ship has perished to obtain a precise knowledge of the condition in which the ship was at the termination of the fixed time. But this difficulty can never be a ground for freeing the insurer from all liability.' The difficulty is not greater than was experienced in *Hare v. Travis* (7), where, there having been a policy upon pearl-shes at and from Liverpool to London, and the ship having deviated by going into Southampton, and the pearl-shes having been injured by sea damage both before and after the deviation, but never having been examined till they arrived in London, it was left to the jury to say what amount of damage they had sustained while protected by the policy." What ultimately became of this case I have not been able to ascertain, but I cannot regard it as an authority for the proposition that the estimated cost of repairs is in all cases the true measure of loss to the owner of a ship injured and sold without being repaired. Such estimated cost may or may not be the best measure of loss; and in *Knight v. Faith* (5), where the ship sold for next to nothing, it is quite possible that the estimated cost of repairs was a juster measure of the assured's right to indemnity than any other which could be suggested. Where such is the case, the estimated cost of repairs will naturally be the basis of the underwriter's calculation; and it may so often happen in practice that this is the

(7) 7 B. & C. 14.

proper basis as to lead to the habit of regarding the estimated cost of repairs as the true basis in all cases of the kind under consideration. But care must be taken not to be misled by this circumstance, and not to mistake the rule for the principle on which it is founded. In *Lidgett v. Secretan* (4) the Court does not appear to sanction the proposition contended for by the plaintiffs. In that case the ship was insured by two policies for two successive voyages—namely, out and home. On the voyage out she was stranded and injured. She was partially repaired; and after the risk covered by the first policy had expired, and after the risk covered by the second policy had commenced, but before her repairs were completed, she was destroyed by fire. The Court decided that, although the ship was ultimately lost, and the plaintiff was entitled to recover under the second policy for a total loss, he was also entitled to recover under the first policy the diminished value of the vessel occasioned by her stranding. The estimated cost of repairs was merely referred to as a mode of estimating such depreciated value; and so far is this case from being an authority for the plaintiffs, that it amounts, in my opinion, to a strong authority against them. Mr. Justice Willes says (8): "The true principle I apprehend to be this: the owners are not to get anything which they did not lose by the vessel striking on the reef; they are to get the amount of the diminution in value of the vessel at the end of the first risk—the difference between her then value and what she would have been worth but for the damage she had sustained. In arriving at that result, I do not see how the arbitrator can avoid taking into consideration the expenses which would have to be incurred in order to put the vessel into a proper state of repair; but he must do this only for the purpose of arriving at the diminution of the value at the expiration of the risk. That, of course, must be subject to all proper allowances." The judgment of Sir Montague Smith in that case is to the same effect.

The practice relied upon by the plaintiffs

(8) 40 Law J. Rep. C.P. at p. 262; Law Rep. 6 C.P. at p. 626.

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was not proved; indeed, the witnesses called to prove it said they had no experience of any settled usage applicable to the case of a damaged ship sold without being repaired.

For the reasons and under the circumstances above stated I am of opinion that the principle contended for by the plaintiffs is erroneous, and that, in substance, the principle contended for by the defendants is correct. The loss sustained by an assured by the stranding of the ship is *prima facie* the depreciation in her value caused by the stranding. Before she stranded she was worth a certain sum; after she stranded she was worth less; the difference between these sums, if it can be ascertained, will be the true measure of the assured's loss, unless he can be shewn to have sustained a greater or less loss between the stranding and the expiration of the risk covered by the policy. That this is so in the case of goods is well established; but, in point of principle and for this purpose, there is no distinction between ships and goods, except that, goods being saleable, their sound and damaged values can be readily ascertained by a sale, whilst the values of sound and damaged ships have generally to be ascertained by estimates. This is the view taken by the best text writers—see 2 *Arnould on Ins.*, 2nd ed., section 365; and the rule as to ascertaining damage to the extent of 50 per cent. in America, 3 *Kent's Com.*, 330 and 331; *Phillips on Insurance*, section 1539; and by Story, J., in *Peele v. The Merchants' Insurance Company* (1), already referred to. So, also, the judgments in *Stewart v. Steele* (2) and *Lidgett v. Secretan* (4) support the same view.

Whether the values to be ascertained and compared are the values at the same place or at different places, and whether they are to be ascertained at the commencement of the risk, or at its termination, or immediately before and immediately after the injury is sustained, are questions to be considered; and, having regard to the authorities just referred to, the correct mode of ascertaining the proportion of loss to be made good by the underwriter appears to be to compare the value of the sound ship at the port of

distress with her value there when damaged, and to apply this proportion to her real value at the commencement of the risk if the policy be open, or to her agreed value if, as in the present case, the policy be valued.

Such being the principle by which to be guided, it remains to apply it to the case before the Court, and to ascertain the value of the ship at Moulmein in her sound and damaged states, and to consider the effect of her sale. For these purposes the declared value in the policy must be disregarded; for, although such value is conclusive for the purpose of determining how much the defendants may ultimately have to pay, it does not preclude either party from proving the true amount of loss sustained—*Young v. Turing* (9). The estimated cost of repairs, though rejected as a direct measure of loss, might be the measure of the difference between the ship's sound and damaged values if no other measure could be found for arriving at the loss really sustained; but, in this case, other and more reliable evidence of the amount of such loss exists, and the estimated cost of repairs ought not, therefore, to be adopted for the purpose of arriving, even indirectly, at the measure of the loss sustained. The evidence as to the value of the ship when sound stands thus. The plaintiffs say she was worth 4,000*l.* at the commencement of the risk; the defendants are content to adopt this statement. At this date the ship was at Singapore. The time which elapsed between the commencement of the risk and the stranding of the vessel was very short; and the time which elapsed between her stranding and sale was also very short; and there is no reliable evidence to shew that the value of the sound ship at Moulmein, at either of these two periods, was greater than her value a short time before, when she was at Singapore, and the risk commenced. In the absence of such evidence, her sound value at Moulmein ought, in my opinion, to be taken to be 4,000*l.* In coming to this conclusion I do not forget that her value, when thoroughly repaired, has been estimated at 4,500*l.*, nor do I overlook the argument that, as she fetched 3,800*l.* in

(9) 2 Man. & G. 593.

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her damaged condition, she must have been worth at Moulmein, when sound, much more than 4,000*l*. I regard the estimate of 4,500*l*. as little better than a guess, and I cannot assume that, if she had been thoroughly repaired, according to Mr. Hopper's estimate, she would not have been more valuable than she was before she stranded, even after making the customary allowance of one-third new for old. The argument deduced from the price she fetched is plausible, but not convincing. I am not at all sure that she did not fetch more than she was worth; and, although what she did fetch is conclusive as regards one element in the calculation, I do not regard it as a reliable starting-point from which to draw an inference as to her sound value. Upon the evidence before me, I hold that value to be 4,000*l*. The value of the ship when damaged has next to be ascertained. But the object of this inquiry must not be lost sight of. That object is to ascertain the loss sustained by the plaintiffs, and they have fixed this element in the calculation by what the ship actually sold for. The underwriters may, no doubt, shew, if they can, that the plaintiffs' loss has not been so great as they allege; but the assured cannot possibly increase their actual loss by saying that they would have lost more if the ship had not sold for so much as she in fact realised. This, I apprehend, is what the present Lord Justice Lush meant when he said, in *Lohre v. Aitchison* (10): "If, instead of repairing, the owner chooses to sell the ship in her damaged condition, he fixes his loss at the difference between what she was worth at the commencement of the risk and what she sold for." For these reasons it ought to be held that, for all the purposes of this action, the value of the ship when damaged cannot exceed what she actually sold for. But, even for the purposes of this action, the actual price she fetched will not be her exact value, for the price was no doubt enhanced by the repairs done to her before sale, and a proper allowance for these must be

made. I merely mention this to prevent its being overlooked. The sound value of the ship being taken at 4,000*l*., and her damaged value being what she sold for, less such deduction as ought to be made in respect of her repairs before sale, the proportion of loss sustained by the plaintiffs by reason of the depreciation in value of the ship will be ascertained. To this will have to be added whatever other sums are properly chargeable against the underwriters; and when the final proportion of loss on this basis has been arrived at, it must be applied to a ship of the declared value of 3,700*l*., and the defendants' proportion of the loss thus calculated will be what they will have to pay.

Having now explained the principle upon which the amount payable by the defendants is to be ascertained, so far as that amount depends on the point submitted to me, I give judgment for the plaintiffs for such sum as the arbitrator agreed upon shall award to be payable by the defendants, regard being had to this decision; and I reserve the costs of the action until after he shall have made his award.

The plaintiffs appealed.

Butt, Q.C. (with him *Pollard*), for the plaintiffs (11).—If this is to be treated as a constructive total loss, the plaintiffs cannot succeed. An insured owner is never obliged to abandon—*Phillips on Insurance*, section 1493; *Allwood v. Henckell*, cited in *Park on Insurance* (12)—and it follows that if he is never obliged to abandon the ship he has a right to repair her to any extent, however unreasonable; but subject to a qualification to be mentioned presently. The next question is whether the assured has a right as against the underwriters to repair, so as to fix them with some portion at all events of the amount of repairs. The limitation as to reasonableness of repairing only applies to the mode in which the repairs are done. It does not follow that because it is unreasonable to re-class the ship it

(10) 46 Law J. Rep. Q.B. 715, at p. 720; Law Rep. 2 Q.B. D. 501, at p. 507; 47 Law J. Rep. Q.B. 534; Law Rep. 3 Q.B. D. 558; 49 Law J. Rep. Q.B. 123; Law Rep. 4 App. Cas. 755.

(11) The case was argued on the 9th of December, 1881, but was re-argued in April, 1882, by one counsel on each side at the desire of the Court.

(12) 7th ed. 280.

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is therefore unreasonable to repair her. The assured has a right to repair without regard to the question of reasonableness, and at the expense of the underwriters, but he must act reasonably in repairing. The question as to what a prudent uninsured owner would do only arises in a case of constructive total loss. The question whether it is reasonable to repair, therefore, cannot be taken into consideration here.

The same rule also applies even where the repairs have not been done; for the owner is entitled to ascertain, as against the underwriter, the amount of damage suffered by the ship by way of deterioration, that is, by the estimated amount of repairs subject to the usual deductions. A particular average loss must be ascertained by estimating the cost of repairs. If the damage done to the ship has not been repaired the only mode of ascertaining its amount is by the estimate of surveyors—*Arnould on Insurance* (13), *Parsons on Insurance* (14). In *Knight v. Faith* (5) the assured claimed as for a constructive total loss, and the discussion there was whether the ship had become a partial or absolute total loss. The Court decided that it was a partial loss, and that the mode of estimating the loss is to estimate the cost of repair. In *Lidgett v. Secretan* (4), where there had been a partial loss unrepaired, and then a total loss, there were two distinct policies, and the Court held that the assured were entitled to recover under the first policy the amount of the ship's deterioration at the expiration of the risk consequent on the damage sustained on the outward voyage, without reference to the sum actually expended on the repairs; and that they were entitled to recover as for a total loss under the second policy, without reference to their claim under the first policy. The true rule, as laid down by Willes, J., at p. 626 (8), is that the owners are not to get anything that they did not lose by the ship striking on the reef. They are to get the amount of the diminution in value of the vessel at the end of the first risk—the difference between her then value and what she would have been worth but for the damage

sustained. The arbitrator cannot avoid taking into consideration the expenses which would have to be incurred to put the vessel into a proper state of repair, but he must only do so for the purpose of arriving at the diminution of value at the expiration of the risk, and subject to all proper allowances. The distinction between the present case and *Stewart v. Steele* (2), which is relied on by the defendants, is that there the ship was sold by the owner as a mere wreck.

The statement of Lush, J., in *Lohre v. Aitchison* (10), at p. 507, that "if instead of repairing the owner chooses to sell the ship in her damaged condition he fixes his loss at the difference between what she was worth at the commencement of the risk and what she sold for," is but a dictum and is not correct. The true rules are laid down by Brett, L.J., in the Court of Appeal (15). The real question to be ascertained here is the deteriorated value of the ship. The plaintiffs contend that the proper mode of ascertaining that is by the estimated cost of repairs; on the other side it is said that the difference between the sound value and the damaged value is evidenced by the amount of the sale of the ship; and Lindley, J., also adds, by the cost of repairs. The rule contended for by the plaintiffs is a certain and practical rule, and one which has always been allowed; whereas the rule relied on by the defendants depends on the amount produced by the sale, which will always vary.

Cohen, Q.C., for the respondents.—The principle of marine insurance is that the assured cannot recover more than if he had never embarked on the adventure. The defendants have placed the plaintiffs in that position, so that they have no ground of complaint. Marine insurance is a contract whereby one party undertakes to indemnify the other against loss arising from certain perils or sea risks (16)—*Hamilton v. Mendes* (17). The value in marine insurance is the value at the beginning of the adventure, and the assured can only recover the pecuniary loss actually incurred, and nothing beyond—*Stewart v.*

(13) 5th ed., vol. ii. p. 901.

(14) 1868 ed., vol. ii. p. 406.

(15) 47 Law J. Rep. Q.B. 534, pp. 535-6
Law Rep. 3 Q.B. D. 558, at pp. 562-3.

(16) *Arnould* (5th ed.), vol. i. p. 15.

(17) 2 Burr. 1210.

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Steele (2), and *Le Cheminant v. Pearson* (18). Custom has of necessity established the rule that when repairs have been effected a deduction is made from the cost of repairs of one-third new for old; and when repairs are prudently executed the underwriter is doubtless bound to indemnify the assured. In *Lohre v. Aitchison* (10) the repairs had been actually and *bona fide* done, so that there is clear distinction between the facts of the two cases. Lord Blackburn there says that "The owner of an insured ship which is so damaged that, though it is capable of repair, the expense of repairing it will exceed its value, may treat the ship as totally lost, and recover a total loss, the underwriters who pay that total loss being entitled to all that is saved." The underwriters have treated the plaintiffs as though there had been a constructive total loss, and have paid a proportionate sum into Court. The assured need not abandon, and he may repair, but no party to a contract can inflame his own damages. Here there have been no repairs done and no expenses incurred, so that the rule established by custom does not apply, and the defendants cannot be called on to indemnify the plaintiffs against expenses which have not been incurred. If a master has two courses open to him, he cannot adopt one course and then charge the underwriter with the expenses which would have followed if the other course had been followed. *Lidgett v. Secretan* (4) only decides that where repairs have not been done the underwriter must make good the depreciation in the value of the ship. It is only necessary to decide one point in this case, and that is to answer the question, whether in a case where no reasonably prudent uninsured owner would repair, and when actually no repairs have been done, and that owner elects to sell, he can recover in respect of expenses which have never been incurred? It is submitted he cannot; there is no authority to that effect; and the reason of the law is against it.

Butt, Q.C., in reply.

Cur. adv. vult.

(18) 4 Taunt. 367.

The following judgments were read on June 6:—

JESSEL, M.R.—The question in this case is, upon what principle ought the liability of underwriters to be determined when the ship has been damaged by the perils of the sea, and has been sold during the continuance of the risk without being repaired, in a case where the amount required to restore her to the same condition as she was in before the injury would have largely exceeded the value of the ship when repaired, so that no reasonable man would have repaired her. In this instance, the value of the ship in her damaged state was large, and to have repaired her would, according to the surveyor's report, have caused a loss of 41,000 rupees—namely, 25,000 rupees, the estimated amount of her value unrepaired, and the sum of 16,000 rupees, being the difference between 45,000 rupees, her estimated value when repaired, and 61,000 rupees, the estimated cost of the repairs. It is plain that, there being no special circumstances in this case, no reasonable uninsured owner would have repaired the ship so as to restore her to her former condition.

The owners took this view, and therefore determined to sell her; and, having made some slight repairs with a view to a sale, they sold the ship for much more than the estimated value in her damaged state—namely, for 38,000 rupees, or thereabouts. The underwriters are willing to pay the whole of the loss actually incurred by the owners—namely, the difference between the value of the ship at the port of departure for the voyage—namely, 4,000*l.*,—and the amount of the net proceeds of the sale after deducting therefrom the amount actually expended for repairs; and this, as I read the judgment, is what they are to pay. If there is any doubt as to the meaning of the words on this point, I am willing that it should be removed by altering the wording of the judgment. On the other hand, the owners claim two-thirds of the estimated cost of the repairs required to put the ship in the same condition as she was before the injury. This proportion of the amount expended for repairs being the sum ordinarily payable by underwriters on the occurrence of a

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partial loss where the ship is an old one, as this was, and is not repaired. The precise question we have to determine does not appear to have been decided, nor can I find any case in which it has been even discussed. It remains, therefore, to be decided upon principle. The contract of insurance is, as I understand, a contract of indemnity to the insured against the loss incurred by him through the ship being injured by the perils of the sea. It follows from this that, as a general rule, in no case can the insured become richer by reason of these perils; or, in other words, that the insured ought not to be entitled to receive from the insurer a larger sum for a single partial loss than if the ship was wholly lost. Treating this as, in effect, a constructive total loss, I consider the amount recoverable to be an amount not exceeding, and, therefore, in a case like this, equal to what would be recovered as on a total loss. As to the value, I think the value to be regarded is the value of the ship at the port of departure; but in this case it is not material, because I think the value at Moulmein before the injury was about the same. The estimated value was 45,000 rupees when the vessel was restored to its class, which, at the exchange of *1s. 9½d.*, would be a little over 4,000*l.*; but the vessel would, after repair, have been in all probability rather better than she was before the injury. This being so, it appears to me that the decision of the learned Judge in the Court below, which was in favour of the underwriters, was substantially right; but I do not wish to be understood as concurring in all the reasons given by him for that decision. It seems to me, both on principle and authority, that the rights of a shipowner who actually repairs his vessel when damaged by the perils of the sea, to recover the amount or a portion of the amount expended in repairs from the underwriters are not in all cases the same as those of a shipowner who declines to repair because the ship is not worth repairing, and who, therefore, sells the ship during the risk; and I wish to confine my judgment to the latter case, which is the case before us. I am therefore of opinion that the decision appealed from should be affirmed.

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BRETT, L.J.—The facts of this case are not in dispute. I do not think it is necessary to repeat them. The case was, at my request, argued a second time before us. Neither before Mr. Justice Lindley nor before us was it argued that there was a total loss of this ship. Both parties have advisedly confined the decision of this case to be dependent upon the assumption that there was only a partial or average loss of the ship. If they had not done so, I am not at all prepared to say that the finding of Mr. Justice Lindley, in which he says, "I find as a fact that a prudent uninsured owner would have done what the plaintiffs did, and that they did what was best for all interested in selling the ship in her damaged state," would not, if the assured had elected so to treat it, have justified the sale as against the underwriters, and have made a total loss of this ship. But I think that the Court cannot decide this case upon such a view of it after the plaintiffs have elected to treat the loss as an average loss, and after the advised persistent arguments on both sides. It appears to me absolutely necessary throughout the consideration of this case to remember that it is to be decided on the assumption that there was only an average loss on ship. The decision of this case upon the facts of it might have been easy and of little importance if it had been treated as a total loss; but the doctrines suggested in argument, and, as I think, countenanced by the judgment of Mr. Justice Lindley, upon the assumption that this was a partial loss, have made the case, to my mind, one of the highest mercantile and legal importance.

On the first hearing before us it was contended on behalf of the defendants, first, that if a ship damaged by sea peril is repaired by her owner so as to be as good as she was before, but a jury find that it was unreasonable so to repair her, the liability of the underwriters must not be ascertained by a comparison with the cost of such repairs, but by ascertaining the difference between what the ship would have sold for damaged and unrepaired and what she would sell for repaired, and by comparing that difference with the value of the ship in the policy. The same argument was put in the following form: secondly, if it is unreasonable to repair

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the ship so as to make her as good as she was before, the assured, though he may, of course, in fact repair, cannot so repair her as against the underwriters so as to charge them, and it is unreasonable so to repair her if the cost of such repairs exceed the value of the ship when repaired. And again in this form: thirdly, where it would be so extravagant as to be unreasonable to repair an injured ship so as to make her as good as she was before, the shipowner ought not to repair her, and if he does, you must in such case ascertain the depreciation in value of the ship caused by the accident, by ascertaining the difference between what the ship would sell for damaged and undamaged at the same place. And it was urged in each and every of these forms that it was a question for the jury whether a prudent uninsured owner would have undertaken the repairs. It seems to me that the judgment of Mr. Justice Lindley countenances, if it does not adopt, these arguments. It must be admitted that they are absolutely new. In a case where the repairs were actually done they were the arguments brought forward and overruled in the case of *Lohre v. Aitchison* (10), in all the Courts, and in the House of Lords. It need hardly be observed that if the counsel for the defendants could have maintained any of these propositions as true in the case of repairs effected, they would have enforced them easily in a case where no such repairs had been done. It was further argued, fourthly, on the first hearing before us, that whenever the damaged ship is sold without being repaired, the loss is to be ascertained by the same process as a loss on damaged marketable goods is ascertained. This formula would be so damaging to underwriters if the estimate of repairs were low, that, stated in these terms, it was, I think, at once abandoned. On the second hearing before us none of these arguments were again brought forward. The arguments for the defendants on the second occasion were that the object of marine insurance is that the assured is to be put in the same position with regard to the subject insured as if he had not embarked on the adventure, and if a ship has been injured and not repaired, and a comparison with

the estimated cost of repairs would produce a sum greater than the sum which would be due on a constructive total loss, the object is not attained except by paying the same sum as would be payable on a constructive total loss.

It was pointed out that if this principle were correct as a principle it would be equally applicable to a case in which the repairs had been done, and that it would in such a case break the rule that there is no salvage on an average loss; to which it was answered that there is a custom where repairs have been done, but that there is no custom where repairs have not been done.

It was further argued that repairs must be *bona fide* done, and that they cannot be done *bona fide* if the cost of them, when done, would exceed the value of the ship when repaired, and therefore that no such possible or contemplated repairs could be considered in estimating an average loss on a ship. But it was pointed out and admitted that such repairs might be *bona fide* incurred in order to earn a valuable amount of freight.

The main argument in the end was, that the law which affirms that a contract of insurance is a contract of indemnity obliges us to say that the assured cannot recover for a partial or average loss more than for a total loss; and that if the comparison, with the estimated cost of repairs, produces a sum equal to 100 per cent. of the sum insured, and the ship be allowed to be sold, without the amount of the proceeds of sale being brought into the account, the assured will in such case, by recovering a full 100 per cent., without deduction of salvage, recover more than he would recover for a constructive total loss. This is the argument on behalf of the defendants which has given me so much trouble. As to all the others, I confess that I feel no doubt that they are all untenable. The following propositions are all, I think, recognised as true in insurance law:—

The assured is not, under any circumstances, bound to sell his ship. The assured may, under any circumstances, sell his ship. He is entitled, under any circumstances, to repair his ship. He is not bound, under any circumstances, to repair

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his ship. In none of these respects does any question arise as to whether a prudent owner uninsured would act in the like manner. All this is so because there is nothing in the contract of insurance which takes away from the assured the absolute power and right to do with his own property what he will. The assured, therefore, can always, whatever be the amount of damage done to his ship, repair her. If he does repair and keep the ship, there cannot be a total loss. The loss, then, must be a partial or average loss, leaving open the question of how such loss is to be adjusted. But in the case of a partial or average loss, there is no salvage; therefore, in such case, if the cost of repairs actually done in a reasonable way at a reasonable cost, so as to make the ship equal to what she was before the accident, equals or exceeds 100 per cent. of the sum insured, the assured, in respect of such average loss on ship, recovers 100 per cent. of the sum insured without any deduction. That was the decision in *Lohre v. Aitchison* (10). The assured need not repair. If he does not, but leaves her unrepaired until the end of the risk, no subsequent total loss intervening, then he is to be compensated as if he had repaired, only that the cost of the repairs he might have made must be determined by estimate instead of by actual expenditure. This proposition is undoubtedly supported in terms by high authorities: "If the damage done to the ship has not been repaired, the only mode of ascertaining its amount is by the estimate of surveyors. Where, however, the damage has been repaired, the established mode of estimating its amount is to deduct one-third from the whole expense, both of labour and materials, which the repairs have cost, and to assess the damages at the remaining two-thirds"—*Arnould on Insurance* (19). He thus points out the mode of arriving at the amount of damage in either case—namely, whether the ship has or has not been repaired. Then he applies one common mode of adjusting the loss: "The rule for adjusting a particular average loss on the ship is very simple—namely, that in open policies the underwriter pays the same *aliquot* part of the

(19) Pt. iii. cap. 5, 5th ed. p. 901.

sum he has agreed to insure, as the damage or the expense of repairing it is of the ship's value at the commencement of the risk; in valued policies he pays the same proportion of the valuation in the policy"—*Arnould on Insurance* (19) "The partial loss in this case," says Lord Campbell, in *Knight v. Faith* (5), in which case the ship had not been repaired, "must be calculated on the same principles as if she had actually been repaired and proceeded on her voyage, or had foundered at sea without having been repaired soon after the policy expired." He admits the difficulty of proof in such cases of the amount of the damages, but says that it can be overcome. Mr. Justice Willes, in *Lidgett v. Secretan* (4), seems to me to say elaborately the same thing. In none of the authorities, such as Stevens, Benecke, Park, Phillips or Parsons, is any different rule suggested for fixing the amount of damage and adjusting the loss in the cases of the ship having been repaired or left unrepaired. If this proposition, as to there being no different rule of ascertaining the amount of damage in the case of actual repairs done, and an estimate of repairs not done, is true, it seems to me to follow that if the assured does not repair, and does not sell, and the accepted estimate for repairs equals or exceeds 100 per cent. of the sum insured, the principle adopted and approved in *Lohre v. Aitchison* (10) is equally applicable to such a case as to the case in which repairs have actually been done. The only difference between the two cases is the mode of proving the amount of the damage. But mode of proof does not alter liability. In such a case, then, the assured would recover 100 per cent. of the sum insured, and the value of the unrepaired ship would not be taken into the account. It seems to me to follow that, if the assured keeps the ship unrepaired until the expiration of the time fixed in the policy, or, at all events, until the day of trial, he may sell the ship the day after, and the proceeds of such sale cannot be brought into the account. The question in this case is, whether, if the sale takes place on the day before the one or the other event, the proceeds of the sale are to be taken into account. All the other propositions advanced in argument

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are answered by the preceding considerations. As to this, the first observation which strikes me is that, if the assured, after the accident, without repairing the ship, sell her, and the policy with her, and the assignee of the policy and ship repairs the ship, and recovers on the policy for repairs actually done, though they amount to 100 per cent., no enquiry will take place as to the amount realised by the original owner, whether he, by comparison with the cost of the repairs, had gained or lost by selling. The second observation is that a distinction between a day before and a day after is too minute to have been treated as a distinction by business men; and the third, which seems to me, following the others, to be of immense force, is that none of the great masters who have dealt with the subject of the adjustment of an average loss on ships have in any way glanced at a different mode of adjusting such a loss if the ship should be sold before the judgment or after it. Not one of them has ever alluded to such a rule as has been acted upon by Mr. Justice Lindley in this case. It is said that the circumstances of this case were never present to their minds. But it is inconceivable to me that Stevens, Benecke, Park, Marshall, Arnould, Phillips and Parsons, writing exhaustive treatises on maritime insurance, should all have overlooked the possibility of such a case arising. The more natural, the more just, conclusion seems to me to be that they knew but of one rule of adjusting a partial or average loss on ships. It is said further that the case has never been present to the minds of the great Judges who have enunciated the rule of adjusting an average loss on ship. Is that possible? The circumstance has actually been before them in every case in which the shipowner or master has considered that the damage done to the ship amounted to a constructive total loss, and has thereupon sold her unrepaid, but where the owner has failed at the trial to prove that there was a constructive total loss. In every such case the owner has recovered as for a partial loss, and no different mode of calculating the loss from the ordinary mode has been suggested. The point was surely distinctly before Lord Campbell in *Knight v. Faith* (5), where the ship had

been sold, and he thus in such a case lays down the rule, "However, if there has not been a total loss of the ship, actual or constructive, with notice of abandonment, it lies upon the assured to shew the extent of the injury which the ship sustained from the accident, together with the sum which would be required for repairing it; and from this there would be the usual deduction of one-third new for old." It is not possible to my mind that so great a Judge should not have added this caution if the supposed rule existed, "provided that the proceeds of the sale of the ship must be deducted, as she has been in fact sold by the master." But I will endeavour further to consider this matter. It seems to me that it can be solved by considering what it is against which the underwriter insures. It is true that the contract of insurance is a contract of indemnity, and that the assured must not be paid more than is sufficient to indemnify him against the loss which the underwriter by the contract of insurance has agreed to indemnify. But the question is what is the loss against which the contract indemnifies? Whatever the assured may gain or lose by the accident by reason of matter outside the contracts of indemnity is not matter to be considered between the assured and the underwriter in settling the loss which is within the contract. As for instance, if the matter insured is marketable goods—suppose them bought for 100*l.* and insured for 100*l.*, and suppose the market to which they were to be carried has so gone down that if the goods arrived there they would sell for 50*l.*; if the goods are totally lost in the voyage the underwriter must pay 100*l.*; the assured by reason of the accident is 50*l.* the better than he would have been if the accident had not happened, the fall of the market, being a matter outside the contract of insurance, is not a matter to be considered in adjusting the loss, and therefore the assured recovers the 100*l.* So if such goods upon such markets were in the voyage damaged to the extent of 75 per cent. the assured would be entitled to receive 75*l.*; and so would be the better by 25*l.* than if the accident had not happened. The question then is, what is the loss against which the underwriter agrees to indemnify? It is the loss which

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the assured intends to cover, and which the underwriter knows that the assured intends to cover. In the case of an insurance on marketable goods it is known to both that the object of the assured in conveying such goods from one place to another is that they may be sold at a profit. In order that such a result may ensue they should arrive and arrive undamaged. If they do not arrive at all the assured is put in the same position as he was at the beginning of the adventure if he is paid the price at which he originally bought the goods. If the goods are damaged he is put into that position by being paid a percentage of such price. The identity of the goods is immaterial to him. Goods for purchase and sale are exactly represented by money. But a ship is not in commerce treated by its owner as a subject of purchase and sale in either one market or another. It is used in commerce, as Arnould notices, by its owner as a machine for carrying cargo backwards and forwards for prices determined by successive contracts of affreightment. If the ship be totally lost, the only mode of indemnifying the shipowner, so as to place him in the position he was at the commencement of the risk, is to pay him the then value of the ship. But if the ship is damaged, the immediate business inconvenience and loss to the owner is not that a sale of the ship is thereby prevented or injured, but that he is prevented by reason of the damage from using the ship as a carrying machine to earn freight. That inconvenience is not to be cured by buying another ship or by selling the damaged ship. A ship damaged in some distant port in which she can be repaired cannot be replaced by the purchase of another ship at home. The business inconvenience to the shipowner—that is, the loss in his business—can only be met by repairing the ship so as to make her as good a carrying machine as she was before. That is the object he desires to obtain by the insurance. The loss he desires to cover, and which the underwriter knows he desires to cover, is therefore the cost of repairs, not the diminution in the value of the ship to sell. The cost of repairs is therefore the matter to be indemnified. The loss in value to sell is not the loss against which the ship-

owner insured. The injury to or loss by a sale is no more within the purview of the contract of insurance on ships than is the loss of market in the case of an insurance on goods. Loss or gain by a sale of the ship is therefore not a matter to be considered between the assured and the underwriter in adjusting either a total or a partial loss on ship. This seems to me the reasoning by which all writers on insurance and all Judges who have dealt with insurance have laid down the one and sole rule which they have laid down for the adjustment of a partial or average loss on ships. And, as was said in *Lohre v. Aitchison* (10), if this has been accepted as a sole and only rule by merchants and underwriters for many years, it is now a rule which is part of the contract of insurance on ships. According to that rule no proof that the ship has been sold or of what were the proceeds of the sale of the ship is properly admissible in evidence in an action brought simply to recover a partial or average loss on a ship.

As to the case of *Stewart v. Steele* (2) it seems to me, I confess, to be the most unsatisfactory case, as reported, with which I have ever had to deal. Every observation made by the Judges during the argument seems to shew that their minds were bent to the consideration of a case in which after a partial damage the ship is totally lost. In such a case it is settled that partial damage actually repaired is to be paid for, but that repairs not done are not to be taken into account. Different reasons are given in the final judgment why the cost which would have been incurred if the wales had been replaced was not to be allowed. In simple truth I do not gather the reason why such cost was disallowed. No writer has ever deduced any rule from that case. The case was cited before Mr. Justice Lindley and before us from 5 *Scott's New Reports*, for the purpose of relying on a supposed *dictum* of Mr. Justice Maule, that "as to the supposed duty of the underwriters to pay for the repairs, that is a mere fallacy, and the frequent statement of the proposition will not make it more fallacious, the law casts no such duty on them." The proposition so stated startled me exceedingly. Underwriters have for years paid for repairs. I felt certain it

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was not correct. And it is not true that Mr. Justice Maule stated such a proposition. What he did state is shewn in the report in the Law Journal (2). He, in answer to an argument to the contrary, stated the underwriters had no duty "to do the repairs to the ship." That proposition has no effect on the solution of the present case, though it is most undoubtedly true. I would add that none of the terms on the face of the policy can help us to a solution of the present question, because, as is stated by Arnould, a policy of insurance in its present form is mainly construed according to long-settled and admitted usage of merchants and underwriters. The defect in the judgment under review seems to me, with deference, to be that it has misapplied the doctrine that a contract of insurance is only a contract of indemnity. It is true that it must not more than indemnify against the loss which it covers, but it is also true that it has nothing to do with gains or losses which are outside the contract by which it undertakes to indemnify against the losses which it does cover. One is naturally startled at the facts of the present case; but they are wholly abnormal, and it is in my opinion most dangerous to mercantile business to tamper with a settled rule of adjustment of liability and claim in order to meet a case which will, in all probability, never happen again. I therefore am of opinion that this appeal and the plaintiffs' claim ought to be allowed.

COTTON, L.J.—This is an action by the owners of a vessel insured with the defendants, and the only question on the appeal is the amount which the plaintiffs are entitled to recover on their policy. The vessel, during the subsistence of the insurance, was materially injured by perils of the sea. The repairs necessary to make good the injuries were estimated at a large sum, and the owners at first claimed to treat the case as one of constructive total loss; but this was objected to by the insurers, and the owners abandoned this contention. They then began to repair the vessel at Moulmein, but instead of executing the repairs necessary to restore the vessel to as good a condition as before

the injury was sustained, they had some of the most necessary repairs done at a comparatively trifling expense, and then during the continuance of the risk covered by the policy sold the vessel at that port. It realised a large sum, and the judgment of the Court below has given the plaintiffs only the difference between the value of the ship in its uninjured state, and the sum realised by its sale, after deducting from this latter sum the cost of the repairs which were in fact done. The plaintiffs claim to be entitled to recover the estimated cost of the repairs necessary entirely to make good the injury sustained by the vessel, less the usual allowance of one-third of the cost, which would give the plaintiffs a very much larger sum than they can recover under the judgment appealed from.

As a general rule, where there is a partial loss in consequence of injury to a vessel by reason of perils insured against, the insured is entitled to recover the sum properly expended in executing the necessary repairs, or, if the work has not been done, the estimated expense of the necessary repairs, less in each case where the vessel was not at the time of the injury a new one the usual allowance of one-third new for old. But in the present case the insured, before the determination of the risk, by their voluntary act shewed that they did not desire to restore the ship to the same condition as before the injury, and rendered it impossible that the repairs of which they seek to recover the expense should ever be executed by them. No doubt both Judges and text-writers have spoken of the insured in a case of partial loss being entitled to recover the amount above mentioned; but they do so without special reference to cases like the present, on which there is no express authority. It therefore becomes necessary to consider the principle on which an insured ship-owner is entitled to recover the above-mentioned proportion of the cost, actual or estimated, of repairs. A policy of marine insurance is a contract of indemnity. In case of partial loss, when repairs are in fact executed, the sums expended in repairing the ship in a reasonable and proper way are damages sustained by the insured by reason of the perils

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insured against and a natural consequence of such perils, and the insured is entitled by way of indemnity to the cost so incurred, after deducting, in the case of a vessel not new at the time of the injury, one-third of the expenditure, this deduction being made to prevent the insured getting a benefit by reason of his ship being repaired with new materials in place of old. Mr. Cohen argued that where the cost of repairing an injured vessel would exceed the value of the vessel when repaired the expenditure could not be recovered from the underwriters. But it must not be supposed that by using the term "properly expended in repairs" I in any way accede to this argument. By "properly expended in repairs," I mean expended in executing the necessary repairs in a reasonable and proper manner.

Where in the case of a partial loss the owner has not repaired the vessel, he is entitled to have made good to him the depreciation at the end of the risk in the value of his vessel, so far as this is caused by the peril insured against. This is the present case, and we have to determine on what principle this deterioration is to be ascertained. As a general rule the estimated cost of the repairs is the measure of deterioration; but, to use the language of Mr. Justice Maule in *Stewart v. Steele* (2), "The insured must recover the repairs not, *eo nomine*, as expenses, but as a measure of the loss." But it is urged by the appellants that the estimated cost of repairs, with the deduction of one-third new for old in the case of ships not new, is the established and settled measure of damages to be recovered by an insured shipowner, where there is a partial loss and the ship has not been repaired. The judgment of Lord Campbell in *Knight v. Faith* (5) and the decision in *Lidgett v. Secretan* (4) have been relied on in support of this contention.

In the former case the policy was a time policy for a year, and the ship sustained injury during the year by perils insured against, and after the expiration of the year was found to be in such a state as to be a constructive total loss, and was sold for a very small sum. The Court held the defendants not liable for the total

loss; and undoubtedly, at page 669, Lord Campbell speaks of the sum to be recovered by the plaintiffs for the partial loss as that which they could prove it would have cost to repair the injury sustained during the time covered by the policy. But there the plaintiffs had not before the expiration of the risk elected not to repair but to sell the ship, and the sum which the repairs would have cost was the only available measure of the deterioration at the expiration of the risk.

In *Lidgett v. Secretan* (4) the vessel was insured by two policies. A partial loss was incurred during the period covered by one of the policies, and after that had expired, and while the ship was being repaired, a total loss occurred by the ship being burnt during the period covered by the second policy. The Court decided that under the first policy the estimated cost of the repairs, which had not been done when the total loss occurred, was to be taken into account in ascertaining the amount recoverable under the first policy. Here again this was the only measure of the depreciation of the vessel by the injury sustained during the first policy. But the Judges who decided that case do not say that the estimated cost of repairs not executed is necessarily in all cases to be taken as the measure, but what they say is, in principle, against the appellants. Mr. Justice Montague Smith says, "The cost of the repairs would be a mode" (not *the* mode) "of estimating the amount by which the vessel was depreciated by striking on the reef;" and Mr. Justice Willes says, "The only question we are asked to decide is what are the true principles upon which the loss is to be assessed? The true principle I apprehend to be this: The owners are not to get anything which they did not lose by the vessel striking on the reef. They are to get the amount of the diminution in value of the vessel at the end of the first risk, the difference between her then value and what she would have been worth but for the damage she had sustained. In arriving at that result I do not see how the arbitrator can avoid taking into consideration the expenses which would have to be incurred in order to put the vessel into a proper state of repair; but he must do this only for the

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purpose of arriving at the diminution of value at the expiration of the risk."

These cases, in my opinion, do not help the appellant's contention, and the decision in *Stewart v. Steele* (2) is against them. There the ship had been injured, and had, in consequence of defects not caused by the perils insured against, been sold for breaking up. The wales had been removed to ascertain the injury which the vessel had sustained, and were not replaced before the sale. The jury had given the ship-owner the sum which it would have cost to replace the wales. But the Court held that on the evidence as the ship was sold for breaking up, the plaintiffs were not damnified by the wales not having been replaced, and were not entitled to recover the sum which it would have cost to replace them.

The authorities therefore, in my opinion, do not support the contention of the plaintiffs that the estimated cost of repairs, less one-third new for old, is necessarily the measure of the sum to be recovered by the insured, and the reasoning and expressions used by the Judges in the cases tend strongly to shew that the estimated cost of repairs which have not been executed is a method, but not under all circumstances the only method, of estimating the deterioration of the vessel. To hold that in the present case the insured is entitled to recover two-thirds of the estimated cost of repairs would be contrary to what is one of the principles applicable to all insurance cases—that the policy is a contract of indemnification, or, to adopt the words of Mr. Justice Willes in *Lidgett v. Secretan* (4), the insured is not entitled to recover more than he lost by the injury sustained by the vessel through the perils covered by the policy.

In this state of the authorities, I am of opinion that the estimated cost of repairs, less the usual allowance of one-third new for old, is not, under all circumstances, the sum which the insured is to recover. Where, as in the present case, there is not a constructive total loss, he is not, as against the insurers, entitled to sell so as to bind them by the loss resulting therefrom; but when he elects to take this course, as in the present case, he, as against himself, fixes his loss—that is, he cannot,

as against the underwriters, say that the depreciation of the vessel exceeds that which is ascertained by the result of the sale. Probably the most accurate way of stating the measure of what under such circumstances he is to recover, is that it will be the estimated cost of repairs, less the usual deduction, not exceeding the depreciation in value of the vessel as ascertained by the sale.

It was urged that the Judge in the Court below had not sufficient evidence of what was the value of the vessel at Moulmein in its undamaged state. But this objection cannot, I think, be sustained; and as he found that this value was the same as that of the vessel at the commencement of the risk, the question as to the proper mode of estimating from the sale the depreciation of the vessel does not, I think, arise. It must be observed that in the present case some repairs had been done to the vessel before it was sold, and these have been allowed to the plaintiffs; for, notwithstanding criticisms on the wording of the judgment, I think that it directs the cost of these repairs to be subtracted from the proceeds of the sale before these proceeds are deducted from the value of the ship when uninjured, so as to fix the amount of deterioration.

In my opinion the judgment appealed from is right, and the appeal must be dismissed.

Appeal dismissed.

Solicitors—Lyne & Holman, for plaintiffs;
Hollams, Son & Coward, for defendants.

[IN THE COURT OF APPEAL.]

1882. { THE MERSEY STEEL AND
June 12, 13. { IRON COMPANY (LIMITED)
v. NAYLOR, BENZON AND
COMPANY.*

*Contract—Monthly Delivery of Goods
—Non-payment by Buyer for one Delivery
—Repudiation of Contract—Set-off
against Claim of Company in Liquidation*

* *Coram* Jessel, M.R.; Lindley, L.J.; and Bowen, L.J.

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tion of a Claim against the Company for Unliquidated Damages—Mutual Credit Clause—Bankruptcy Act, 1869, s. 39—Judicature Acts, 1873, s. 24. sub-s. 5; 1875, s. 10—Rules of Court, 1875, Order XIX. rule 3.

There is no absolute rule to shew whether the breach of a contract by one of the contracting parties is to exonerate the other party from his liability to further perform the contract.

The true test in each case is whether the acts and conduct of the one party evince an intention to abandon and be no longer bound by the contract—and this is a question of evidence.

Non-payment for a parcel of goods supplied, or non-delivery of a parcel of goods contracted to be supplied, is not of itself necessarily evidence of any such intention.

Nor is any distinction to be drawn between a contract not performed at all and one that has been part performed.

The question is not as to the right to rescind a contract, but as to the right to treat a wrongful rescission of a contract as a complete renunciation of it.

By the joint operation of section 10 of the Judicature Act, 1875, and Order XIX. rule 3, the defendant to an action brought by a company in liquidation may in the same action set off by way of counter-claim against the claim of the company a claim for unliquidated damages, to an amount not exceeding the claim of the company.

Semble, Order XIX. rule 3, being only a rule of procedure, would not by itself be sufficient. The words "Rules as to debts and liabilities provable," in section 10 of the Judicature Act, 1875, must be held to comprise the rules which regulate not only what are debts and liabilities provable, but also the manner of their proof.

So as unliquidated damages are provable under section 158 of the Companies Act, 1862, section 10 imports into the liquidation of a company the mode adopted in bankruptcy of proving such damages, which is to take an account between the bankrupt and the party claiming, and to set off against the amount claimed any sum due from the claimant to the bankrupt's estate, and to allow only the balance to be proved.

In other words, the mutual credit clause

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(section 39) of the Bankruptcy Act, 1869, is now, by section 10, imported into the winding-up of a company.

Appeal from the judgment of Lord Coleridge, C.J., sitting without a jury.

A contract was entered into on the 22nd of December, 1880, between the plaintiff company and the defendants, whereby the defendants were to purchase from the company 5,000 tons good sound cogged Bessemer Steel Blooms of the company's manufacture, suitable for rolling into rails, at the price of 5*l.* 10*s.* per ton, f.o.b. Liverpool, delivery 1,000 tons monthly, commencing January then next. Payment net cash within three days after receipt of shipping documents.

The company, in the month of January, shipped by various vessels 331 tons 17 cwt. 1 qr. of the blooms, which shipments were paid for.

On the 31st of January, 1881, the company shipped on board the *Helvetia*, 211 tons 4 cwt. of the blooms, the price of which was 1,161*l.* 12*s.* The shipping documents were received by the defendants' agent on or about the 1st of February.

In February, 1881, the company made further shipments of blooms on board the *Celtic* as follows:—

		tons	cwt.	qrs.
February	1	39	11	2
"	2	85	1	0
"	3	67	11	1
"	4	61	15	2
"	5	6	3	0
		260	2	1

The price of these shipments was 1,433*l.* 1*s.* 11*d.*

The shipping documents were delivered to the defendants on the 5th of February, and payment became due on the 8th of February.

A petition for the compulsory winding-up of the company was presented by John Fowler, on the 2nd of February, 1881, in the County Palatine Court.

The company, on the 5th of February (Saturday), wrote to the defendants complaining that they had not received a cheque for the shipment *per Helvetia*, and on the 7th of February the defendants wrote in answer that they understood that a petition had been presented for winding

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up, and that they therefore doubted whether they ought to send a cheque for that shipment until the question of the petition was disposed of, asking at the same time to be informed whether a petition had been presented, to what Court, and when it was set down for hearing.

On the 8th of February the company wrote to the defendants as follows:—

“Liverpool, February 8.

“Unfortunately it is correct that a petition has been presented for winding up this company, and stands for hearing on Tuesday, the 15th instant, in the County Palatine Court here. . . . If in the meantime we are to continue to deliver blooms under your contract, we must ask you to be good enough to observe your part of the contract by remitting us promptly. . . . If you decline to do this we shall consider the contract at an end at once.”

On the 9th of February, the defendants telegraphed to the company as follows:—

“Our solicitor advises we cannot safely make the payment without an order of the Court, which he says you can obtain without difficulty or delay. Consult your solicitor on this at once.”

And on the same day they wrote to the company—

“We are most anxious not to put you to any inconvenience, but we are advised by our solicitor that we ought not to make the payment under the present circumstances. His letter points out the way of getting over the difficulty, and we hope you will adopt it immediately.”

With this letter they enclosed a copy of the letter of their solicitor, in which he advised them that it would not be safe to pay, having regard to section 153 of the Companies Act, 1862, and suggesting an application by the company to the Palatine Court, and sketching out a form of the order for which the company should apply authorising the defendants to make the payments.

The company, on the 10th of February, wrote in answer—

“Our solicitors advise us that the section named relates only to the parting with or disposing of property, and not to the receipt of property or money. We shall therefore consider your refusal to pay for the goods already delivered as a

breach of contract on your part, and as releasing us from any further obligations on our part.”

A correspondence then ensued between the solicitors of the company and the defendants, the company declining to make the application suggested by the defendants' solicitor.

On the 15th of February the petition was heard, and a winding-up order was made, and on the 16th Mr. Banner was appointed provisional liquidator.

On the 17th of February the defendants' solicitor wrote to the company's solicitors as follows:—

“Messrs. Naylor Benzon would be glad to know as soon as possible what he (Banner) proposes to do as to the contract. I have just heard that there is some question as to damages due to my clients for failure to deliver the January instalments. I apprehend that they would have a right to deduct those damages from any payments now due from them. My clients are prepared to accept all deliveries which Mr. Banner may make in pursuance of the contract, and to pay him such sums as are due from them under the contract, taking all parts of it together. And I should advise them, to prevent any present difficulty, to pay Mr. Banner for any deliveries without any deduction on account of damages, on his consenting, with the authority of the Court, to keep the payments to a separate account, and that they shall be made without prejudice to our claim to deduct the damages. Or I think it probable that my clients would consent to accept delivery now and waive the damages.”

On the 24th of February an order was obtained from the Vice-Chancellor of the Palatine Court, directing Mr. Banner to continue to carry on the business of the company.

On the 28th of February the defendants' solicitor again wrote to the company's solicitors asking why the liquidator had not made the deliveries due for February, and proceeded: “You will understand that Messrs. Naylor, Benzon & Co. always have been and still are ready to accept such deliveries and make such payments as ought to be accepted and made under the contract.”

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The company's solicitors on the 1st of March wrote to the defendants' solicitor: "The liquidator has discontinued deliveries because Messrs. Naylor, Benzon & Co. withhold payment of the balance remaining due. We are instructed to bring an action against them to enforce payment."

After some more correspondence, the liquidator refusing to continue the contract, the defendants sent on the 15th of March a cheque for 881*l.* 13*s.* 2*d.*, retaining the balance on account of damages for breach of contract.

On the 30th of May the writ in the action was issued, and by their claim the company claimed a balance of 1,713*l.* 0*s.* 9*d.* remaining due for the January and February deliveries after allowing for the 881*l.* 13*s.* 2*d.* paid by the defendants.

The defendants, by their defence, admitted that the company were entitled to receive payment for the deliveries made at the rate of 5*l.* 10*s.* per ton, and that they had only paid 881*l.* 13*s.* 2*d.* on account of the price of those deliveries, and stated their willingness, if anything more was due to the company in respect thereof, to set off against such balance an equal amount out of the sums due to them from the company in respect of the matters of their counter-claim.

By their counter-claim they alleged that by virtue of the contract they were entitled to receive from the company deliveries of 1,000 tons during each of the first five months of 1881. That the plaintiffs had during January committed a breach of such contract by delivering only 331 tons 17 cwt. 1 qr. instead of 1,000 tons in that month; and that subsequently, in February or March, before the delivery of the contract quantity for either of those months, the company had wrongfully repudiated the contract; and they claimed 2,500*l.* as damages for the breaches of contract by the plaintiffs.

The company, by their reply, denied that they repudiated the contract, alleging that the defendants had broken it, and refused to pay for the iron delivered.

The company, by paragraph 6, further alleged that the defendants' set-off and counter-claim was in respect of claims against the company arising after the petition and winding-up order, and that

the defendants had not obtained leave under the Companies Acts, 1862 and 1867, to make or prosecute such set-off or counter-claim, and under the said Acts were not entitled to recover in respect of the counter-claim or to reduce or extinguish the claim of the company by the set-off.

The defendants, by way of rejoinder, joined issue upon the defence of the company to the counter-claim, and demurred to the 6th paragraph as being bad in law, on the ground "that it is not necessary to obtain leave to set off or set up by way of counter-claim any right or claim against the company in an action brought by the company," and on other grounds.

The action was set down for trial at Liverpool, but on being opened was adjourned to London for argument, and was heard by Lord Coleridge, C.J., without a jury, when his Lordship decided that the defendants were bound to pay, and that the defendants having broken the contract, and thus entitled the company to treat it as at an end, could have no claim for damages.

The defendants appealed.

The Solicitor-General (Sir F. Herschell) and Bigham, for the appellants.—The real question is whether we are entitled as against the plaintiff company, which is in liquidation, to set off in the action unliquidated damages against the amount claimed by the company. This was not decided below, the Lord Chief Justice basing his decision on what he considered to be the repudiation of the contract by the defendants. But the mere non-payment by us under the circumstances of the case did not amount to a repudiation. The case falls within *Freeth v. Burr* (1), and the non-payment was not such an act as to amount to an intimation of our intention to abandon and refuse performance of the contract, within the meaning of the rule laid down in that case—*Ex parte Chalmers; in re Edwards* (2).

There was here, also, no inability on the part of the defendants to perform their

(1) 43 Law J. Rep. C.P. 91; Law Rep. 9 C.P. 208.

(2) 42 Law J. Rep. Bankr. 37; Law Rep. 8 Chanc. 289.

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part of the contract. The only reason for not paying was their fear, causeless it may be, of a liability to pay over again—*In re The Phoenix Bessemer Steel Company* (3) and *Simpson v. Crippin* (4). The most recent case, in which all the cases are cited, is *Honck v. Muller* (5).

The second point is as to our right of set-off.

The question turns on the Companies Act, 1862, and the Judicature Act and Orders. The company say we ought to obtain leave; but it has been held in *Gray v. Raper* (6) and *Henderson v. The Peruvian Railway Company* (7), that absence of leave could not be pleaded, but was merely a ground for an application for injunction in the Court where the winding-up was proceeding; and as the company obtained leave to bring an action, that of necessity gave the defendants the right to raise any defence they may have, and the question is reduced to this—whether we can set off unliquidated damages in this action against the company's claim. It is said that this cannot be done as against a company in liquidation, but that we must pay the full amount claimed and prove in the winding-up.

There can be no doubt as to our right of proof, as under the Companies Act, 1862, by section 158, unliquidated damages are distinctly made provable; and although that Act does not include the set-off and mutual credit section in the Bankruptcy Act, we submit that now, under section 10 of the Judicature Act, 1875, those provisions are to be introduced in the winding-up of a company. Under section 39 of the Bankruptcy Act the only proof that can be made in the bankruptcy is a proof for the balance remaining after taking into account the set-off. That is, it was introduced for the purpose of taking an account in the bankruptcy between debtor and creditor so as to see on which side the balance lies, and only for that balance is there a proof.

If our damages exceed the claim of the plaintiffs, and we brought in and proved in the bankruptcy for our claim for damages without taking into account the debt we owe, the trustee would reject the proof on the ground that we were not following the rules of bankruptcy, according to which our only proof would be for the balance. Mutual credit is in fact a rule as "to proofs," and therefore we are within the ruling of the Master of the Rolls in *In re The Northern Counties Insurance Company* (8), which holds that section 10 makes one law for proofs in bankruptcy and winding-up; and if so, then mutual credit is introduced into the winding-up of a company by section 10, and there is a *dictum* distinctly to that effect of Bacon, V.C., in *Campbell's Case* (9).

The rules of bankruptcy are not confined to procedure only, but include principles. If mutual credit can be called a rule as to proof, then Order XIX. rule 3, gives us all we want—and we are entitled in this action to set off our claim for unliquidated damages against the company although in liquidation—*Peat v. Jones* (10)—an analogous case, where a claim for unliquidated damages against a trustee in bankruptcy was allowed to be set off in an action brought by the trustee.

Although the orders may be said merely to alter the procedure, yet new rules of procedure do give new incidental rights, and the statute of set-off, 2 Geo. 2. c. 22. s. 23 (which is very similar to Order XIX. rule 3), may be called a mere Statute of Procedure. Before it passed a judgment could at common law be set off against another judgment under what was called the equitable jurisdiction of the common law, and that statute only enabled that to be done before judgment which could before be done after judgment. The rules have changed the law—*e.g.*, upon the question of costs—*Garnett v. Bradley* (11).

The cases of *The Progress Assurance Company*; *ex parte Bates* (12), *In re The*

(3) 46 Law J. Rep. Chanc. 115; Law Rep. 4 Ch. D. 119.

(4) 42 Law J. Rep. Q.B. 28; Law Rep. 8 Q.B. 14.

(5) 50 Law J. Rep. Q.B. 529; Law Rep. 7 Q.B. D. 92.

(6) Law Rep. 1 C.P. 694.

(7) 16 Law Times, 297.

(8) 50 Law J. Rep. Chanc. 278; Law Rep. 17 Ch. D. 337.

(9) Law Rep. 4 Ch. D. 470, at p. 475.

(10) *Ante*, p. 128; Law Rep. 8 Q.B. D. 147.

(11) 48 Law J. Rep. (H.L.) Exch. 186; Law Rep. 3 App. Cas. 944.

(12) 22 Law Times, 430.

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Albion Steel and Wire Company (13), *In re The Withernsea Brick Works* (14), *In re The Association of Land Financiers* (15), *In re Hopkins* (16) and *Buckley* (17), were referred to.

C. Russell, Q.C., and *French*, for the company.—The real question to be decided in each case is, whether the acts or conduct of one party to a contract amounts to evidence of his intention to be no longer bound by it.

The case of *Honck v. Muller* (5) shews a tendency in the Court to revert to the earlier decisions. A substantial breach of contract on the one side ought to release the other party. Insolvency is only one of the grounds on which a party may be released; but there may be a non-payment, although there is no question as to insolvency, so much affecting the capability of the party to deliver as to amount to a release of the party who is to deliver under the contract. The facts of each case must be considered, and mere non-payment may deprive the party to deliver of the means of performing his part of the contract—*Withers v. Reynolds* (18).

[*BOWEN, L.J.*—There there was a positive refusal to pay for future deliveries. *JESSEL, M.R.*—That is no authority to shew that mere non-payment will do. The ground for the decision there was not that he did not pay, but that he said he would not pay in the future. That is the judgment of *Patterson, J.*]

The authority of *Hoare v. Rennie* (19), although it is said to have been disapproved, has been indorsed in *Honck v. Muller* (5). The defendants should have obtained leave under section 87 before raising this claim. The counter-claim is really a cross-action, and a distinct action. See *Stooks v. Taylor* (20) and *Vavasseur v. Krupp* (21).

(13) 47 Law J. Rep. Chanc. 229; Law Rep. 7 Ch. D. 547.

(14) 50 Law J. Rep. Chanc. 185; Law Rep. 16 Ch. D. 337.

(15) 50 Law J. Rep. Chanc. 201; Law Rep. 16 Ch. D. 373.

(16) Law Rep. 18 Ch. D. 370.

(17) 3rd ed. p. 280 *et seq.*

(18) 4 B. & Ad. 882.

(19) 5 Hurl. & N. 19; 29 Law J. Rep. Exch. 73.

(20) 49 Law J. Rep. Q.B. 857; Law Rep. 5 Q.B. D. 569.

(21) Law Rep. 15 Ch. D. 474.

There is no right of set-off given by the Companies Act, 1862, and they must shew a statutory right—*Sankey Brook Company v. Marsh* (22)—and their only right (if any) must be given by section 10 of the Act of 1875; but there is nothing in that section to introduce into the Companies Act the mutual credit section of the Bankruptcy Act. The 10th section is not to be extended—see *In re The Withernsea Brick Works* (14), and observations of *James, L.J.*, in *Lee v. Nuttall* (23), *Thomas v. The Patent Lionite Company* (24), *Smith v. Morgan* (25), *The Railway Steel Company* (26), and *In re Richards & Co.* (27).

The Judicature Acts and Rules thereunder relate only to matters of procedure, and do not affect the rights of parties, nor, save in some specified cases, alter the law—see *per Bramwell, L.J.*, in *Pellas v. The Neptune Marine Insurance Company* (28). And such a set-off did not exist under the Companies Act, and there has been no alteration made in the law by a mere rule of procedure as Order XIX. rule 3.

Biggam, in reply, referred to *Ex parte Barnett*; *in re Devezze* (29).

JESSEL, M.R.—This is an appeal from a decision of the Lord Chief Justice, and it raises two points, one certainly of very great importance, and the other of great importance. The first question is, what is the rule which is to prevail with regard to the getting rid of the liability to the further performance, or to the performance of a contract, having regard to the acts or defaults of one party in respect of that contract? If one party breaks a contract, is the other party bound to perform his part of it or not? There is no absolute rule upon the subject—that is to say, no

(22) 40 Law J. Rep. Exch. 125; Law Rep. 6 Exch. 185.

(23) 48 Law J. Rep. Chanc. 616; Law Rep. 12 Ch. D. 61, at p. 65.

(24) 50 Law J. Rep. Chanc. 544; Law Rep. 17 Ch. D. 250.

(25) 49 Law J. Rep. C.P. 410; Law Rep. 5 C.P. D. 337.

(26) 47 Law J. Rep. Chanc. 321; Law Rep. 8 Ch. D. 183.

(27) 48 Law J. Rep. Chanc. 555; Law Rep. 11 Ch. D. 676.

(28) 49 Law J. Rep. C.P. 153, 155; Law Rep. 5 C.P. D. 34.

(29) 43 Law J. Rep. Bankr. 87; Law Rep. 9 Chanc. 293.

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absolute rule which can be laid down in so many words, to shew whether a breach of contract on the one side has exonerated the other party to it. But I think the rule is properly stated, as a rule of law, in the case of *Freeth v. Burr* (1). It is stated by the Judge from whose decision the present appeal is brought. The Lord Chief Justice there says, "I say this in order to explain the ground upon which I think the decisions in these cases must rest. There has been some conflict amongst them, but I think it may be taken that the fair result of them is as I have stated—namely, that the true question is, whether the acts and conduct of the party evince an intention no longer to be bound by the contract." Now that is a question of evidence—that is, you must consider the nature of the breach, the circumstances under which the breach occurred, and then see whether that is the result of it. There may be actual declaration—one man may say, in so many words, I do not intend to go on with the contract; but it is not so where, as in this case, the intention must be inferred from the acts of the parties. Then he goes on: "Now non-payment on the one hand, and non-delivery on the other, may amount to such an act or may be evidence for a jury of an intention wholly to abandon the contract and set the other party free." That is, where you have the act so done that one of the parties, if I may say so, elects to be free, then the other cannot be made liable in damages. Now in *Freeth v. Burr* (1), and in many other cases, no such distinction is taken as is referred to by Lord Bramwell, if I rightly read his judgment in *Honck v. Muller* (5); that is, there is no distinction drawn whatever in the case of a contract partly performed and a contract never performed at all. In *Freeth v. Burr* (1) there had been part performance, and in the case of *The Phoenix Bessemer Steel Company* (3) the point really was not argued. The one side had sued the other on a contract for selling goods on credit, and they said, "We will not sell you the goods any more except for cash." The other side said, "But we are entitled to credit, and if you will not sell them to us except for cash, we will not take them at all, and then there shall be an end of it." The only point argued was, whether

the persons who were entitled to the credit were insolvent in such a way and to such an extent that the vendors had a right to say, "We will not sell except for cash." That was the only point argued. Of course if they had been, the vendors would have been entitled to say, "We will not sell you goods if we are not paid for them." But nobody argued the other point, that upon the refusal of the vendors to sell without cash, and when the answer is "we must decline to deliver the iron," they were released from the contract. It was so held by myself when the case came originally before me at the Rolls, and then before the Court of Appeal affirming that decision. That case was the case of a contract which had been part performed to a very considerable extent; so again in the case we were referred to of *Withers v. Reynolds* (18) the contract had been partly performed; and therefore the notion of Lord Bramwell that there is any difference in that respect between a contract part performed and a contract not performed at all is, I do not think, well founded, if I am right in attributing to his Lordship, in the case of *Honck v. Muller* (5), the opinion that in no case could such a point as is now before the Court be taken where the contract was part performed. I am not quite sure that that is the construction of the judgment, although I have read it three times, but that seems to me to be the fair construction.

I notice that in the very case Lord Justice Lindley referred to—that of *Simpson v. Crippin* (4)—no such distinction was taken, and the original contract in *Hoare v. Rennie* (19) had not been performed at all. How that is I cannot exactly tell, because that case was heard on demurrer; and I agree so far with the observations of Mr. Bigham in reply that the Judges seemed to have forgotten that, and to have treated it as a special case, and drawn inferences of fact.

However, that being so, the only point we have to consider is whether there is anything in the evidence in this case which should lead us to the conclusion that the buyers refused to go on with the contract. Now, I must say I think the evidence is very strong the other way, that the buyers were both ready and will-

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ing to pay, if it had not been for the unlucky circumstance that induced them to refuse to pay under a mistake of law. They ought to have paid, no doubt, within three days after the delivery of the ship's documents, and there was a payment which became due on the 5th of February. When the 5th of February arrived the buyers had information that a petition for winding up this limited company, who were the sellers, had been presented, and they enquired whether it had been presented. The answer was that it had. They then took legal advice, and their solicitor gave them—I am not at all surprised, because those things do occur with the most eminent members of the profession, and must occur with solicitors occasionally—advice which was not right in law. He told them that, the petition for winding-up having been presented, they could not safely pay the company for what was delivered. What did they do? They transmitted a copy of the letter of the solicitor to the vendors (I am giving the effect of the correspondence without going into detail), and said, "We are advised, or we are told, if you get an order of the Court of the County Palatine requiring the payment to the company we shall be safe." They would have been safe without that, and certainly would have been safe with it. They say, "Apply for the order, which you will get as a matter of course." I am not so sure about that, because the Court would have said it was not wanted. However, the decision would have done all that was required; "and then," they say, "we will pay you." So the matter went on. The company did not apply for the order, and took no step except giving the defendants a notice that if they did not pay they would treat the contract as at an end. There were, perhaps, reasons why they were desirous of treating it as at an end, because certainly the iron was worth more than the price at which they sold it. Then the petition came on to be heard on the 15th of February, and the winding-up order was made, and on the 16th a liquidator was appointed. The liquidator could have received payment, and could have gone on with the delivery of iron; but there were considerable difficulties which arose, and

it was not until the 24th of February that he got an order to go on with the business. Then the purchasers wrote a long letter giving the company an option. They said, "We have a claim for damages for non-delivery in January; we will take two courses: we will either pay you the money if you will put it to a separate account and hold it as against our claim for damages, or we will waive the claim for damages if you will go on with your deliveries." That was not, to my mind, a refusal to go on with the contract. It was a mode pointed out for going on with it. The liquidator accepted neither course. He said, "As you will not pay, I will not deliver"; and thereupon, on the 28th of February, he is formally asked for delivery, and on the 1st of March he formally refuses, and there is an end of it.

Now, looking at these circumstances, it seems to me, so far from affording evidence of any desire on the part of the purchasers to put an end to the contract, it is very strong evidence that they wanted the contract to go on and the deliveries to continue, because it is not suggested for a moment that this well-known firm were in any pecuniary difficulties or wanted delay in payment because it was not convenient to pay. Another suggestion was made in the course of the argument, but it appears to me also devoid of foundation. That suggestion was, "they wanted to avoid payment so as to get up a case for damages." Then the delay has occurred without delivery, which entitles them to say, "We will claim large damages, and we will set those off against payment." I think the answer to that is a very simple one—that they offered to pay, having waived the claim for damages if the deliveries were continued; and it does appear to me, on the whole of the correspondence, that there is really an anxiety exhibited on the part of the purchasers for the contract to go on, and nothing on either side which can, as I read the correspondence, be fairly construed into a statement on their part that they will not comply with the terms of the contract. That being so, I think, subject to the question as to the effect of the winding up, the defendants ought to succeed.

Now comes the question of the winding-

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up; and I admit it is one of very considerable difficulty, because the legislative enactments on the subject are not as plain as they might be. But I cannot accept the argument offered on the part of the plaintiffs in the action to this effect, that, because the enactments are not perfectly plain, therefore we are not to try and find out their meaning, and that there is to be no alteration in the law unless it is made in such clear and unambiguous terms that there can be no argument upon it. It is the duty of the Court to find out what the meaning of the Legislature is; and there is a further duty upon the Court, which I have always endeavoured to perform, and that is, to attach a rational and beneficial meaning, if that is possible, rather than an irrational and an injurious meaning to the statutes which have been passed by the Legislature.

Now, in reason, there cannot be any question whatever that the right to set off unliquidated damages as against a debt is one which ought to be supported. It stands in that way, irrespective of winding up. The present defendants would have a right to say, "You owe us a large sum of money for damages. You sold us iron at a price which, if delivered, would have left us a very handsome profit. We have lost that by your non-delivery of part; set that off against what we owe you for the portion you have delivered." In reason there is nothing to be said against it; in law there is nothing to be said against it independently of winding up, because, as the law now stands, whatever the law was formerly, they could have pleaded, as they did plead by way of set-off, the amount of unliquidated damages against the claim for goods delivered. Then does the winding-up stand in the way? for that is what it comes to. In other words, has the liquidator the right, by reason of the winding-up of a company, to claim payment in full for the goods sold and delivered, leaving the purchasers to prove for their damages, and get, perhaps, a small dividend in the winding-up proceedings?

Now, in order to see whether this can be done or not, of course we must not allow our own notion of what is right and wrong, or what is reasonable and un-

reasonable, to prevail, unless there is some statutory enactment upon which we can found our decisions.

Under the Companies Act, 1862, I cannot say that there is such a right of set-off given, because the Legislature, perhaps by accident, has not inserted in that statute the mutual credit section which is to be found in the Bankruptcy Act; and though it enables a party to prove for unliquidated damages, it does not require an account to be taken, as is done in the Bankruptcy Court, for the purpose of seeing on which side the balance is, and then order proof for payment accordingly. But the Legislature, by the 25th section of the Act of 1873, has made an alteration in that respect, and, by the 10th section of the Act of 1875, has amended the law. Indeed, the recital in the Act of 1873 was that advantage should be taken of the union of the Courts, because at that time it was proposed to unite the Court of Bankruptcy with the other Courts—an alteration which I hope to see some day or other—although the Legislature, by the Act of 1875, has not carried that out. It was to take advantage of the union to improve the law. So this sub-section was put in; and it is important to see how it stood originally, because it has some bearing upon the Act of 1875. In the Act of 1873, after reciting, "It is expedient to take occasion of the union of the several Courts whose jurisdiction is hereby transferred to the High Court of Justice" (which, I said before, included the Bankruptcy Court), "to amend and declare the law to be hereafter administered in England as to the matters next hereinafter mentioned." Then it goes on:—"In the administration by the Court of the assets of any person who may die after the passing of this Act, and whose estate may prove to be insufficient for the payment in full of his debts and liabilities, the same rules shall prevail and be observed as to the respective rights of secured and unsecured creditors, and as to debts and liabilities provable, and as to the valuation of annuities and future or contingent liabilities respectively, as may be in force for the time being under the law of bankruptcy, with respect to the estates of persons adjudicated bankrupt."

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It has been suggested that those words are to be limited to the respective rights of secured and unsecured creditors to get rid of the essential difference of the rights of secured creditors in Chancery and in Bankruptcy; but I cannot read them so. The words are, "as to debts and liabilities provable." They really do not apply to the liabilities as distinguished from debts, and therefore there is no alteration as to debts and liabilities provable. It must mean as to what debts and liabilities should be proved, and the manner in which they are to be proved.

Now, as to what can be proved, you do not require any alteration for the purpose I am going to mention. You could formerly have proved even against a dead man's estate for damages for breach of contract, but the mode of proof was different. Now, when you come to the Act of 1875, you have the same words as in the Act of 1873, with this distinction, that the winding-up of companies, having been forgotten in the Act of 1873, it is put in the Act of 1875, and that is the only alteration which was made in the 1st sub-section of section 25 of the Act of 1873. When you come to look at all the words you see they have put in these words, and say, "in the winding-up of any company under the Companies Acts, 1862 and 1867, whose assets may prove to be insufficient for the payment of the debts and liabilities and the costs of winding up."

That being so, here again we find in the Companies Act, 1862, that a proof might be made for unliquidated damages after breach by section 158, but the rule as to the mode of proof is to be the same as in bankruptcy. What was the mode of proof in bankruptcy? If you came to prove in bankruptcy under the Act of 1869 for a liability in respect of damages for a breach of contract, you took an account on both sides, and if, after deducting from the claimant's claim in respect of damages the amount of the debt due to the bankrupt, a balance was left still due to the claimant, he was allowed to prove for that balance. So that that was the rule as to proving, and consequently, after the passing of section 10 of the Act of 1875, we do find the rule as to proving, which applies now to the winding-up of companies as well as to the

estates of deceased persons, is the same as in bankruptcy. Then it is plain to my mind that so far as that Act is concerned, if the appellants had come to prove in the winding-up by virtue of section 10, they would have deducted from their claim for damages the amount claimed in respect of the debt due from them to the company. Well, then we come to what is to be the effect of that section, and therefore we must look at the terms of Order XIX. rule 3. If I had occasion to consider what the effect would really have been if there had been no section 10 in the Act of 1875, I confess I should have felt very considerable difficulty in saying that there was a very substantial alteration in the law, as distinguished from the alteration in procedure, and I should have felt that difficulty for two reasons. First of all, as a general rule, when you get an alteration of the rule of pleading in procedure (and this Order is headed "pleading generally") you do not expect to find substantial alterations of the law, but merely alterations in the mode of asserting or defending previously existing rights. That is the primary view of it; and, in the next place, we find these words at the end of the rule: "But the Court or a Judge may, on the application of the plaintiff before trial, if in the opinion of the Court or Judge such set-off or counter-claim cannot be conveniently disposed of in the pending action, or ought not to be allowed, refuse permission to the defendant to avail himself thereof." It can hardly have meant to give new rights, for in that case the decision of the Judge would be altering altogether the rights of the parties. I suppose it would have been said that it ought not to be allowed if the law would not otherwise allow it, and the mere altering the rule of procedure would not be altering the substantial rights of the parties.

But, as I said before, we have section 10. The Order says: "A defendant in an action may set off or set up, by way of counter-claim, against the claims of the plaintiff, any right or claim, whether such set-off or counter-claim sound in damages or not, and such set-off or counter-claim shall have the same effect as a statement of claim in a cross-action, so as to enable the Court to pronounce a final judgment

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in the same action, both on the original and on the cross-claim."

That shews what the rule was for. It was to enable that to be done in one action which would otherwise require two. Now that being so, it seems to me to come to this—that if, according to the rule, on a question of proof, you ought to set off, then you ought to do the same thing in an action, and this points out the mode of doing it. Again, I think, even independently of the rule, you can find a reason for availing yourself of it in the action, on the same ground to which I adverted before. It seems, according to the report, to be put rather more shortly than I think it was really put by me in the case of *Peat v. Jones* (10),* as to the ground upon which the bankruptcy rule has been applied in actions for about a century and a half; and the Judges had said that the assignee in bankruptcy, as he was then called, would not be in a better position by his bringing an action than if the claim had been made in the Bankruptcy Court. True, the Act of Parliament only says that when the claimant comes to prove in bankruptcy, and to take an account; but it may be that he has nothing to prove, that he has only a set-off for a less amount. But the Judges took the meaning of the Bankruptcy Act to be, that when the man is a bankrupt, an account is to be taken between the parties, and that whether he brought his claim into the Court of Bankruptcy or not, the assignee should only be entitled to the balance, as he would be entitled if a proof were tendered in bankruptcy. That was what has been termed, I think, in one of these cases, "the equity of the statute."

That being the meaning of the law, the mode of carrying it out is an accident. If the assignee, instead of bringing the claimant into a Court of Bankruptcy, chose to bring an action, we should allow the man the same benefit as he would have obtained if his claim had been taken into the Court of Bankruptcy. If that is right—and the Court of Appeal held it was right in *Peat v. Jones* (10)—it comes to this, that

* The judgment of the Master of the Rolls is reported at greater length in the Law J. Reports.

where you see that the Statute enacts that, as between two parties, there is to be a particular mode of taking an account between them, and if the balance is one way, the creditor shall prove in the winding-up, and that if it is the other way the liquidator shall be only entitled to claim the difference—the same mode of taking the account ought to apply to a different form of procedure, whether it is an action or whether it is taking the accounts in the Court of Bankruptcy. And as it would have been by the Act of 1873 in the High Court, because the Court of Bankruptcy was amalgamated, so that the same equity should prevail, then I say that the 3rd rule of Order XIX. comes in, because it shews you how to take it, namely, by counter-claim.

It appears to me, therefore, that if we look at the enactments which the Legislature has passed on the subject, and endeavour fairly to apply them, and, as I say, endeavour also to apply them in a rational and beneficial manner, we can carry out that which is reasonable and fair: we can allow justice to be done by giving the appellants what they ask—namely, the right to a defence to the extent of the amount of the damages, which in this case we are told exceed the amount of debt, by giving them a judgment in their favour, which is all they can obtain in the present case.

LINDLEY, L.J.—I am also of opinion that the judgment of Lord Coleridge in this case cannot be supported. The first question is, whether the defendants are entitled, apart from any question of set-off, or any difficulty of that kind, to any damages by reason of the breach by the plaintiffs of a contract on their part. Lord Coleridge held that they were not, on the ground that there had been such a refusal on their part to perform the contract as to amount to a rescission of it. Now it depends really on the letters and the correspondence which have been read. They were all before him, and they are all before us. The view which the Lord Chief Justice took of this correspondence is stated in these words: he says, "Here the defendants, while insisting on future deliveries, positively refuse to pay for the

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iron already delivered and for all which might be subsequently delivered, unless the plaintiffs fulfilled a condition which the defendants, in my opinion, had no right to impose." That is the conclusion at which the Lord Chief Justice arrived from the perusal of these letters which were placed before him.

Now, without pausing to remark on the actual terms in which that conclusion is expressed, and the legal consequence drawn by the Lord Chief Justice from it, I confess it appears to me that the correspondence does not, when carefully studied, bear that interpretation. The alleged refusal arose in this way: It appears that the adviser of the defendants took a view which was untenable—that is to say, that they could not properly pay certain money which they owed to the plaintiff company by reason of the pendency of the petition to wind up the plaintiff company. The view, taken erroneously, it appears to me, and in fact that is now conceded, was that there was something in section 153 of the Companies Act of 1862 which rendered such a payment improper. It was overlooked that section 153 applies to dispositions by the company being wound up of its property, and not to payments to such company; and the distinction is obvious, and not only obvious in the language of section 153, but there is a case to be found, and a case arising out of the winding-up of Harvey's Bank (*Read v. Bailey*) (30), in which it was held that a transfer of shares to a company which was being wound up, is not within section 153, and exposed the company to calls with respect to those shares. *A fortiori*, such a transaction as this is not within the words of section 153; therefore that was mistaken advice. However, there it ends. The advice was given, and the consequence of that was, that the defendants declined, or refused—I will use that word for a moment—to pay what they owed. But they did not so decline or refuse as to warrant the inference which is necessary, according to the case of *Freeth v. Burr* (1)—the inference, I mean, that they abandoned the contract or repudiated it—and would not go on with it. The inference is quite the

(30) 47 Law J. Rep. Chanc. 161; Law Rep. 3 Ch. App. 105.

other way. The true inference to be drawn from the correspondence is, that they were ready enough to pay, but that they felt embarrassed, and did not know how to pay. That was the real truth. Whether they ought to have been embarrassed is quite another matter. Acting honestly, and having got the advice which they did, they did feel embarrassed; therefore, in that sense, they hesitated about paying. That is the real truth. It was not such a refusal to pay as brings the case at all within the principle of *Freeth v. Burr* (1).

Now I certainly do not pretend to reconcile all the cases on this subject—I have tried, and I despair—I cannot reconcile *Hoare v. Rennie* (19), *Simpson v. Crippin* (4) and *Honck v. Muller* (5). I can understand each case by itself; but when we come to consider, and to see whether those principles have been consistently applied, it seems to me that there is very considerable difficulty in reconciling the decisions. But really it is not necessary to do that, or anything like it. What we have to do is to abstract some intelligible principle by which to be guided; and it appears to me the principle is stated accurately in the case of *Freeth v. Burr* (1) by Lord Coleridge himself in delivering his judgment in that case. What he says is, "I think it may be taken that the fair result of them"—that is, the cases that he had been reviewing up to that date in 1874—"is as I have stated, namely, that the true question is, whether the acts and conduct of the parties evince an intention no longer to be bound by the contract." I think that is the fair way of testing these cases; and it appears to me that either Lord Coleridge lost sight of that in deciding this case, or that he drew an inference from the correspondence which does not come up to the standard. Taking that as the true test, it appears to me—without going through the letters, but referring merely to the dates, in order that I may meet the argument of Mr. Russell—that the true and fair construction of the important letters of the 10th of February, the 17th of February and the 1st of March, is this, that the defendants refused, or declined, or hesitated to pay, not, as is stated in the case of *Freeth v. Burr* (1), "evinced an intention no longer to be bound by the

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contract," but evincing a difficulty suggested to them by their solicitor—a difficulty they did not see their way to get out of. I believe that is the true construction and true effect of these letters. Therefore, upon this point, which is the only point upon which the Lord Chief Justice decided this case, I am unable to agree with him.

Then there remains another point, which is of a totally different character. It is said, "Well, but this is an action brought by a company which is now being wound up." The petition to wind up the company was on the 2nd of February, 1881; the order to wind it up was on the 15th of February, 1881, and the action was brought by the company in liquidation by leave of the Judge to whose Court the winding-up proceedings were attached. It is said that in an action of this kind a defendant is not at liberty to plead by way of set-off or counter-claim a claim for unliquidated damages, even although he restricts the amount to the amount sought to be recovered by the plaintiff company in the action. That raises a very important and difficult question. Let us see how the matter stands. First of all, let us see how it would stand if the company were not being wound up at all. Under those circumstances I apprehend that Order XIX. rule 3, would apply. It applies to actions by companies as well as to actions by individuals, and under the Judicature Act it appears to me that there is no difficulty at all in asserting a counter-claim, even to a greater extent than the amount claimed by the plaintiff. But the plaintiff company is being wound up, and the question is what difference that makes.

Now, with regard to set-off, it has been established, as far as I know, ever since the Companies Act, 1862, that whether an action was brought by a company, or whether a proof was carried in by a creditor of the company in a winding-up, a set-off of a liquidated sum due from the company before the winding-up was admissible. Whether it was under the general statute of set-off or otherwise, it is not, perhaps, necessary now to consider. The importance of bearing it in mind is this—that there is nothing in the Companies Act, 1862, which expressly relates

to set-off as between a company on the one hand and non-contributories on the other. There are sections in the Act which relate to set-off as between a company on the one hand and contributories on the other, and, speaking roughly, such a set-off is not allowed in the case of an action or claim between limited companies and contributories, and is allowed between unlimited companies and contributories. But there is no statute expressly relating to set-off between companies on the one hand and non-members on the other. At the same time, there is in the same Act of 1862 a provision, or rather a series of provisions, which shews that one of the primary objects of the Court in winding up a company is to get a rateable distribution of its assets among its creditors, so that one may not be preferred to another.

Notwithstanding those general sections, it was held, as I have stated, ever since 1866, at least in *Anderson's Case* (31), and has been followed by the modern law, that a set-off applied either to an action or a winding-up proceeding, and that has always been the practice. Another illustration of the same kind is to be found in the case of *Ex parte James* (32), and I have never heard it in any way questioned or disputed. But then, of course, the reason for that was the analogy to the old statute of Geo. 2, the statute of set-off, which did not apply to unliquidated damages. Unliquidated damages, I mean, are dealt with in a different manner. It is important to bear in mind that unliquidated damages can be proved in a winding-up, which ought not to be lost sight of by any means. Section 158 is very wide, and I can hardly conceive any claim against a company which can result in damages which cannot be made the subject of proof. That is important, and I am not aware of any decision before the Judicature Act that throws light upon the question whether a cross-claim for unliquidated damages could or could not be set off under the winding-up proceedings. I do not know of a case one way or the other.

Now we come to section 10 of the Judicature Act of 1875, which appears to me to be extremely important. It

(31) Law Rep. 3 Eq. 337.

(32) Law Rep. 8 Eq. 235.

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is well known that there were difficulties in the administration of assets, particularly as regards secured creditors; and the rules in Chancery which applied to the winding-up or the administration of assets of deceased persons, and as to insolvent persons, were different from those in Bankruptcy. Therefore that led to the insertion in the Act of 1873 of a clause which has been modified and extended by the 10th section of the Act of 1875. The difference between the 10th section of the Act of 1875 and the previous enactment in the Act of 1873 is that the Act of 1875 makes the enactment applicable to the winding-up of companies. I do not think there is any other difference. Section 10 of the Act of 1875 read shortly is this—that on the winding-up of any company under the Acts of 1862 and 1867, whose assets may prove to be insufficient for the payment of its debts and liabilities, and the cost of winding-up, the same rules shall prevail and be observed as to the respective rights of the secured and unsecured creditors, and as to debts and liabilities provable, and as to valuation of annuities and contingent liabilities respectively, as may be in force for the time being under the law of bankruptcy with respect to the estates of persons adjudged bankrupt. Now the first part is as to secured and unsecured creditors. The first part of that section is applicable to *Kellock's Case* (33), a case well known to persons who have had to do with winding-up proceedings. The part as to debts and liabilities provable, is that which we are dealing with here. To what extent does that part of the section go? I do not know the history of the introduction of those words. I do not know exactly what they were put in to meet. One can conceive that they were inserted in the original Act with reference to the estates of deceased persons, and possibly they were more important in cases of that kind than in cases of winding up companies, having regard to the language of section 158. However, here they are, and we must deal with them. Now why must we cut them down? If we read them literally they will introduce in the winding-up of companies the same rules as to the “debts

(33) Law Rep. 3 Chanc. 769.

and liabilities provable, and as to the valuation of annuities and future and contingent liabilities respectively, as may be in force for the time being under the law of bankruptcy.” It appears to me there is no sufficient reason for cutting those words down, and that there is a very good reason for extending them, and applying them to this case, the apparent object being of course to assimilate the administration in bankruptcy with the administration in winding-up, so far as the intention to assimilate them is expressed in this section, not further. Now, in conjunction with that section, I think we ought to take Order XIX. rule 3, because Order XIX. rule 3, in terms applies to actions between companies as well as to actions between anybody else; and when we are asked to cut down Order XIX. rule 3, it is important to observe what has been done by the Legislature by section 10 of the Act of 1875, and it appears to me that if we look at the Act of Parliament and the Order, and read them in conjunction with each other, one throws light on the other; and it appears to me, although there would be a difficulty (I think, myself, an insuperable difficulty) in getting Order XIX. rule 3, to apply to this case if it were not for this section 10 of the Act of 1875, yet when you couple them together the difficulties vanish, and the real result of giving effect to both section 10 and Order XIX. rule 3, is that the mode of counter-claiming for unliquidated damages ought to be allowed in this case of a company whose affairs are being wound up in liquidation. That appears to me to be the logical conclusion to be drawn from the section and the rule together. Now there is nothing that I know of—certainly no authority against that view—nor is there, that I am aware of, any decision against it. The only decision which could approach a decision against it is that of Mr. Justice Williams in the case of *The Ince Hall Rolling Mills Company v. The Douglas Forge Company* (34). He decided in that case, as I understand him, upon the principle that the goods supplied through the liquidator were supplied in performance of a distinct and new contract with the liquidator, and, of course, a

(34) *Ante*, p. 238; Law Rep. 8 Q.B. D. 179.

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liquidator selling the goods of a company would not sell them to a man who would pay the price by set-off. That is not his object. His object is to obtain money with which to make payments, and he would not sell to a man if he did not obtain money in exchange. That decision does not apply to a case like this where there has been no such new contract. Here the goods were all supplied before the liquidator was appointed. He had done nothing; he had supplied nothing, and there was no harm done. It appears to me that that case is distinguishable from this; and with that exception, I am not aware that there is anything like a decision adverse to the view we are now pronouncing. The case referred to, *The Sankey Brook Company v. Marsh* (22), was a case of a similar description. There the liquidator supplied goods and applied to the persons to pay for them, but they explained that there was a sum owing to them which they meant to set-off, and the liquidator said—"Then I will not supply persons from whom I cannot get payment." There there was no right of set-off. If a liquidator during the liquidation orders things for the company he must pay for them in full out of assets, so that the persons to whom he supplies goods may not be driven to prove against the estate. Of course we know that perfectly well. That is the converse case.

It appears to me upon the whole that this case is established before us, having regard to the general operation of section 10 of the Act of 1875, and Order XIX. rule 3, which in terms applies to actions, such as that with which we are dealing, the right of counter-claim; and upon these grounds I think the appeal ought to be allowed.

BOWEN, L.J.—I am of the same opinion. With regard to the first point, whether the plaintiffs were justified here in refusing to deliver further, and treating the contract as determined by reason of the non-payment and the conduct of the defendants, I desire to say that I think the true test is the one laid down in *Freeth v. Burr* (1). Nor do I understand that the Lord Chief Justice below really desired to depart in

any way from the principle which is to be found in the judgment of *Freeth v. Burr* (1), a judgment which was delivered by himself. I think there has been a mistake in the print in the shorthand notes of his judgment in the present case, and that he did not mean to say that "the test in these cases was whether the conduct of one party to the contract was really inconsistent with the contract," because, of course, a breach of contract is inconsistent with the contract; but that the test was, whether the conduct of one party to the contract was really inconsistent with the performance in the future, or continuance of, the contract. The rule in *Freeth v. Burr* (1), which has been read already, appears to me to be the correct one, that the fair result of all these cases is this, to try and see whether the acts and conduct of the parties evince an intention no longer to be bound by the contract.

Now, if that is the principle of law upon the one hand, it is obvious that the facts in every case may approach nearer to the line or may be at a greater distance from it; but it seems to me that the confusion, if confusion there has been in this case, is to be accounted for by this, that the Judges in the various cases have had to draw inferences from the particular facts in order to make up their minds whether the principle which I have read from *Freeth v. Burr* (1), was really applicable. Non-delivery of a parcel would not be necessarily, of course, sufficient conduct to intimate that the person who does not deliver intends no longer to be bound; but I should be very far from saying that non-delivery of a certain parcel might not, in particular contracts and under particular circumstances, afford evidence of such intention on the part of the party who refused to deliver. Then non-payment of itself is certainly not necessarily evidence of an intention no longer to be bound by the contract; but I do not say there might not be circumstances and conduct which would be sufficient to entitle the Court, or whatever tribunal was charged with the drawing of the inference, to draw that inference. The language of Lord Bramwell in *Honck's Case* (5) (if, indeed, Lord Bramwell is to be understood as saying that he thinks that doctrine can no longer be applied when the contract has

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been part performed) seems to me to go beyond what can be supported. As the Master of the Rolls has pointed out, most of these cases—a great number of them at all events—where the party on one side was allowed to treat the conduct of the party on the other as putting an end altogether to the contract, have been cases in which the contract had been part performed. It seems to me that a fallacy may possibly lurk in the use of the word “rescission.” It is perfectly true that a contract can only be rescinded by the joint will of the two parties, as the contract is made by the joint will of the two parties. But the fallacy, it seems to me, is in not remembering that we are dealing here not with the right to rescind the contract, but the right to treat a wrongful rescission of the contract as a complete renunciation of it. *Ex hypothesi*, in such a case the person whose conduct is relied upon as a renunciation of the contract does not rescind rightfully. He has not got a right to rescind, but he is renouncing wrongfully, and all that the law says is that when there is that wrongful renunciation of the contract which falls within the decision of *Freeth v. Burr* (1), it evinces an intention no longer to be bound by the contract.

As I said before, I think the fallacy perhaps, if that was Lord Bramwell’s contention, arose from his not recollecting at the moment that the question was not whether there was a right to rescind a contract, but whether there was a right to treat a wrongful rescission by the one side as effectual for the purpose of putting an end to the contract.

With regard to *Hoare v. Rennie* (19), I think that the true explanation of that case is that the plea was not, so to speak, a formal plea; it was a special plea which set out various points from which I confess two different inferences may quite well be drawn, and as you draw one or the other I think the decision in *Hoare v. Rennie* (19) would be supported or not; and the Court in the decision upon the special plea in *Hoare v. Rennie* (19) seems to have drawn the sort of inference from the special plea which one would expect the Court to draw from the statement of a special case. So much with regard to the first point, whether the plaintiffs were entitled to treat the

conduct of the defendants as putting an end to the contract altogether.

If the true principle is that laid down in *Freeth v. Burr* (1), I agree upon the whole, and after reflection, with the Master of the Rolls and Lord Justice Lindley in thinking that the conduct set forth in the correspondence in this case does not amount to such a refusal to be bound in future by the contract on the part of the defendants as entitled the plaintiffs to consider the contract at an end.

With regard to the second point, it seems to me that section 10 of the Judicature Act of 1875 lands the defendants. Here is a debt which is provable, and it seems to me the claim on the other side for the non-delivery is a liability which is provable, and that being so, the section says that the rule in bankruptcy shall be observed and prevail in winding up as to debts and liabilities provable. That, I think, is sufficient to shew that in a winding-up the one claim can be set off against the other debt.

Then, if that is so in the winding-up, the case of *Peat v. Jones* (10), which was a decision of the Appeal Court, appears to me sufficient to enable the defendants to set up this defence in this action. If it was not for section 10, I agree in thinking that it is very doubtful whether Order XIX. rule 3, would by itself be sufficient. In the first place, I think it is a mere procedure rule. But no difficulty probably arises, because in the last two lines of that rule it appears that the Court has power to prevent any set-off or counter-claim being set up which ought not to be allowed; but from section 10 of the Act of 1875 it is quite possible the counter-claim might be allowed as it is in the procedure pointed out; and the 3rd rule of Order XIX. shews the proper way of setting up, or bringing to the notice of the Court, the rights of the parties which have been established by section 10 of the Judicature Act. For these reasons I think the judgment of Lord Coleridge cannot be supported.

Solicitors—G. M. Clements, for appellants;
W. W. Wynne & Son, agents for Simpson &
North, Liverpool, for respondents.

1882. }
May 13. } MOSTYN v. STOCK.

*Bankruptcy—Execution for a Sum exceeding 50*l.*—Payments on Account by Execution Debtor to the Sheriff with Consent of Execution Creditor—Right to Balance of less than 50*l.*—Bankruptcy Act, 1869 (32 & 33 Vict. c. 7), s. 87.*

*The sheriff in possession under a writ of fi. fa. for a sum, with possession money, exceeding 50*l.*, received from the debtor, with the knowledge and consent of the execution creditor, two sums on account which reduced the amount due to the execution creditor to 37*l.* 10*s.* The trustee in liquidation of the affairs of the execution debtor paid this sum to the sheriff, who gave up possession of the goods and paid the money into Court to await the event of an interpleader issue:—Held, that the 37*l.* 10*s.* belonged to the execution creditor and not to the trustee.*

This was an interpleader issue decided by Lopes, J., on further consideration. The facts and arguments appear in the judgment.

Forbes, Q.C. (with him *Arthur Edwards*), for the plaintiff, the trustee in liquidation.

H. Matthews, Q.C. (with him *Alfred Young*), for the defendant, the execution creditor.

LOPES, J.—The question raised in this case is whether the plaintiff, the trustee in liquidation, or the defendant, the execution creditor, is entitled to the sum of 37*l.* 18*s.* 2*d.*, paid into Court under the following circumstances, to abide the event of this interpleader issue. On the 3rd of November, 1881, a sum of 5*l.* was paid to the sheriff by an execution debtor, whose goods were in the possession of the sheriff under a writ of *fi. fa.* for a sum, including possession money, exceeding 50*l.*, and a further sum of 10*l.* on the 4th of November, 1881, of which payments the solicitors of the execution creditor knew and approved; and they also gave authority to the sheriff to allow the execution debtor further time to pay the balance 37*l.* 18*s.* 2*d.*, and thus avoid a sale. On the 30th of November, 1881, the trustee in liquidation of the affairs of the execution debtor paid the balance of 37*l.* 10*s.*, including possession

money, to the sheriff, who gave up to him possession of the goods. Now it is clear that had these payments not been made the 87th section of the Bankruptcy Act, 1869, would have applied, and the plaintiff would be entitled to the sum in question—*Ex parte Liverpool Loan Company; in re Bullen* (1), *Ex parte Sims*; *in re Grubb* (2) and *Howes v. Young and Howes v. Stone* (3). It therefore remains to decide what is the effect of the two payments to the sheriff which reduced the amount below 50*l.* It has been held that a voluntary abandonment of part of the debt by the execution creditor, after judgment signed and before levy, avoids the operation of section 87 of the Bankruptcy Act, 1869—*In re Hinks; ex parte Berthier* (4). This principle has been extended in the case of *Turner v. Bridgett (Wright, claimant)* (5), where it was held that the execution creditor could, by abandoning so much of his judgment as might be necessary to keep the total amount for which the goods were sold under 50*l.*, prevent the goods vesting in the trustee. If that case be good law the present appears to be an *a fortiori* case. The sums of 5*l.* and 10*l.* being paid *bona fide* became the property of the execution creditor, and could not be recovered by the trustee. In *Ex parte Sims* (2) it was held that it was the sum to be actually levied by sale that was to be looked at. Though there was no sale here the payment of the 37*l.* 18*s.* 2*d.* by the trustee amounted to the same thing, and 37*l.* 18*s.* 2*d.* was all that could have been levied by sale. The execution creditor is therefore, in my judgment, entitled to the sum in the hands of the sheriff.

Judgment for the defendant.

Solicitors—Pitman & Son, agents for E. A. Ashmall, Hanley, for plaintiff; Crowder, Anstie & Vizard, agents for Saunders & Bradbury, Birmingham, for defendant.

(1) 42 Law J. Rep. Bankr. 18; Law Rep. 7 Ch. App. 732.

(2) 46 Law J. Rep. Bankr. 103; Law Rep. 5 Ch. D. 375.

(3) 45 Law J. Rep. Exch. 499; Law Rep. 1 Ex. D. 146.

(4) 47 Law J. Rep. Bankr. 64; Law Rep. 7 Ch. D. 882.

(5) *Ante*, pp. 374, 377; W.N. 11 March, 1882, p. 34.

1882. }
 May 19. } CASSABOGLON v. GIBBS.
 June 23. }

Sale—Measure of Damages—Merchant and Commission Agent—Purchase ordered through Agent—Inferior Goods forwarded.

A commission agent who is instructed to buy goods of a specific description on account of a merchant, and who buys and forwards goods of an inferior description, is liable to recoup the merchant the amount of the loss which he has actually sustained, and is not liable to pay the difference between the value of the goods sent and the market value of the goods ordered as if he were a vendor.

On the 23rd of March, 1882, the plaintiff telegraphed to the defendants through their London agents, "At what price can you buy ten cases finest dry new crop Persian opium?" The defendants replied naming a price. On the 25th of March the plaintiff gave an order in writing to the defendants' agents, which they telegraphed to the defendants, "to buy for my account ten cases finest dry new Persian opium." Subsequently the plaintiff in the same way ordered twenty more cases of the same drug. The defendants drew on the plaintiff in respect of the opium, and the bills were accepted and paid.

The defendants purchased for the plaintiff and shipped thirty cases of what they erroneously believed to be finest dry new crop Persian opium, but no part of it on examination was found to be of that description. The plaintiff refused to accept the consignment, which was sold on account of those concerned. The sale realised considerably less than the market price of thirty cases of finest dry new crop opium, and the plaintiff claimed the difference. The defendants paid 300*l.* into Court, which, it was admitted, would be sufficient to recoup the plaintiff for the loss which he had actually incurred.

The Solicitor-General (Sir F. Herschell) (Pollard with him), for the plaintiff.—The plaintiff is entitled to recover the difference between the proceeds of the sale of the opium sent and the market price of

finest dry Persian opium. The relation between commission merchant and his principal is that of vendor and purchaser for this purpose. It is so laid down by Blackburn, J., in giving his opinion to the House of Lords in *Ireland v. Livingstone* (1).

He also cited *Feise v. Wray* (2). The effect of the transaction was a sale, and this was not destroyed by the fact that the defendants traded as commission agents.

Cohen, Q.C. (Anstie with him), for the defendants.—Ireland v. Livingstone (1) was altogether a different case. The defendants are liable for the consequences of their breach of duty, and that is all.

He cited *Johnston v. Kershaw* (3).

The Solicitor-General in reply.

The judgment of the Court (4) was (on June 23) delivered by

WILLIAMS, J.—This was a Special Case stated by consent of the parties for the opinion of the Court as to the measure of damages which the plaintiff was entitled to recover against the defendants under the following circumstances: The plaintiff is a merchant in London. The defendants are commission agents at Hong Kong, having an agency in London. On the 23rd of March, 1880, the plaintiff enquired of the defendants by telegram at what price they would buy for him cases of the finest dry new crop Persian opium. The defendants replied to this; and on the 25th of March the plaintiff gave them orders to buy for his account certain cases of the opium described, and to have them shipped by mail steamer. About the 26th of March, 1880, the defendants purchased for the plaintiffs what they believed, though erroneously as it turned out, to be finest dry new crop Persian opium, and on the 30th of March by letter advised the plaintiff of the purchase. On the 7th of April, 1880, the defendants forwarded to the plaintiff invoices of the opium, and advised him that they had drawn upon him for the amounts—namely, 1,221*l.* 3*s.* 11*d.* and

(1) 41 Law J. Rep. Q.B. 201; Law Rep. 5 H.L. Cas. 895.

(2) 3 East, 93.

(3) 36 Law J. Rep. Exch. 44; Law Rep. 2 Exch. 82.

(4) Manisty, J., and Williams, J.

Cassaboglon v. Gibbs.

2,346*l.* 12*s.* The plaintiff duly accepted, and paid these drafts. Upon the arrival of the opium in London it was discovered that no part of it was in accordance with the order, but it was soft and oily, and unfit for the purposes to which the finest dry Persian opium is applicable. It is admitted for the purposes of this Case that there was not in the market at Hong Kong any finest dry new crop Persian opium, and that the defendants could not have purchased any for the plaintiff. The plaintiff immediately rejected the whole of the opium, and refused to accept it. The plaintiff, having already sold a portion of the opium, had to make an allowance to the purchasers of 170*l.* on account of the inferiority of quality. The remainder of the opium was sold at a lower price than that paid for it by the plaintiff. The plaintiff then brought this action against the defendants for compensation for his loss, and in clause 15 of the Case his claim is thus expressed: The plaintiff claims to be recouped or paid by the defendants the difference between the market price of the article ordered and the proceeds of the sale of the drug actually sent, as damages for the above-mentioned alleged breach of the contract of agency or alleged failure to perform at all the said contract, or alleged gross and culpable negligence as such agents in their conduct of such agency and performance of their duties in connection therewith, or as damages for the breach of warranty and promise to purchase alleged to be contained in the telegrams and letters. The defendants have paid into Court the sum of 300*l.*, and the plaintiff admits that if the defendants are only liable to make good the loss actually sustained by him in consequence of the defendants' breach of duty, the 300*l.* is sufficient to satisfy his claim, and the question is whether the plaintiff is entitled to claim for loss beyond that amount."

We are of opinion that the plaintiff is not entitled to recover from the defendants anything beyond his actual loss. The plaintiff employed the defendants as his agents to purchase the opium for him, and their duty was to use due care, skill and diligence in executing his orders; and for their failure in this respect they are liable to the plaintiff for all loss and damage

sustained by him through their omission and negligence.

The plaintiff seeks to treat them as vendors of the opium to him, and to hold them responsible for damages as for a breach of warranty of the kind and quality of the goods, in which case the measure of damages would be not merely the difference between the cost to him of the goods and their real value, but the difference between the value of goods of the description sold and of the goods actually sent. A single illustration is sufficient to shew the fallacy of the plaintiff's contention. Suppose one instructs a commission agent to purchase for him a very valuable original picture, if it should be offered for sale, and the agent carelessly bids for a picture under the belief that it is the original, and it is knocked down to him for, say, 100*l.*, and he informs his employer that he has bought the picture for that sum, and his employer remits the money, and the picture is forwarded, but upon arrival is discovered to be merely a copy. The employer rejects the picture, and it is sold for 90*l.* Now suppose that if it had been the original picture it would have been worth 1,000*l.*, is the agent liable for 910*l.* damages, or only for the actual loss caused to his employer through his want of care and skill. It seems to us that the latter is the true measure of damages, and therefore that our judgment should be for the defendants.

Judgment for the defendants.

Solicitors—Paines, Layton & Pollock, for plaintiff; Flux & Leadbitter, for defendants.

[IN THE COURT OF APPEAL.]

1882. }
May 25. } WILLIAMS v. MERCIER.*

Husband and Wife—Married Woman—Separate Estate—Liability for Debts contracted before Marriage—33 & 34 Vict. c. 93. s. 12—Practice—Interpleader—Orders I. rule 2, and XL. rule 10.

The plaintiff sued the defendant, a mar-

* *Coram* Jessel, M.R., and Lindley, L.J.

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ried woman, without her husband, for debts contracted before her marriage, and recovered judgment against her, and the sheriff seized jewels which had been presented to her on her marriage. The husband claimed the jewels as his property. An order was made for the trial of an interpleader issue, and upon the trial of the issue the husband obtained a verdict in his favour. A settlement had been executed on the marriage, which declared that jewels of the wife should belong to her for her separate use. Upon a motion for a new trial, the settlement not being before the Court, and it being assumed that the settlement did not affect the articles in dispute,—Held, by MATHEW, J. (CAVE, J., dissenting), that the jewels were in the nature of paraphernalia, and could not be alienated during coverture without the husband's consent.

But upon the settlement being produced before the Court of Appeal:—Held, that the jewellery, being thereby declared to be the separate property of the wife, was liable to be seized by the execution creditor, and that it was not necessary for the husband to be made a party to the action.

Order XL. rule 10 applies as well to proceedings in interpleader as to ordinary actions, although the old practice in interpleader is preserved by Order I. rule 2; therefore, on a rule for a new trial of an interpleader issue, the Court has jurisdiction to direct judgment to be entered instead of ordering a new trial.

Motion for a new trial in an interpleader issue.

An action was brought by Madame Marie Mercier, a milliner, against Mrs. Hwfa Williams for the price of goods supplied to her before her marriage. The husband was not made a defendant. The plaintiff recovered judgment by default for 1,090*l.* 5*s.* 4*d.*, and on the 30th of September, 1881, levied execution by seizing a quantity of jewellery as belonging to Mrs. Williams.

The husband then claimed the jewels as his property, and upon an interpleader summons being taken out by the sheriff, an issue was directed to try the question, whether, at the time of the execution, the goods were the property of the husband as against the plaintiff.

It was admitted that the jewels in question were presents which had been given to Mrs. Williams on the occasion of her marriage.

Previously to the marriage a settlement had been made, dated the 21st of March, 1881, and by this settlement it was provided that all real and personal property to which the wife, or the husband in her right, at any time during the intended coverture should become entitled, whether in possession, reversion or otherwise, except jewels, trinkets, ornaments of the person and articles of the like nature, which it was thereby declared should belong to the wife for her separate use, should be assigned and transferred to the trustees of the settlement upon the trusts therein declared.

On the trial of the interpleader issue on the 15th of February, 1882, Lord Coleridge, C.J., directed the jury that in law the goods were the property of the husband, the plaintiff in the issue, and a verdict was found in accordance with that direction.

Madame Mercier then obtained a rule nisi for a new trial; and on the 4th of April a Divisional Court, consisting of Mathew, J., and Cave, J., delivered the following judgments, in which they dissented from one another, and consequently the rule was discharged.

MATHEW, J.—The jewels seized were claimed by the plaintiff as his property in right of his wife; while the creditor asserted her right to seize them in execution, on the ground that they were the separate property of the wife. The judgment having been obtained in an action against the wife alone, after her marriage, in respect of a debt of hers while single, the sole question reserved and argued was, whether or not the articles seized were the wife's separate property. A marriage settlement, in which none of the articles in dispute were referred to, was executed before the marriage. Upon the cross-examination of the plaintiff, who claimed them as his, it appeared that the articles seized were of two classes—first, jewels acquired by the wife some time before her marriage; and secondly, wedding presents made by friends or by her husband. As to the first class the

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husband's title was not disputed, but as to the second it was argued that they were the separate property of the wife. In support of this contention reliance was placed on the case of *Graham v. Londonderry* (1) as authority for the proposition that gifts made to a lady, upon the occasion of her marriage, of articles intended to be worn by her as personal ornaments, are her separate property. There can be no doubt that property may be bestowed upon a woman while single, or during marriage, in such a manner as to indicate an intention to benefit her to the exclusion of her husband. But this intention must be indicated clearly and unequivocally—*Grant v. Grant* (2) and *Mewes v. Mewes* (3). It was argued in this case that, although there was no proof of any intention expressed in words to create such a separate interest in the wife, the occasion upon which the jewels were received by the lady was of itself sufficient to shew that the articles were intended to be hers exclusively. I cannot, however, assent to this view of the law. Each case must depend upon its own circumstances. It is a question of fact whether the property is the husband's or the wife's, and the presumption of the husband's title to chattels in the possession of the wife is not to be displaced without adequate proof that the chattels were so acquired by the wife as to exclude his right to them. In *Ridout v. The Earl of Plymouth* (4) and *Jervoise v. Jervoise* (5) jewels given to a wife by her husband and by a third person were held to be part of her "paraphernalia," and not her separate property. No single fact was given in evidence in support of the creditor's contention, beyond the admission of the husband that the jewels had been received by the wife as wedding gifts. It seems to me unreasonable to impute to those who make wedding presents (which are often of no great intrinsic value) any clear and decisive intention as to the ultimate disposition or ownership of the articles given. It is

quite true that it may not be intended that the husband shall have the possession of them, or that his creditors shall seize them. But, on the other hand, it is not contemplated (especially if the giver be a friend of the husband) that the wife shall give away or sell, or that her creditors shall seize, what was intended to be a memorial of the goodwill of the giver both to the husband and wife. The reasonable inference would seem to be that personal ornaments of any considerable value presented to the wife were intended to go with similar articles presented by the husband, and to be a part of her "paraphernalia," and therefore to be property which could not be alienated during coverture without the husband's consent. In this case I think no evidence was given which ought to have been submitted to the jury in support of the creditor's contention, and therefore that this verdict should stand in favour of the plaintiff the husband.

CAVE, J.—In this case I am of opinion that the distinction between "paraphernalia" and gifts by a relative or stranger to the wife in contemplation of marriage did not receive sufficient attention, and that there ought to be a new trial. In *Graham v. Londonderry* (1) it was held that if articles of the nature of "paraphernalia" are given to a woman before or after marriage by a father or a relative or even a stranger, they are to be deemed to be absolute gifts to her separate use, and that, if received with the consent of her husband, he cannot, nor can his creditors, dispose of them any more than of any other property received and held to her separate use. This distinction between "paraphernalia" and articles of a like nature given by a relative or stranger is recognised as undoubted law by writers of authority—*Roper on Husband and Wife* (6) and *Story on Equity Jurisprudence* (7); and I think, therefore, that the case ought not to have been withdrawn from the jury, and therefore that there ought to be a new trial; but as my brother Mathew is of a different opinion, the verdict will stand for the plaintiff.

Against this decision Madame Mercier now appealed.

(1) 3 Atk. 388.
 (2) 84 Beav. 623; 34 Law J. Rep. Chanc. 641.
 (3) 15 Beav. 529.
 (4) 2 Atk. 104.
 (5) 17 Beav. 566; 23 Law J. Rep. Chanc. 708.

(6) Vol. 2. ch. 17. s.
 (7) Vol. 2. s. 1377.

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At the hearing of the appeal, Jessel, M.R., asked to see the original settlement, which had not been produced either at the trial or before the Divisional Court. It was accordingly produced.

Tomlinson and Garth, for the appellant.

A. Cock (Sir H. Giffard, Q.C., with him), for the respondent Mr. Williams. —The verdict on the issue was rightly found for the plaintiff, because, admitting that the jewels were the separate property of Mrs. Williams, the husband must take them as trustee for her. At law, therefore, they were his property, and the sheriff could not seize them in execution of a judgment recovered against the wife alone. The husband should have been joined as a defendant in the original action.

Moreover, if the verdict upon the issue was wrong, there must be a new trial, for the Court cannot on this appeal give judgment for the defendant. Order XL. rule 10, does not apply to interpleader, because by Order I. rule 2, the old practice and procedure in interpleader are still preserved.

JESSEL, M.R.—When the settlement is looked into it becomes quite plain that these jewels are the separate property of the wife. They were her property before the marriage, and on the marriage they became the property of the husband, and the settlement then made them the separate property of the wife. Now section 12 of the Married Women's Property Act, 1870 (33 & 34 Vict. c. 93), provides that "a husband shall not be liable for the debts of his wife contracted before marriage (8); but the wife shall be liable to be sued for, and any property belonging to her for her separate use shall be liable to satisfy, such debts as if she had continued unmarried." That is, execution can issue against her as if she were unmarried. It is not therefore necessary to join the husband with her in the action.

With reference to the order that we ought now to make, it is perfectly clear

(8) So much of this section is repealed by section 1 of 37 & 38 Vict. c. 50 (The Married Women's Property Act 1870 Amendment Act 1874).

that Order XL. rule 10, applies to every application for a new trial; interpleader proceedings are not excepted. It is true that by Order I. rule 2, the old practice of interpleader is continued; but in Order XL. rule 10, there are no negative words to exclude the new powers of the Court in carrying out that practice. We must therefore declare that the property which was seized was the separate property of the wife, and judgment must be entered for the execution creditor, with costs both in the Court of Appeal and in the Divisional Court.

LINDLEY, L.J.—I think that the settlement is open to no other construction than that which the Court now puts upon it. Although it is true that the old practice in interpleader is to be pursued, yet in a case like the present, where there is really nothing to be tried, I am of opinion that the Court of Appeal does not exceed its powers in directing a verdict to be entered instead of ordering a new trial. The verdict will therefore be for the execution creditor.

Solicitors—Pawle & Fearon, for respondent
Lewis & Lewis, for appellant.

[IN THE COURT OF APPEAL.]

1882. } BECKETT AND COMPANY v.
July 3. } ADDYMAN.*

Principal and Surety — Continuing Guarantee—Death of Co-surety—Notice to Creditor.

A firm of bankers took a continuing guarantee for advances to a customer in the form of a joint and several bond from two sureties. One of the sureties died, and after notice thereof the bank made further advances to the customer:—Held, that the surviving surety was liable to the bank in respect of such advances.

This was an action brought by a firm of bankers at Leeds upon a joint and

* *Coram* Lord Coleridge, C.J.; Brett, L.J., and Cotton, L.J.

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several bond against one of two sureties. The plaintiffs in their statement of claim, after setting out the terms of the bond, admitted that one of the co-sureties died in 1872, that the bank had notice of his death, and that since that time the principal debtors had paid into the bank sums sufficient to cover the balance due at the date of the death of the surety to the bank from them, but alleged that since that time, and up to the date of the liquidation proceedings instituted by the principal debtors in 1881, the bank had made further advances to the principal debtors to the full amount guaranteed by the defendant. In his statement of defence the defendant alleged that the death of the co-surety was known to him about the time that notice thereof was given to the bank, that shortly afterwards he and the plaintiffs had notice of the existence of the will of the said co-surety, and that the executors thereunder had proved the same, and had opened an account on behalf of the estate in their names as executors of the said will in the plaintiffs' bank; that since such notice and such opening of an account sufficient sums had been paid by the principal debtors into their account with the bank to cover the balance due to the bank.

To this the plaintiffs demurred; and on the 4th of February, 1882, judgment was given by Field, J., for the plaintiffs.

The defendant appealed.

Petheram, Q.C. (with him *A. C. Ashton*), for the appellant.—It was an implied term that when the liability of the co-surety ceased, that of the defendant should also cease, on the same principle as that on which a Court of equity would hold that a surety who signs a joint guarantee is entitled to have the other co-surety sign. The liability of the defendant's co-surety ceased on his death and notice thereof to the bank—*Coulthart v. Clementson* (1); and the defendant having lost his right to contribution ought to be held to be discharged from liability. *Ellis v. Wilmot* (2) was also cited.

(1) 49 Law J. Rep. Q.B. 204; Law Rep. 5 Q.B. D. 42.

(2) 44 Law J. Rep. Exch. 10; Law Rep. 10 Exch. 10.

Barber, Q.C. (with him *Faber*), for the respondents.—The defendant is still liable on his several covenant, notwithstanding the death of his co-surety, which did not, like some act of the creditor, relieve him from liability any more than the insolvency or bankruptcy of the co-guarantor. In *Coulthart v. Clementson* (1) the notice was given by the executor of one co-surety who was himself co-guarantor, and Bowen, J., evidently thought it possible that he could be liable as surviving guarantor (2).

LORD COLERIDGE, C.J.—It seems to me that the defendant is, without doubt, liable under an instrument clearly in terms rendering him liable. It is said that, although as between him and the bank, nothing has been done by the latter, yet he is not liable on some suggested equitable ground. In the cases cited in the course of the argument there was a clear equity, the creditors having themselves, without notice to one surety, done something which altered the position of the other.

In this case there is nothing of that kind. The death of one or both parties at some time or another must have been contemplated, and it is clear that either party might have determined the guarantee, for the consideration here was not made payable at once, but at intervals, and therefore there was power to refuse to continue to be liable.

Here there was a death of one of the guarantors, of which notice was given to the bank, who did nothing, nor were any steps taken towards altering the position and liabilities of the parties. At law, therefore, the defendant remained liable, and I can see no equity to release him from the liability. The decision of the Court below must be affirmed.

BRETT, L.J.—Here there is a joint and several obligation of two obligors. In regard to their several liability they are distinct, and in a similar position to that of a single guarantor, who would have a right to put an end to advances by notice, but till he does so the bank would have a right to go on making advances. The defendant is therefore clearly liable at law. But it is said that he is relieved by some equity, that he is released by the

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death of his co-surety, of which notice was given to the bank, because his remedy over against that co-surety ceased. But the fact of the death is not the act of the bank; and the argument must go so far as to say that if a co-surety becomes bankrupt the liability of the other surety ceases. This would be to strike out the separate liability. If the bank has released one of the co-sureties the other would be no longer liable, but nothing has been done by the bank, and I therefore think that the plaintiffs are entitled to recover on their legal right, and that the decision of the Court below must be affirmed.

COTTON, L.J., concurred.

Appeal dismissed.

Solicitors—Paterson, Snow & Bloxam, agents for Dibb, Atkinson & Braithwaite, Leeds, for plaintiffs; Emmet & Co., agents for J. W. Addyman, Leeds, for defendant.

1882. } BROWN v. THE MANCHESTER,
March 24. } SHEFFIELD AND LINCOLN-
April 4. } SHIRE RAILWAY COMPANY.

Railway Company—By-laws—Rates for Carriage of Goods—“Just and Reasonable Condition”—Alternative Rate—Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), s. 7.

The plaintiff, by a contract in writing, undertook and agreed to free and relieve the defendant company, and all other companies over whose lines fish consigned to the defendants for carriage might be sent, from “all claims or liability for loss or damage by delay in transit, or from whatever cause arising,” in consideration of the defendants carrying the same at a rate one-fifth lower than if no such undertaking were given: Held, that there being an alternative rate, the condition that the company should be free from all claim or liability, though absolute and containing no exception, was nevertheless just and reasonable.

This was a Special Case stated by the

County Court Judge at Grimsby, of which the following are the material parts:—

The plaintiff was a fish merchant of Great Grimsby, and had been in the habit for some years of consigning live codfish to the defendants for transport to Billingsgate Market.

On the 28th of December, 1880, the plaintiff signed the following “risk note.”

“Manchester, Sheffield and Lincolnshire
“Railway.
“Risk Note.

“Grimsby Dock Station,
“December 28, 1880.

“Sir,—I beg to inform you that to parties willing to free and relieve this company, and the other railway companies over whose lines fish may be forwarded from any of our stations, from all liability for loss or damage by delay in transit, or from whatever other cause arising, the company agree that the rates charged will be one-fifth lower than where no such undertaking as the annexed is granted.—I am, sir, for and on behalf of the company, your obedient servant,

“JAMES REED.”

“December 28, 1880.

“Sir,—In reference to the above, I request that you will forward all fish delivered by me or on my account from any of your stations at the lower rate, and I undertake and agree to free and relieve the railway companies from all claims or liability for loss or damage.

“This undertaking to remain in force from the present date until December 31, 1885.—I am, sir, your obedient servant,

“HENRY WILLIAM BROWN.”

“Mr. Reed, Grimsby Dock Station, Manchester, Sheffield and Lincolnshire Railway Company.

“Witness, W. H. Watkinson.”

With the exception of the signatures, date and address, the above was in a lithograph form, furnished by the defendant company.

In accordance with this undertaking, all fish was from that date forwarded for the plaintiff at the lower rate.

On April 13, 1881, two days before Good Friday, the quantity of fish delivered by the fish merchants at Grimsby for

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transit by the defendants' lines to London was much in excess of the ordinary amount, but no consignments were refused by the defendant company, nor special provisions made or steps taken for the sending off the vans of fish in such time as that they could reach Billingsgate Market as usual; nor was any notice or warning given to the plaintiff, who accordingly, instead of keeping his fish alive till they could be sent off, stunned them as usual, and packed them ready to be sent off.

The plaintiff's fish, in consequence, not being sent off till 3.25 a.m. on April 14, instead of by the 8.40 p.m. train on the 13th, were too late for Billingsgate, and the plaintiff suffered loss thereby.

The learned Judge held that the defendant company had failed to justify the delay which had taken place in delivering the fish consigned to them for carriage, and that they were not protected by the "Risk Note" which the plaintiff had signed; and directed judgment to be entered for the plaintiff for 1*l.* and costs. The question for the Court was whether this judgment was right.

Gully, Q.C. (with him *C. A. Russell*), for the defendants appealing.—The reduction of the rate by one-fifth was the consideration for the signing of the contract, and the plaintiff had the option of the unconditional legal rate, which it is admitted was published. And this condition freeing the company from liability is, if there be an alternative rate, just and reasonable—*Lewis v. Great Western Railway Company* (1)—which in the absence of an option given to the sender would no doubt be unjust and unreasonable—*Rook v. North Eastern Railway Company* (2).

Cyril Dodd (with him *Webster, Q.C.*), for the plaintiff (respondent).—The fact that alternative rates are offered by the company is only an element to be considered in the case, and does not make an unreasonable condition good. The Judge has here held that the condition was not just and reasonable. There is no case where it has been reasonable for a com-

pany to contract itself out of all liability. The case of *Glenister v. The Great Western Railway Company* (3), on which the defendants relied at the trial, expressly excludes wilful misconduct, as indeed do all the other authorities. No option was really given, as the only alternative was the ordinary rate which any one could have. In *Ashenden v. The London, Brighton and South Coast Railway Company* (4), the judgment went on the ground that it must be unreasonable to get rid of all liability of every sort and kind, and it may well be that there is something in the nature of an implied contract to take reasonable care—*McManus v. The Lancashire and Yorkshire Railway Company* (5). The onus of proving the reasonableness of the condition lies on the company—*Peck v. The North Staffordshire Railway Company* (6). This was not loss by delay *in transitu*, but only a case of not starting, and the condition does not apply. *Allday v. The Great Western Railway Company* (7) was also cited.

MATHEW, J.—The only point necessary for us to consider in the judgment of the County Court Judge is the second, namely, whether the company is or is not exempted from liability by the terms of this special contract. [His Lordship then read the letter of December 28, 1880, and the reply thereto.] One difficulty that has presented itself to us in the course of the case is that it is not stated or shewn what the alternative rates were; but it is agreed on both sides that there were certain rules as to rates by which no conditions were imposed on the customers and the company remained liable as common carriers. Then there was evidently an option available to the customers. Here there was a perfectly clear agreement by the company on the one hand to carry for one-fifth less, and the plaintiff on the other to free the company from all liability. The only question is then whether that agreement

(1) 47 Law J. Rep. Q.B. 131; Law Rep. 3 Q.B.D. 195.

(2) 36 Law J. Rep. Exch. 83; Law Rep. 2 Exch. 173.

(3) 29 Law Times, N.S. 423.

(4) Law Rep. 5 Ex. D. 190.

(5) 4 Hurl. & N. 327.

(6) 10 H.L. Cas. 473; 32 Law J. Rep. Q.B. 241.

(7) 5 B. & S. 903.

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is reasonable or not. We must bear in mind in deciding this question that it is clearly made out that there were customary alternative rates, that the plaintiff voluntarily entered into this agreement, as did all the neighbouring fishmongers, that it is admitted there was a considerable saving to the plaintiff by the reduction of the rates, and that the plaintiff knew of the existence of the ordinary rates.

It therefore resolves itself into a question of fact for the Court whether this was reasonable; and in my judgment it was reasonable. As to the second point, I think the damage arose from a "delay in transit," within the meaning of the conditional clause of this contract.

CAVE, J.—I am of the same opinion. This is only a question of fact as to the reasonableness of this contract. There is always some difficulty in understanding the meaning of the term "just," but I am putting a favourable construction on it if in this case I construe it as meaning "to the advantage of the customer." In my judgment, the Act contemplates a condition which may exclude all liability of the company, provided the Court can hold that it is just and reasonable. Now if there were but one rate, and yet a condition that the company should be relieved of all liability, the Court would not hold that to be reasonable; but that is not this case. Here an option and alternative are offered. The customer may send at the ordinary rate and hold the company liable to him as common carriers, or on the other hand if he choose to free them from all liability they will carry the goods for a one-fifth lower rate.

Now is it expedient for him, that is, to his advantage, to adopt the latter course? If so, it is impossible to say that the condition is unreasonable with regard to the sender. It is said that there is no evidence that the reduction of one-fifth is an equivalent to what the sender gives up. But I think there is strong evidence of it in the fact that a man who knows his own business thought it to his advantage to accept the terms, and that the reduction of the terms was an equivalent to the giving up the ordinary liability of the company. In

my judgment, therefore, the condition was fair and reasonable.

Judgment for defendants, with costs.

Solicitors—Rollit & Sons, agents for Rollit & Sons, Hull, for plaintiff; Cunliffe, Beaumont & Davenport, agents for R. Lingard Monk, Manchester, for defendants.

1882. }
March 17. } CAPELL V. GREAT WESTERN
July 8. } RAILWAY COMPANY.

Lands Clauses Act, 1845 (8 Vict. c. 18), ss. 34, 51, 52, 53, 76—Costs—Arbitration—Payment before Execution of Conveyance.

The owner of land taken under the compulsory powers of the Lands Clauses Act, 1845, is entitled to the taxed costs of the arbitration, so soon as his title has been accepted by the promoters of the undertaking; and his right to recover such costs is not postponed until the conveyance of the land has been executed.

This case came on for further consideration before Lopes, J.

The following are the important allegations of the statement of claim:—

3. By an Act of Parliament called "The Bristol and Exeter Railway Act, 1875" (38 & 39 Vict. c. 127), the Bristol and Exeter Railway Company were authorised to make and construct a railway in the county of Somerset to the town of Weston-super-Mare.

By section 2 of the above-named Act, the Lands Clauses Consolidation Acts, 1845, 1860 and 1869, and the Railways Clauses Consolidation Act, 1845, and other Acts, were incorporated with and form part of the said Bristol and Exeter Railway Act, 1875.

4. By an Act called "The Great Western and Bristol and Exeter Railway Companies' Amalgamation Act," of 1876 (39 & 40 Vict. c. 74), the Bristol and Exeter Railway Company and the Great Western Railway Company were amalgamated as from the 1st of August, 1876.

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5. On or about the 24th day of April, 1876, notice was, under the Bristol and Exeter Railway Company's Act of 1876, given by the Bristol and Exeter Railway Company to the plaintiff, being the owner and in possession of, and enabled to sell or convey or release certain land, to treat for the purchase thereof; and on or about the 9th day of October, 1876, the defendants offered to the plaintiff the sum of 1,700*l.* for the purchase of the said land, which offer was refused by the plaintiff.

6. On the 19th day of December, 1876, the amount of compensation payable by the defendants to the plaintiff was settled by arbitration under the provisions of the Lands Clauses Consolidation Acts, 1845 and 1869, and the sum of 1,750*l.* and the costs of the said arbitration were awarded to the plaintiff.

7. On the 5th day of August, 1881, the costs of and incidental to the said arbitration and award were, according to the provisions of the 1st section of the Lands Clauses Consolidation Act, 1869 (32 & 33 Vict. c. 18), taxed and settled as between the plaintiff and the defendants; and on the said 5th day of August, the Taxing Master gave his *allocatur* for the sum of 177*l.* 12*s.* 6*d.*, the amount of such taxed costs.

8. The defendants have approved of and accepted the plaintiff's title in the land so taken and purchased by them as aforesaid, and on or about the 15th day of October, 1881, the defendants agreed with the plaintiff to take possession and to finally settle the purchase within one month of the 15th of October, 1881.

Statement of defence:—

2. The defendants admit the 7th paragraph of the statement of claim, subject to this—that the taxation and settlement and *allocatur* were subject to all rights of the defendants to dispute their liability to pay such costs, or to refuse to pay such costs, until such time as they should become legally payable; and no consent was given by the defendants to such taxation, settlement or *allocatur* having any other or greater effect.

3. The defendants deny every allegation of the 8th paragraph of the statement of claim.

4. At the commencement of this action,

the necessary conveyances of the plaintiff's land and interest had not been approved or executed by either party, nor had the plaintiff made title thereto, nor had anything happened or been done to dispense with the necessity of a conveyance by the plaintiff; and the defendants have always insisted on such conveyance, and have always been ready and willing, and offered before action, to pay the costs sued for so soon as the plaintiff's title should be approved and the plaintiff should be ready to execute the proper conveyances and assurances.

6. Since the commencement of this action, the plaintiff's title has been perfected and approved by the defendants, and a conveyance has been executed, and the defendants have paid to the plaintiff the entire purchase money or compensation, and also all costs of conveyance and otherwise incidental to the purchasing and taking of the plaintiff's land and interest, except the costs of the arbitration mentioned in the statement of claim. Upon the completion of the purchase, and since the commencement of this action, the defendants have further tendered to the plaintiff the said costs of arbitration as taxed and settled, but the plaintiff has refused to accept the same.

A. Charles, Q.C., with him *Bucknill*, for the plaintiff.

H. Matthews, Q.C., with him R. S. Wright, for the defendants.

LOPES, J. (on July 8), after having read paragraphs 5, 6, 7 and 8 of the statement of claim, proceeded to give the following judgment:—

The plaintiff's title was accepted and approved by the defendants before the commencement of the action. Since the commencement of the action, the conveyance has been executed, and the defendants have paid to the plaintiff the entire purchase-money and all costs of conveyance and otherwise incidental to the purchasing and taking the plaintiff's land, except the costs of the arbitration.

The case comes before me without a jury; and it was agreed that the correspondence and documentary evidence should be regarded as put in, and proceed-

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ings be stayed in three other similar actions until judgment in this, such actions to be governed by the decision in this action.

The question raised is whether the taxed costs of the arbitration became payable before or after the execution of the conveyance by the owner of the land to the company; in other words, whether execution of the conveyance is a condition precedent to the payment of taxed costs.

The plaintiff contends that they are a distinct and separate matter, and become payable within a reasonable time after taxation, or at any rate after the title of the claimant is accepted and approved by the defendants. The defendants contend that the costs of an arbitration are ancillary to the payment of the purchase-money, and are not payable until the purchase-money is payable; and, inasmuch as the purchase-money is not payable until the conveyance is executed, neither are the costs of the arbitration. It is clear that the amount of compensation money to be paid for land compulsorily taken, although fixed by an award under the Lands Clauses Consolidation Act, 1845, is not recoverable until a conveyance of the land has been executed—*The Guardians of East London Union v. The Metropolitan Railway Company* (1); not merely when a good title has been shewn—*Howell v. The Metropolitan Railway Company* (2). There is no authority, however, to shew that costs stand on the same footing as the purchase-money. *Earl Ferrars v. The Stafford and Uttoxeter Railway Company* (3) is an authority shewing that there is a distinction between them. *Todd v. The Metropolitan Railway Company* (4) was relied upon as shewing that the costs of the enquiry for ascertaining compensation only become payable on the existence of a well-founded claim, and it was urged that it would be very unfair for the promoters to be compelled to pay the costs of an arbitration before conveyance, when it might turn out that the claimant had no title at all.

(1) 38 Law J. Rep. Exch. 225; Law Rep. 4 Exch. 309.

(2) 51 Law J. Rep. Chanc. 158; Law Rep. 19 Ch. D. 508.

(3) 41 Law J. Rep. Chanc. 362; Law Rep. 13 Eq. 524.

(4) 24 Law Times, 435.

I think these cases only refer to well-founded claims before the arbitrator. The title in all enquiries under the Lands Clauses Consolidation Act is assumed, and all that has to be ascertained is the value of that which the company seek to acquire. The cases last named are authorities to shew that where there is no claim there can be no costs. If a claimant goes to an arbitrator or to a compensation jury with no right to do so he cannot have his costs; and these cases do not assist the defendants' contention that the costs of the arbitration are not payable until the conveyance is executed, because they might have to pay costs to a person who they found out afterwards had no title.

There is no authority which really touches the point raised in this case. It is necessary to consider carefully the words of section 34 and section 53 of the Lands Clauses Consolidation Act, 1845 (5), which

(5) 8 Vict. c. 18. s. 34: "All the costs of any such arbitration, and incident thereto, to be settled by the arbitrators, shall be borne by the promoters of the undertaking, unless the arbitrators shall award the same, or a less sum than shall have been offered by the promoters of the undertaking, in which case each party shall bear his own costs incident to the arbitration, and the costs of the arbitrators shall be borne by the parties in equal proportions."

Section 51: "On every such enquiry before a jury, where the verdict of the jury shall be given for a greater sum than the sum previously offered by the promoters of the undertaking, all the costs of such enquiry shall be borne by the promoters of the undertaking; but if the verdict of the jury be given for the same or a less sum than the sum previously offered by the promoters of the undertaking, or if the owner of the land shall have failed to appear at the time and place appointed for the enquiry, having received due notice thereof, one-half of the costs of summoning, impannelling and returning the jury, and of taking the enquiry, and recording the verdict and judgment thereon, in case such verdict shall be taken, shall be defrayed by the owner of the lands, and the other half by the promoters of the undertaking, and each party shall bear his own costs, other than as aforesaid, incident to such enquiry."

Section 52: "The costs of any such enquiry shall, in case of difference, be settled by one of the Masters of the Court of Queen's Bench of England or Ireland, according as the lands are situate, on the application of either party, and such costs shall include all reasonable costs, charges and expenses incurred in summoning, impannelling and returning the jury, taking the enquiry, the attendance of witnesses, the em-

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relate to costs. There is nothing in section 34 favouring the contention that the costs are to be postponed until conveyance. The natural reading of the section leads to another conclusion. There are many inconveniences which might be suggested if the payment of these costs is to be postponed until the conveyance. The conveyance might not be executed for a long time. Again, when you look at sections 51, 52 and 53 (5), with regard to the costs of an enquiry with a jury, great inconvenience

ployment of counsel and attorneys, recording the verdict and judgment thereon, and otherwise incident to such enquiry."

Section 53: "If any such costs shall be payable by the promoters of the undertaking, and if within seven days after demand such costs be not paid to the party entitled to receive the same, they shall be recoverable by distress, and on application to any justice he shall issue his warrant accordingly; and if any such costs shall be payable by the owner of the lands or of any interest therein, the same may be deducted and retained by the promoters of the undertaking out of any money awarded by the jury to such owner, or determined by the valuation of a surveyor under the provision hereinafter contained; and the payment or deposit of the remainder, if any, of such money, shall be deemed payment and satisfaction of the whole thereof, or if such costs shall exceed the amount of the money so awarded or determined, the excess shall be recoverable by distress, and on application to any justice he shall issue his warrant accordingly."

Section 76: "If the owner of any such lands purchased or taken by the promoters of the undertaking, or of any interest therein, on tender of the purchase-money or compensation either agreed or awarded to be paid in respect thereof, refuse to accept the same, or neglect or fail to make out a title to such lands, or to the interest therein claimed by him, to the satisfaction of the promoters of the undertaking, or if he refuse to convey or release such lands as directed by the promoters of the undertaking, or if any such owner be absent from the kingdom, or cannot after diligent enquiry be found, or fail to appear on the enquiry before a jury, as herein provided for, it shall be lawful for the promoters of the undertaking to deposit the purchase-money or compensation payable in respect of such lands, or any interest therein, in the bank, in the name and with the privity of the Accountant-General of the Court of Chancery in England or the Court of Exchequer in Ireland, to be placed, except in cases herein otherwise provided for, to his account there, to the credit of the parties interested in such lands (describing them so far as the promoters of the undertaking can do), subject to the control and disposition of the said Court."

would arise if these costs were not paid until after the conveyance. The summary and easy mode of enforcing payment provided by section 53 would be unintelligible.

It was urged that if the costs became payable before the conveyance was executed, and the claimant eventually failed to make out a title, the promoters might be harassed by a second enquiry and be burdened with a second set of costs without any power of recovering back what they had fruitlessly paid. I was at first impressed with this argument; but I think a case of the kind suggested is provided for by section 76 of the Lands Clauses Consolidation Act (5), and a course is indicated for the promoters to follow which would entirely obviate the suggested difficulty.

I think the plaintiff's costs became payable within a reasonable time after taxation, and that the plaintiff is entitled to recover them in this action. There will be judgment for the plaintiff for 177l. 12s. 6d., and interest from the date of the writ, with costs.

Judgment for the plaintiff.

Solicitors—Mead & Daubeny, agents for W. H. & H. F. Davies, Weston-super-Mare, for plaintiff; R. R. Nelson, for defendants.

[IN THE COURT OF APPEAL.]

1882. }
June 20, } MASPONS Y HERMANO v. MILDRED,
27, 28, } GOYENECHÉ AND COMPANY.*
July 8. }

Foreign Consignor and London Consignee—Contract—Principal and Agent—Unnamed Foreign Principal—Goods Insured by Consignee and Lost—Right of Parties to Insurance Moneys—Custom of Trade.

The plaintiffs, merchants at Havannah, employed D. & Co., commission agents at Havannah, to ship and consign goods for sale to the defendants, the bankers and agents in London of D. & Co. The defend-

* *Coram* Jessel, M.R.; Lindley, L.J., and Bowen, L.J.

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dants knew nothing of the plaintiffs, and only dealt with D. & Co.; and the goods were consigned in the name of D. & Co., and all the shipping documents were in their names.

The general course of business between D. & Co. and the defendants was for the defendants to make advances to D. & Co. on general account, on the understanding that D. & Co. should remit them cash, bills or goods to cover such advances.

On the 28th of July, 1881, the defendants received a telegram from D. & Co., requesting them to insure the goods in question. The next day the defendants wrote in reply, acknowledging the telegram, and stating that they had taken out a provisional policy for the amount named.

On the 9th of August the defendants received a letter from D. & Co., written on the 24th of July, which informed them that there was an unnamed principal (who were in fact the plaintiffs). This letter the defendants answered on the 10th of August.

The policy was perfected in the usual way on the 18th of September on behalf of all parties interested.

D. & Co. failed a few days before the 18th of September. The goods were lost at sea; but before the underwriters paid the defendants the insurance moneys the plaintiffs claimed to be entitled to the proceeds of the policies. The defendants knew of this claim, but claimed to retain and set off the policy moneys against the balance due to them on the general account between them and D. & Co. To an action by the plaintiffs for the insurance moneys the defence was—First, that there was no privity of contract between the plaintiffs and defendants; secondly, that the contract between D. & Co. and the defendants was governed by the Spanish law which prevailed at Havannah, and by which the defendants were entitled to treat D. & Co. as principals; and, thirdly, that there was a well-known course of business between foreign consignors and London merchants, for the latter to make advances to the former against goods and shipping documents, on the terms that the London merchants were entitled to hold the proceeds of all goods so consigned; or, if they were lost at sea, the insurance moneys against any balance that might be due to them on their

general account current with the consignors:—

Held, that the contract between D. & Co. and the defendants was governed by English law, and that the persons who could sue and be sued on that contract in England must also be determined by English law; that by English law it was settled that the plaintiffs, as unnamed principals, could, under the circumstances, sue the defendants, and the fact that the plaintiffs were foreigners carrying on business abroad made no difference; that the alleged usage of trade was not proved; and that the plaintiffs were therefore entitled to the insurance moneys, freed from the claims of the defendants, but subject to any set-off which D. & Co. might have against the plaintiffs for the balance due from them to D. & Co. on the account current between them.

The New Zealand Land Company v. Watson (50 Law J. Rep. Q.B. 433; Law Rep. 7 Q.B. D. 374) discussed and distinguished.

This was an appeal from a decision of Manisty, J.

The facts and the arguments are sufficiently stated in the judgment, and in addition to the authorities there cited the following were referred to:—*Westwood v. Bell* (1), *Arnould on Marine Insurance* (2) and *Duer on Insurance* (3).

Butt, Q.C., and Barnes, for the appellants.

Benjamin, Q.C., Cohen, Q.C., and Arbuthnot, for the respondents.

Barnes, in reply.

The considered judgment of the Court was (on July 8) delivered by

LINDLEY, L.J.—The plaintiffs are merchants carrying on business in Havannah, and the defendants are merchants in London. Demestre & Co. carried on business in Havannah as shipping agents, bankers and importers, and were employed by the plaintiffs to ship goods for them to the defendants, for sale on the plaintiffs' account. The defendants knew Demestre

(1) 4 Campb. 349.

(2) P. 212.

(3) Vol. ii. p. 285.

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& Co., and corresponded with them, and had extensive dealings with them; but, although the plaintiffs knew who the defendants were, and wished Demestre & Co. to employ them, the defendants knew nothing of the plaintiffs, and when the plaintiffs sent goods through Demestre & Co. to the defendants for sale, the goods were sent in Demestre & Co.'s name, and the defendants accounted to Demestre & Co. for them, and Demestre & Co. accounted to the plaintiffs. On the other hand, the defendants acted as bankers and factors for Demestre & Co., and made them advances, upon the understanding and agreement that Demestre & Co. should remit to the defendants cash, bills or goods to cover such advances. The defendants kept only one account with Demestre & Co., although they sometimes made advances on specific consignments. Such appears to have been the general course of business on both sides previously to the transactions which gave rise to the present litigation.

In July, 1880, the plaintiffs made arrangements with Demestre & Co. to forward to the defendants for sale a cargo of tobacco, some samples of which had been sent previously. Demestre & Co. accordingly chartered the ship *Bachi* in their own names, the tobacco was put on board, the bills of lading for it were made out in Demestre & Co.'s name. The vessel was to go to Gibraltar and Marseilles. The defendants were to sell the cargo there, or, if desirable, elsewhere, and the defendants were to insure the cargo. The correspondence relating to this transaction is contained in certain letters and telegrams. [The effect of these documents, which his Lordship did not read, was as follows:— On the 19th of July, 1880, the plaintiffs wrote to Demestre & Co., approving of their having signed the charter-party of the *Bachi* for Gibraltar and Marseilles, and adding, "In this vessel we will ship, as already informed you, about 1,500 bales of tobacco, and about 550 quintal cwt. of pica dura for both ports, which shipment you will send to the order of Messrs. Mildred, Goyeneche & Co., of London, as usual, on the basis already stipulated. In the meantime you can telegraph your friends in London to open provisional policies of insurance." On the 24th of

July Demestre & Co. wrote to the defendants, and, after referring to some bales of tobacco which they had already shipped to them by way of trial, they added, "The 'interesado' has decided on making the shipment which he proposed to make previously. To that end we have chartered the Spanish brig *Bachi* for Gibraltar and Marseilles." After stating the amount of the cargo, they added, "which we are going to ship to your consignment, with bill of lading to order, that you may order the reshipment in Gibraltar of the whole or a part to whatever destination you may judge most convenient." This letter was received by the defendants on the 9th of August. On the 28th of July the defendants received a telegram from Demestre & Co.—"Insure all risks, 8,000*l.* cargo, tobacco, Spanish schooner *Bachi*, consigned to you." On the 29th of July the defendants wrote to Demestre & Co., acknowledging the receipt of this telegram, and saying that they had opened a provisional policy for the amount mentioned, "sailing on the 1st of August." On the 31st of July Demestre & Co. wrote to the defendants that they were "despatching the *Bachi*, which sails for its destination tomorrow," and added that they were going to telegraph to the defendants to insure the cargo for 3,000*l.* more. A telegram to that effect was received by the defendants on the 3rd of August. On the 3rd of August Demestre & Co. wrote to the plaintiffs informing them of what they had done. On the 5th of August, the defendants wrote to Demestre & Co. telling them that they had increased the insurance to 14,000*l.* On the 7th of August Demestre & Co. wrote to the defendants informing them that the *Bachi* did not sail till the 4th of August, and in this letter they again referred to the "interesado." On the 10th of August, the defendants wrote to Demestre & Co. acknowledging the receipt of their letter of the 24th of July, and on the 17th of August the defendants wrote acknowledging the receipt of Demestre & Co.'s letter of the 31st of July.] His Lordship proceeded: The letter of Demestre & Co. to the defendants of the 24th of July was received by them on the 9th of August, and was answered by them on the 10th, and De-

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Demestre & Co.'s letter of the 31st of July was received by the defendants on the 16th of August, and was answered by them on the 17th. The ship sailed on the 4th of August, and was lost on the 13th of the same month, but her loss was not known to the defendants until five or six days afterwards, and was not known to Demestre & Co., or to the plaintiffs, until a day or two later. The telegrams of the 28th of July and the 3rd of August, directing the defendants to insure the cargo first for 8,000*l.* and then for 3,000*l.* more, were acted upon immediately by them, for they at once effected insurances for those amounts by slips in the usual way, but the policy was not made and signed until the 18th of September. The policy was effected by the defendants in their own names, and for the benefit of all persons interested. A few days before the policy was obtained Demestre & Co. failed, and before the underwriters had paid to the defendants the amounts insured by the policies, the plaintiffs claimed to be entitled to the proceeds of the policies, and the defendants knew of this claim. The defendants received from the underwriters 11,000*l.* in respect of the policies, and the defendants seek to retain the whole of that sum, upon the ground that Demestre & Co. are indebted to them to a larger amount upon the general balance of accounts between them. The plaintiffs, on the other hand, contend that they are entitled to the whole 11,000*l.*, after deducting the premiums paid by the defendants for effecting the policies, and what, if anything, Demestre & Co. might have deducted or set off as against the plaintiffs, if Demestre & Co. had received the policy moneys and remitted them themselves. The present action is brought by the plaintiffs to recover the 11,000*l.* from the defendants. The action was tried before Mr. Justice Manisty and a special jury, and he left to them the following questions, which they answered thus: "Were the goods which constituted the cargo in question the property of the plaintiffs?" Answer.—"Yes." "Were the defendants employed by the plaintiffs to sell the goods in question for them, and to account to them for the proceeds, and did the defendants accept that employ-

ment?" Answer.—"Not employed directly for the plaintiffs, and defendants did not accept such employment." "Or were the defendants employed by Demestre & Co. to sell the goods and account to them for the proceeds, and did they accept that employment?" Answer.—"Yes." "Did the defendants know, or have reason to believe, that Demestre & Co. were acting as agents for some other person or persons not named?" Answer.—"Yes; they knew or had reason to believe it." "Were the defendants employed by the plaintiffs to receive the amount of the insurance for them and to account to them for the same, and did they accept that employment?" Answer.—"No." "Did the defendants receive the amount of the insurance as agents for and on account of the plaintiffs, or as agents for and on account of Demestre & Co.?" Answer.—"They received it for and on account of Demestre & Co., and the individual interested." "Did the plaintiffs authorise Demestre & Co. to ship and consign the goods to the defendants in their own names, and were they so shipped and consigned?" Answer.—"Yes." "On whose behalf and for whose benefit were the insurances effected?" Answer.—"For all parties whom it might concern." "Is there a usual, ordinary and well-known course of business between foreign consignors and merchants in London for the latter to make advances to the former against goods and usual shipping documents, on the terms that the London merchants are to be entitled to hold the proceeds of all the goods so consigned, or, if they are lost by the perils of the sea, the insurance money, against any balance that may be due to them on their general account current with the consignors?" Answer.—"There is not sufficient evidence to enable the jury to decide." Upon these findings judgment was entered for the defendants. The plaintiffs have appealed from this judgment, and have also applied to the Divisional Court for an extension of time to move for a new trial. Upon the appeal being opened before us it was arranged that the whole case should be argued and determined upon the Judge's notes of the evidence, the correspondence and other documents

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used at the trial, and the findings of the jury, this Court being at liberty to draw inferences of fact from the materials thus placed before it, and to give such judgment as the Court might think fit, subject, of course, to an appeal to the House of Lords. The questions at issue between the parties reduce themselves to two—namely (first), can the plaintiffs sue the defendants at all? (secondly) if they can, are the defendants entitled to the set-off they rely on? With respect to the first question, the defendants contend that they are accountable to Demestre & Co. alone; that there is no privity of contract between the plaintiffs and the defendants, and that the plaintiffs have no right to sue, unless it be in the name of Demestre & Co. In support of this contention reliance was placed on the Spanish law prevailing at Havannah, on the judgment of Lord Blackburn in *Armstrong v. Stokes* (4), and on the decisions in *The Elbinger Actien Gesellschaft v. Claye* (5), and *The New Zealand Land Company v. Watson* (6). The Spanish Code, by sections 118 and 119 as explained by the witness Girado, of the Spanish Bar, authorises an agent to act in his own name, relieves him from all obligation to disclose his principal, binds him as if he were the principal, and precludes the principal from enforcing the contract made by the agent, unless the agent has first transferred his right of action to his principal. These rules, moreover, apply to cases in which the agent is known by the person dealing with him to have a principal, if the name of that principal is not disclosed. The defendants were aware of the Spanish law on this subject, and contend that they were entitled to treat Demestre & Co. as principals and owners of the cargo, and to ignore the plaintiffs altogether. The Spanish law appears to us to be a circumstance to be taken into account in considering the nature and extent of the authority given by the plaintiffs to Demestre & Co.; but the Spanish law is not,

in our opinion, material for any other purpose. The contract between Demestre & Co. and the defendants is governed by English law, not Spanish, and the persons who can sue and be sued on that contract in England must also be determined by our law, and not by the law of Spain. We proceed, therefore, to consider the nature and extent of Demestre & Co.'s authority, and the knowledge which the defendants had on that subject. The plaintiffs certainly authorised Demestre & Co. to ship the tobacco in question in their own names, and to consign it to the defendants for sale. The tobacco was unquestionably the plaintiffs' property, and was to be sold on their account, and was to be insured for them as owners. Demestre & Co. were, in our opinion, authorised to receive the proceeds of the sale of the goods from the defendants in the event of a sale; but we are unable to adopt the defendants' contention that Demestre & Co. had authority to deal with the goods as their own, nor did they in fact so deal with them. When the defendants received the telegrams of the 28th of July and the 3rd of August, and effected a provisional insurance, they did not know to whom the cargo belonged, nor for whom it was to be insured. But, before the 18th of September, when the policy was really effected, the defendants had received the two letters of the 24th and 31st of July, and knew that Demestre & Co. were acting for some third person, alluded to as the "interesado," both in shipping the goods and in ordering the insurance; and with this knowledge the defendants effected the insurance in their own names for the benefit of all persons interested. By their letters of the 10th and 17th of August the defendants in effect inform Demestre & Co. that the provisional insurances, effected before their letters had arrived, were such as they were directed to effect by those letters. In other words, the defendants drew no distinction between the provisional insurances and the real policy. They treated the former as merely preliminary to the latter, and this, we have no doubt, was the real fact. The provisional insurances were effected by unsigned slips in the usual way; the policies were in law binding on the underwriters, and it is im-

(4) 41 Law J. Rep. Q.B. 253; Law Rep. 7 Q.B. 598.

(5) 42 Law J. Rep. Q.B. 151; Law Rep. 8 Q.B. 13.

(6) 50 Law J. Rep. Q.B. 433; Law Rep. 7 Q.B. D. 374.

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possible, in our opinion, to treat the defendants as having effected the policies for their own benefit, or for the benefit of themselves and Demestre & Co., to the exclusion of the "interesado." The jury were, in our opinion, quite right in finding that the defendants effected the insurances for the benefit of all concerned—that is, as it turns out, for the benefit of the plaintiffs and of Demestre & Co. and of the defendants, according to their respective interests in the cargo. The plaintiffs being the owners of the cargo, the insurance was, consequently, for their benefit, subject to the liens (if any) of Demestre & Co. and of the defendants respectively. The question now arises, Whether by English law the plaintiffs are entitled, as undisclosed principals, to sue the defendants for the moneys they have received in respect of the insurance thus effected? The English law respecting undisclosed principals is well known to differ from the law of many other, if not most other, countries. Their law is similar to the law of Spain, which has already been alluded to. But that by our law the plaintiffs are entitled to sue the defendants under the circumstances above set forth has been long settled. That the plaintiffs could sue, if they were not foreigners carrying on business abroad, is plain from the cases collected in the notes to *Thompson v. Davenport* (7) and from *Irvine v. Watson* (8), one of the most recent authorities on the subject. But it was contended that, inasmuch as the plaintiffs were foreigners carrying on business abroad, the case was different. We are, however, unable to come to this conclusion. In the first place, *Lanyon v. Blanchard* (9), *Mann v. Forrester* (10), and *Manns v. Henderson* (11) are direct authorities in support of such an action as this. In the second place, it is to be observed that this is not a case in which the defendants dealt with an English house acting for a foreign principal. Demestre & Co. were themselves a foreign house, and, although the defen-

dants relied upon a custom or usage of trade which, if proved, would have shewn that there was no contract between the plaintiffs and the defendants, the alleged custom or usage was not proved. Thirdly, the defendants in this case were neither buying from nor selling to Demestre & Co.; the defendants were simply consignees for sale, acting for Demestre & Co., who, as the defendants knew, were themselves acting for some third person. In these respects the case differs from such cases as *The Elbinger Actien Gesellschaft v. Claye* (5) and *Hutton v. Bullock* (12). As regards foreigners who buy or sell goods through English commission merchants, we take the law to be as stated by Lord Blackburn in *Armstrong v. Stokes* (4):—"The great inconvenience that would result if there were privity of contract established between the foreign constituents of a commission merchant and the home suppliers of the goods has led to a course of business, in consequence of which it has long been settled that a foreign constituent does not give the commission merchant any authority to pledge his credit to those from whom the commissioner buys them by his order and on his account. It is true that this was originally (and in strictness, perhaps, still is) a question of fact; but the inconvenience of holding that privity of contract was established between a Liverpool merchant and the grower of every bale of cotton which is forwarded to him in consequence of his order given to a commission merchant at New Orleans, or between a New York merchant and the supplier of every bale of goods purchased in consequence of an order to a London commission merchant, is so obvious and so well known that we are justified in treating it as a matter of law, and saying that, in the absence of evidence of an express authority to that effect, the commission agent cannot pledge his foreign constituent's credit."

This view of the law was acted upon in *The Elbinger Actien Gesellschaft v. Claye* (5) and *Hutton v. Bullock* (12). But we are not aware of any authority extending this exception to the general rule to such a case as this. *The New Zealand Land Company v. Watson* (6) was strongly

(12) Law Rep. 8 Q.B. 331.

(7) 2 Sm. L.C., 8th ed., p. 391.

(8) 49 Law J. Rep. Q.B. 531; Law Rep. 5 Q.B. D. 414.

(9) 2 Campb. 596.

(10) 4 Campb. 60.

(11) 1 East. 335.

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relied upon by the defendants as an authority against the plaintiffs' right to maintain this action. That case seems at first sight very like the present in many respects. But the differences are as important as the resemblances. The authority and course of dealing in that case were different from those we have now to consider. In *The New Zealand Land Company v. Watson* (6) the plaintiffs had consigned their goods to an English house by whom the defendants were employed, and the English house were the plaintiffs' *del credere* agents. Both these circumstances are wanting in the present case. If the plaintiffs here were suing persons employed by the defendants the decision in question would more closely resemble this than it does. The truth seems to be that, in *The New Zealand Land Company v. Watson* (6), the doctrine laid down in *Armstrong v. Stokes* (4) was carried one step further than it had been before; and the defendants contend that it ought to be carried a step further still, and to be extended to cases in which an English house is employed by a foreign agent for a foreign principal, who afterwards sues the English house. Where an English merchant acts as a middle-man for a foreign undisclosed principal, buying or selling through him, the person dealing with the English merchant does not, *prima facie*, contract with the undisclosed principal, and to this extent the ordinary English doctrines relating to undisclosed principals have been gradually modified with reference to mercantile usage and convenience. But we are not aware that any decision goes further than these, and we do not feel warranted in further encroaching on those doctrines. We adopt the view of Lord Blackburn in *Armstrong v. Stokes* (4), that it is too late now to question the propriety of the English law on this subject. If the English law is to be made to conform with foreign law in this respect it must be by legislative enactment rather than by judicial decision. We pass now to the second contention of the defendants, namely, that, even if the plaintiffs are entitled to sue the defendants, the defendants are entitled to a lien or right of set-off against the plaintiffs in respect of the amount due to the defendants from

Demestre & Co. on the general balance of their accounts. This question, whether regarded as a question of lien or as a question of set-off, must again be determined by English law, and, according to our law, the right of the defendants to a lien or set-off depends on a question of fact, namely, whether the defendants did or did not know that Demestre & Co. were acting for an undisclosed principal before the defendants' alleged lien or right of set-off accrued? It is admitted that the defendants knew the plaintiffs' real position before the defendants received the proceeds of the policies; but it was contended that they had no notice of any agency when they effected the insurance, and that, consequently, they acquired a lien on the policy for the balance due to them by Demestre & Co., and that this lien entitled the defendants to retain the proceeds of the policy. It has, however, already been shewn that when the defendants obtained the policy on the 18th of September they knew of the "interesado," and that the insurance was for his benefit. It has also been shewn that the provisional insurance made by the defendants before they had this notice cannot avail them so as to put them in a better position than the policy itself. It follows, therefore, that the lien or set-off contended for cannot be maintained. The rule which allows a person who deals with an agent not known to be such to set off against his principal any debt due from the agent to the person so dealing with him is well settled—*George v. Glagett* (13); but it is equally well settled that this rule does not apply where the person dealing with the agent knows him to have a principal, although the name of the principal may not be disclosed. Whether the undisclosed principal carries on business in this country—as in *Fish v. Kempton* (14), *Semenza v. Brinsley* (15), *Ex parte Dixon*; in *re Henley* (16), and *Irvine v. Watson* (8); or abroad, as in *Lanyon v. Blanchard* (9) and *Manns* (13) 2 Sm. L.C. 118.
(14) 7 Com. B. Rep. 687; 18 Law J. Rep. C.P. 206.
(15) 18 Com. B. Rep. N.S. 467; 34 Law J. Rep. C.P. 161.
(16) 46 Law J. Rep. Bankr. 20; Law Rep. 4 Ch. D. 133.

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v. Henderson (11), is immaterial. Upon this point, as well as the first, the defendants relied on *The New Zealand Land Company v. Watson* (6); but the main difference between that case and this has been already pointed out. As regards the money sought to be set off in that case, the set-off was made before the plaintiffs had made any claim against the defendants; while here the plaintiffs made their claim before the defendants received the proceeds of the policy. In *The New Zealand Land Company v. Watson* (6) the plaintiffs sought to follow their goods and the proceeds thereof into the hands of the defendants, and the Court appears to have thought that, although they might have followed the goods, they could not have followed the proceeds after they had been set off. It is difficult to follow this reasoning. The observations of Lord Blackburn about following goods in *Armstrong v. Stokes* (4) ought to be constantly borne in mind in cases of this description. He said—"It is right, in order to avoid misapprehension, to say that the phrase, repeatedly used by the counsel for the plaintiff, that the vendor has a right to follow the goods, is, in our opinion, calculated to mislead. There are cases, such as that of *Wilson v. Hart* (17), to which such a phrase would be applicable; but those, as is pointed out in 2 *Smith's Leading Cases* (18), proceed on the ground of fraud. In the absence of fraud, unless the person receiving the goods is a party to the contract under which the goods were sold, the vendor has no right to follow them. If the goods were bricks sold to a contractor he could not charge the owner of the house into which they were built, though he might do so if the person supposed to be the contractor turned out to be really agent for the owner of the house; and the principle is the same in such a case as the present." Applying these observations to *The New Zealand Land Company v. Watson* (6) the inability of the plaintiffs to follow their goods into the hands of the defendants and to recover them, without satisfying the defendants' lien, would seem to have followed as soon as it was decided that

there was no contract on which the plaintiffs could sue the defendants. In this case there is such a contract, and, having regard to it and to the knowledge the defendants had when they effected the insurance, *The New Zealand Land Company v. Watson* (6) cannot be regarded as an authority in their favour. If in this case the goods had not been lost, but had been sold by the defendants, and they had paid Demestre & Co. before the plaintiffs revoked their authority to receive payment, such payment would have discharged the defendants, for the plaintiffs clearly authorised Demestre & Co. to receive payment. But it is equally clear that the plaintiffs did not authorise Demestre & Co. to apply the proceeds of the plaintiffs' goods in paying a debt of their own. Having regard to the authority conferred on Demestre & Co., the defendants could not have asserted as against the plaintiffs a lien on the goods or their proceeds for the general balance due from Demestre & Co. Nor, in the circumstances of this case, can the defendants establish a better title to the policy or its proceeds than they would have had to the goods if they had arrived. If, when the defendants effected the insurance they had effected it for their own benefit, without notice that the goods were not Demestre & Co.'s, the defendants might have acquired a better title to the policy and its proceeds than they would have had to the goods; but, as matters stand, we are unable to see any distinction between the two. Looking at the case broadly, there is some inconvenience, not to say injustice, whichever way this case is decided. On the one hand, it is not right to pay one man's debts out of another man's money, which is what the defendants are seeking to do. On the other hand it is not right to avail oneself of another man's credit and connection, and not comply with the conditions on which that credit and connection rest, and this is what the plaintiffs are seeking to do. The plaintiffs, however, never led the defendants to believe that the goods were Demestre & Co.'s, for, although the bills of lading were in their name, the letter which accompanied the bills of lading informed the defendants that the goods were not Demestre & Co.'s, and were to be insured for

(17) 7 Taunt. 295.

(18) 5th ed. p. 332; 6th ed. p. 351.

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the "interesado." For the reasons above given, the plaintiffs appear to us to be entitled to recover the 11,000*l.*, subject to the deductions which they themselves concede ought to be made. The amount of these must, if not agreed upon, be ascertained by enquiry; but the judgment entered for the defendants must be reversed, and judgment must be entered for the plaintiffs, with costs up to and including the appeal.

Solicitors—Waltons, Bubb & Walton, for plaintiffs; Freshfields & Williams, for defendants.

1882. { PARSONS (*appellant*) v. THE
June 16. { BIRMINGHAM DAIRY COMPANY
(*respondents*).

Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), ss. 6, 12, 13 and 14—Adulterated Article—Purchase by Private Individual—Notification to Seller—Analysis.

[For the report of the above case, see 51 Law J. Rep. M.C. 111.]

1882. { BEATTY AND OTHERS v. GILL-
June 13. { BANKS.

Riot—Unlawful Assembly.

[For the report of the above case, see 51 Law J. Rep. M.C. 117.]

[IN THE HOUSE OF LORDS.]

1882. {
June 9, 12, 13. { SCARF v. JARDINE.

Partnership—Change by Substitution of New for Retiring Partner—Continued Dealings with Firm without Notice of Change—Right to Charge either Old or New Partner—Election.

Where a change is made in a partnership by the retirement of an old and the admission of a new member, a customer of the original partnership who, after the

change, but without notice thereof, supplies goods to the firm, has the option to charge the firm as composed before the change, or as existing when the goods were sold. He cannot hold both outgoing and incoming partners liable.

A customer under such circumstances, after subsequently receiving notice of the change, sued the new partnership, and upon their becoming bankrupt proved in the bankruptcy:—

Held, that he had made his election to charge the new firm, and that such election was irrevocable and barred his right to sue an outgoing partner.

This was an appeal from a judgment of the Court of Appeal which reversed one of Denman, J.

The defendant before the 27th of July, 1877, carried on business in partnership with one W. H. Rogers, under the firm of W. H. Rogers & Co. On that day the partnership was dissolved, and Rogers took another partner, named Beech, and continued to carry on the business under the same name.

The plaintiff, who had had dealings with the old firm, sold in January, 1878, goods to W. H. Rogers & Co., which were delivered in the following month. Subsequently to such delivery, on the 25th of February, 1878, he received notice of the change in the firm, in which notice it was stated that all debts owing to or by the old firm would be received and paid by W. H. Rogers alone.

The plaintiff continued to deal with the firm after notice, and in his accounts treated it as one firm throughout. He applied to the new firm for payment of the whole amount due to him, and eventually, on the 22nd of July, 1878, received a post-dated cheque from them, which was dishonoured when presented. He then sued Rogers and Beech, and upon their going into liquidation proved in the liquidation for the amount due to him. He subsequently brought this action against the defendant for the price of the goods supplied before notice of the change in the firm.

The case was tried before Denman, J., who by agreement decided all questions arising in the action except the date of the

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receipt of notice of the defendant's retirement, which was found by a jury as the 25th of February, 1878.

Denman, J., gave judgment for the defendant, but it was reversed by the Court of Appeal. The question in both Courts was treated as one of novation, and it was assumed that the plaintiff could hold the defendant liable jointly with the new firm unless he had agreed to look to the new firm only.

The defendant appealed.

Forbes, Q.C., and *G. E. S. Fryer*, for the appellant.—This is not a question of novation. If it were, there is ample evidence that the plaintiff had agreed to look to the new firm alone—*Ex parte Rivolta; in re Conner* (1), *Rolfe v. Flower* (2), *In re Smith, Knight & Co.*; *ex parte Gibson* (3). But here the appellant was not really a partner at the time of the sale of the goods. There never was any contract with him in fact. The plaintiff has the right to hold either the old firm liable or the new—the old by estoppel, the new as the actual contracting parties. He cannot charge both Scarf and Beech. He has elected to charge the new firm, and cannot now retract.

There is no authority exactly in point. The nearest analogy is the case of principal and agent. If upon discovery of an undisclosed principal he is held liable, the agent cannot afterwards be sued. The same rule would apply *a fortiori* to the present case.

If judgment had been obtained against the new firm, *Kendall v. Hamilton* (4) and *Priestly v. Fernie* (5) are clear authorities that Scarf would be discharged. But the Bankruptcy Act, 1869, s. 54, gives proof in bankruptcy the effect of a judgment. The plaintiff's affidavit in the bankruptcy is conclusive evidence of election—*Bilborough v. Holmes* (6); and *Ex*

parte Appleby (7) shows that the proof against Rogers and Beech would not have been admitted unless the right against Scarf had been given up. It is a question of fact whether there has been an election or not—*Calder v. Dobell* (8)—and it is agreed that all facts are to be decided by the Court.

Finlay, Q.C., and *C. A. Russell*, for the respondent.—The liability was not alternative but joint. There is no authority either way, but it is contended that the outgoing partner is in the same position as any other who holds himself out as a partner. Scarf must be taken to represent that he is a member of the firm.

[LORD BLACKBURN.—No; that the old state of things continues.]

Then if the liability is alternative there is no sufficient election here. The plaintiff has shewn no intention to give up his right against Scarf.

[LORD BLACKBURN.—The intention is immaterial. If he can sue one only, has he irrevocably chosen to sue one?]

The issuing of a writ is not a sufficient election—*Priestly v. Fernie* (5)—he must sue to judgment. Proof in bankruptcy is not conclusive—*Curtis v. Williamson* (9), *Calder v. Dobell* (8), *Bottomley v. Nuttall* (10), *Keay v. Fenwick* (11) and *Harris v. Farwell* (12). Proof in bankruptcy has not for all purposes the effect of a judgment, but only in the case provided by section 54 of the Bankruptcy Act, 1869. They also cited the *Digest*, lib. 14, tit. 1, "*De exercitoria actione*."

Forbes, in reply.

THE LORD CHANCELLOR (LORD SELBORNE).—The facts in this case are few and simple, but they raise a question which may be of some general importance, and which seems, from what has been stated at the bar, to be as yet undetermined by authority.

There was a firm carrying on business,

(1) Weekly Notes, 1882, p. 76.

(2) Law Rep. 1 P.C. 27.

(3) 37 Law J. Rep. Chanc. 864; Law Rep. 4 Chanc. 662.

(4) 48 Law J. Rep. C.P. 705; Law Rep. 4 App. Cas. 504.

(5) 3 Hurl. & C. 977; 34 Law J. Rep. Exch. 172.

(6) 46 Law J. Rep. Chanc. 446; Law Rep. 5 Ch. D. 255.

(7) 2 Deac. 482.

(8) 40 Law J. Rep. C.P. 224; Law Rep. 6 C.P. 486.

(9) 44 Law J. Rep. Q.B. 27; Law Rep. 10 Q.B. 57.

(10) 5 Com. B. Rep. N.S. 122; 28 Law J. Rep. C.P. 110.

(11) Law Rep. 1 C.P. D. 745.

(12) 15 Beav. 31.

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under the name of W. H. Rogers & Co., in Manchester, with which the plaintiff, Mr. Jardine, had dealings. It consisted at first of two partners, the defendant Mr. Scarf, and Mr. W. H. Rogers. On the 27th of July, 1877, those two persons dissolved the partnership between them, and another person, named Beech, joined Mr. Rogers, and they carried on the same business, under the same name and at the same place, from that time forward. Of this the plaintiff, Mr. Jardine, knew nothing until the 25th of February, 1878. In the meantime, in January, 1878, goods were ordered from him on behalf of the firm carrying on business under the name of W. H. Rogers & Co., according to the ordinary course of business—which, I presume, was the same as had prevailed before the dissolution of partnership in the previous month of July—goods were ordered of Mr. Jardine, and were delivered by him in February, 1878, at the place of business of the firm. At the time when they were ordered, and at the time when they were delivered, he was ignorant of the dissolution of partnership which had in fact taken place, and of the fact that the business was then being carried on, not by Mr. Scarf and Mr. Rogers, but by Mr. Rogers and Mr. Beech. He became aware of those facts upon the 25th of February, 1878, on receiving a circular dated on the 21st of the same month of February, by which notice was given to him, and by which the date of the dissolution of partnership was mentioned as the 27th of July then last; and it was at the same time stated that all debts owing to or by the old firm would be received and paid by Mr. Rogers alone, who would continue to carry on the business as theretofore, in partnership with Mr. Beech, under the same style and firm.

Mr. Jardine afterwards supplied other goods to the new firm. He made no break in the accounts in his books. He rendered an account consisting of the old and the new debts—by “the old” I mean the debt which had been incurred before he became aware of the dissolution of partnership; by “the new” I mean that which had been incurred afterwards—he rendered that account to the new firm. He had some correspondence with them,

looking to them as the persons from whom he might expect payment of the whole of that demand; and they, on the other hand, replied in the correspondence as being prepared to liquidate the debt; they made some payment on account, and they gave a cheque for the balance on the 22nd of July, 1878, which was post-dated a week. That cheque, when presented, was dishonoured; and on the 7th of August, 1878, Mr. Jardine commenced an action against Rogers and Beech for the balance, which included the present demand—that is to say, included the demand for the goods which had been ordered in January and supplied in February before notice of the dissolution of partnership. That action was stopped, not by any discontinuance on the plaintiff's part, but by the failure of the new firm, which went into liquidation on the 16th of August, 1878. Under this liquidation the plaintiff proved as a creditor of the new firm, by an affidavit in which he swore that Rogers and Beech were justly and truly indebted to him in the sum of 125*l.* 19*s.* 1*d.* for goods sold and delivered by him to Rogers and Beech, that sum including the goods in question.

Your Lordships, I think, must take it, upon the facts as they appear, that no objection was made to that proof; that it was never retracted; that it was admitted; and, although it does not appear upon the proceedings that a dividend has been paid under it, yet, at all events, for anything that your Lordships know to the contrary, that may be the case, or may be the case hereafter.

Now, after the liquidation, and after the proof, the present action was brought by Mr. Jardine against Mr. Scarf, who, in point of fact, had ceased to be a partner in July, 1877; who, in point of fact, had given no authority to order the goods in question upon his credit; and who, as between himself and the persons who did order the goods, was, at the time when they were supplied, a stranger to the business. On the other hand, at the time when those goods were supplied, the persons who actually ordered them were Rogers and Beech. They were the persons alone interested in the business, and they were undoubtedly, upon ordinary

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principles, liable for what they so ordered. The defendant also might be held liable—about that there can be no doubt—because the principle of law which is stated in *Lindley on Partnership* (13) is incontrovertible—namely, that “when an ostensible partner retires, or when a partnership between several known partners is dissolved, those who dealt with the firm before a change took place are entitled to assume, until they have notice to the contrary, that no change has occurred;” and the principle on which they are entitled to assume it is that of the estoppel of a person who has accredited another as his known agent from denying that agency at a subsequent time, as against the persons to whom he has accredited him by reason of any secret revocation. Of course in partnership there is agency—one partner is agent for another—and in the case of those who, under the direction of the partners for the time being, carry on the business according to the ordinary course, where a man has established such an agency, and has held it out to others, they have a right to assume that it continues until they have notice to the contrary.

There was, therefore, in this case undoubtedly a state of circumstances which would have entitled the plaintiff, if he had thought fit, to hold Mr. Scarfe liable, the credit being given to him and to Rogers, there being no knowledge on the part of the plaintiff of the dissolution of partnership—no knowledge of any revocation of the agency at the time when these goods were delivered. On the other hand, if you look not to the estoppel but to the fact, the plaintiff was entitled to hold the persons who actually gave the order and received the goods, and were interested in the profit and loss of the firm which ordered them, liable to him; those persons being not Scarf, Rogers and Beech, or Scarf and Rogers, but Rogers and Beech alone.

Now it appears to me that the real question which your Lordships have to determine is not as it was treated in the Court below—in, I think, both the Courts below—namely, the question of what is called “novation”—but it is this, whether, in that state of circumstances, there

(13) 3rd ed. vol. i. p. 429.

was a concurrent joint liability of the three persons, Scarf, Rogers and Beech, upon the principles which I have stated; or whether the plaintiff had a right to make his choice whether he would sue those who were liable by estoppel or sue those who were liable upon the facts. Put it as I can, I am unable to understand how there could have been a joint liability of the three. The two principles are not capable of being brought into play together; you cannot at once rely upon the estoppel and set up the facts; and if the estoppel makes A and B liable, and the facts make B and C liable, neither the estoppel nor the facts, nor any combination of the two, can possibly make A, B and C all liable jointly.

Therefore, it appears to me that if the plaintiff chose to go upon the facts, and to make the persons who actually ordered and got the benefit of the goods his debtors (which he had a plain and certain right to do), he entirely disavowed the estoppel, and could no longer set it up. If, on the other hand, he chose to go upon the estoppel, then, Beech being a stranger to the liability upon that footing, he could only sue Scarf and Rogers. One way of testing it would be by enquiring what was the rule under the old system of pleading. If at that time Scarf and Rogers had been sued, could they have pleaded in abatement that Beech ought also to be joined as being also liable? I think most clearly they could not. And, upon the other hand, if Rogers and Beech had been sued, still more impossible would it have been for them to plead in abatement that Scarf ought also to be joined, for he was neither a partner when the goods were ordered, nor as between him and themselves could any liability possibly have attached to him.

It seems to me, therefore, that the plaintiff was necessarily put to his election. He might hold either Rogers and Scarf or Rogers and Beech liable; he could not hold Rogers, Scarf and Beech all liable together. That makes it unnecessary for me to say much upon the question of novation, except that, if your Lordships should differ from the Court of Appeal in this case, you will have the satisfaction of feeling that you do so on grounds which do not seem to have been clearly or fully

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presented, if they were presented at all, to the Court of Appeal. In the Court of first instance the case was treated really as one of what is called "novation," which, as I understand it, means this—the term being derived from the civil law—that, there being a contract in existence, some new contract is substituted for it, either between the same parties (for that might be) or between different parties, the consideration mutually being the discharge of the old contract. A common instance of it in partnership cases is where, upon the dissolution of a partnership, the persons who are going to continue in business agree and undertake, as between themselves and the retiring partner, that they will assume and discharge the whole liabilities of the business, usually taking over the assets; and if in that case they give notice of that arrangement to a creditor, and ask for his accession to it, there becomes a contract between the creditor who accedes and the new firm to the effect that he will accept their liability instead of the old liability, and, on the other hand, that they promise to pay him for that consideration.

Now, if this case had rested upon that ground (on which it appears to have been put in the Court of first instance) I could not myself have agreed in the decision at which the Court of first instance arrived; because there is really only one act done upon which a serious argument, as it seems to me, could be founded in favour of novation, if the circumstances had required that the case should be put upon that ground—I mean the giving of the cheque, which I have already mentioned, on the 22nd of July, 1878, by the new firm. Down to that time it was, as it seems to me, merely in the natural and ordinary course of things that, when the notice of dissolution referred to Mr. Rogers (who was continuing to carry on the business of that firm with Beech) as the person who would receive and pay all debts owing to or by the old firm, either Mr. Rogers or his firm should act in the liquidation of the affairs and debts of the old concern; and the mere corresponding with them, the mere sending in the matter to them, would not, as it seems to me, make Beech liable, unless he did something to make himself liable

beyond carrying on that kind of correspondence. Then, upon the other hand, is there sufficient evidence of the intention which would be necessary on the part of the plaintiff to relinquish these original debtors? The fact of this cheque being given, which, as I have said, is the only thing which can be relied upon as shewing that Beech was willing to make himself liable, is perfectly consistent with the plaintiff's not relinquishing the original debtors. If it results in payment, he is perfectly entitled to take it. If it does not result in payment, it will not fulfil its original object. It did not result in payment, and the action followed. The proof in bankruptcy afterwards being *in invitato*, though it might be some evidence of the intention of the plaintiff to get what he could out of Rogers and Beech, yet certainly would be no evidence of any accession on the part of Beech to the liability, which was not upon him at all.

I therefore should not have differed from the opinion of the Court of Appeal if I had thought (as the Court of Appeal seems to have treated it) that the case depended upon what is called the doctrine of novation. I am inclined to say that the facts which have taken place were susceptible of an interpretation consistent with an intention on the part of the plaintiff to retain his original debtors, at all events at the time of action brought, and that, on the other hand, there was nothing to make Beech a debtor if he had not been so before. But as Beech was really a debtor, the whole doctrine of novation disappears from the case, and the question resolves itself into that which I originally stated—namely, whether there was an intention on the part of the plaintiff to hold the three persons jointly liable or only two, and if two, whether it is possible, after choosing to hold those who actually gave the order and received the goods liable, and proceeding against them as debtors in such a way as to amount to a distinct election to take their liability, to retract that and to fall back upon the liability which, on a different principle, might have been asserted against the other two—that is to say, against Scarf and Rogers, to the exclusion of Beech. I think that the plaintiff was bound by his election, and that after appro-

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bating the liability according to the facts, and taking as his debtors those who had actually given the order, he could not when it suited his convenience retract it, reprobate it, and go back upon the liability, by estoppel, of the man who never gave the order at all.

Then did the plaintiff do that which was, and ought to be held as, an election of liability? I think that he did, with full knowledge of all the facts from the 25th of February. He not only carried on the correspondence to which I have referred, which might have been entirely consistent with his reserving his right to elect; he not only received the cheque, upon which I am disposed to make the observation that taking it would not have been a conclusive election, but he brought his action against Rogers and Beech, who could not be liable except upon the footing of his holding them to that liability to which they were undoubtedly subject, at his election, according to the facts; and not only did he make his election, but when the action was stopped by the liquidation he carried in his proof, swearing that they were justly and truly indebted to him for the goods as sold and delivered by him to them. Rogers and Beech were in point of fact the debtors, and he had the benefit of that which really (without going into any technical distinctions) for this purpose appears to me to be a sufficient ground of judgment.

I do not think it necessary to go into any of the cases which have been mentioned, because I think that the principle is perfectly distinct. The case which was relied upon by the respondent of *Curtis v. Williams* (9) simply held that the mere act of making an affidavit of the kind which was made in this case in bankruptcy was not one as to which the party would have no *locus penitentie* under any circumstances, where he had been desirous, when he had fully considered the matter, of withdrawing it before it was put upon the file, and nothing was done, so far as appears, after it was put upon the file. There was nothing to bind him to his election except that inadvertent and (at the time when it was done) unintentional act of his agent; and the Court, who probably knew the facts of that case, were quite

right in holding that that ought not to be regarded as an election by him.

I need not refer particularly to the facts of *Bilborough v. Holmes* (6), but a proof, under circumstances similar to the present, was held, upon the principle of election, to bind the party who made it. In *Bottomley v. Nuttall* (10) an acceptance had been given, which was evidence of a successive obligation, and proof of it would by no means extinguish or destroy any right which the party might have upon the original debt and the original consideration.

There is, therefore, as was frankly admitted at the bar, no direct authority upon this point. Your Lordships are obliged to determine it upon principle; and on principle, I think, your Lordships ought to hold that the plaintiff was put to his election, that he made it when he brought the action and proved in liquidation, and that he cannot now, consistently with the election which he has made, hold Mr. Scarf liable.

I therefore move your Lordships that the order under appeal be reversed; which will have the effect, I suppose, of restoring the judgment of the Court of first instance, in point of form at all events; and that the defendant (the appellant here) have his costs in the Court of Appeal and in this House.

LORD BLACKBURN.—I am of the same opinion. This was an action brought against Mr. Scarf to recover a sum of 102*l.* 10*s.* 4*d.* It is now admitted that on the 30th of January, 1878, these goods were ordered from the plaintiff, Mr. Jardine, by Mr. Rogers, he sending the order in the name of the firm of W. H. Rogers & Co., which was the name under which he and Scarf had traded, and under which name they had dealt with the plaintiff; that the plaintiff well knew that he and Scarf had been the persons so trading; that those goods thus ordered upon the 30th of January were afterwards supplied, part upon the 1st of February, part upon the 16th, and part upon the 20th. One question of fact was, when had the plaintiff, Mr. Jardine, notice of what was the fact—namely, that Scarf had ceased to be a partner, and that, at the time when the goods were ordered, and at the time when

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the goods were supplied, the firm of Rogers & Co. consisted, not of Rogers and Scarf, but of Rogers and Beech, who had not been formerly a partner, but had come into partnership with Rogers afterwards, and not till Scarf had retired? Now on that, I understand, the question went to the jury.

The fact was plain that on February 5, 1878, this notice was printed in the *Gazette*:—"Notice is hereby given that the partnership heretofore subsisting between us, the undersigned, Benjamin Scarf and William Henry Rogers, carrying on business as merchants at 32 Church Street, Manchester, under the firm of W. H. Rogers & Co., was dissolved by mutual consent on the 27th day of July last. All debts owing to or by the said firm will be received and paid by the said W. H. Rogers alone, who will continue to carry on the business as heretofore, in partnership with the undersigned James Beech, under the firm of W. H. Rogers & Co." If Mr. Jardine, the plaintiff, had not been a person who had dealt with the former firm, the notice in the *Gazette* would have given him notice as from that 5th of February, which was after the order had been given upon the 30th of January. The goods were delivered at different times, as I have stated, substantially after the 5th of February, and it was material to ascertain when it was that Mr. Jardine got actual notice. As soon as he was aware of this notice being published in the *Gazette*, it is quite plain that he would know that the authority which had originally belonged to Rogers to bind himself and Scarf had been revoked. But he was not bound to read the *Gazette*; and in point of fact it appears, according to the finding of the jury, that he did not read it; and it was not until the 25th of February that he received a circular, at the bottom of which was appended the *Gazette* notice, and which circular was in these terms:—"Sir,—I beg to call your attention to the annexed notice of dissolution of partnership lately existing between Mr. Benjamin Scarf and myself, and I have the pleasure to inform you that Mr. James Beech has joined me in the business, and will take an active part. The style of the firm will not be altered. Undernoted are the signatures of each

partner. Yours truly, W. H. Rogers." Then the signatures were given, and below that was a copy of the notice which had been previously published in the *Gazette*. The finding of the jury was that this notice came to Mr. Jardine on the 25th of February, and not sooner. I should have stated that there was a subsequent payment of 50*l.*, which reduced the amount in dispute to, I think, 45*l.*; the amount is no great matter; whatever sum it was, that payment reduced the amount in dispute, though that is not large in itself.

Now, that being the case, the question then arose what defence, if any, there was proved. It was agreed that this should be determined by the Court without asking any further question of the jury, but taking the evidence and drawing the inferences of fact whether there was a defence or not. On that Mr. Justice Denman, who tried the case, thought (it was apparently put to him in that way) that the question was whether or not there was novation; which the Lord Chancellor has just said (and I quite agree with him) is another word for accord and satisfaction, by giving in substitution the liability of another person upon another contract in lieu of the contract for which the former partners were liable; and Mr. Justice Denman thought that there had been a novation proved.

When the case came before the Court of Appeal the majority of the Court of Appeal (Lord Justice Baggallay seems to have doubted about it) thought that the novation in that sense was not proved. I do not feel quite certain that if I knew all the evidence (for it has not been brought fully before us), if I thought the question was whether there was novation or not, I should have agreed with them that, on the evidence brought before us, it was not in this case proved. I need not, however, enter into the question how that was, because my opinion, which leads me to concur in the judgment which has just been moved, is, that that was not the real question—that there was a mistake and misapprehension on the part, not only of the counsel who urged it, but of the Judges who heard the case, when they thought that the question was that of novation when the defence depended upon a prior question.

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Though the amount now in dispute is very small, the question is an important one. I do not think there can be any doubt (it is very old law indeed) that where a person has given authority to another (it is not peculiar to partnership), the authority being such as would apparently continue, he is bound to those who act upon the faith of that authority, though he has revoked it, unless he has given the proper notice of the revocation. In this case I think there can be no doubt that Rogers, having been partner with Scarf, had authority, and apparently continuing authority, to bind Scarf as to all matters concerning the partnership, and that Mr. Jardine, being an old customer, had a right to believe that that authority continued until he was told that it was revoked. But then I do not think that the liability is upon the ground that the authority actually continues. I think it is upon the ground, as has been very well put and explained in *Freeman v. Cooke* (14), that there is a duty upon the person who has given that authority, if he revoke it, to take care that notice of that revocation is given to those who might otherwise act on the supposition that it continued; and the failure to give that notice precludes him from denying that he gave the authority against those who acted upon the faith that that authority continued. I put rather an emphasis upon those last words, "against those who acted upon the faith that that authority continued," for I think that no man has a right to say, "I know now that the authority was in fact revoked, but I will continue to go on, and will do things subsequently, and act upon the supposition that I hold this person liable, though I am not actually acting upon the faith that he has given authority, but I am acting upon the ground that I find another is really liable, and I will only come on him if that other does not pay." I do not think he can do that. The question, therefore, is this, was Mr. Jardine acting upon the faith that it was so?

Now Mr. Jardine, upon the 30th of January, as far as appears upon the evidence, had never so much as heard of Mr.

(14) 2 Exch. Rep. 654; 18 Law J. Rep. Exch. 114.

Beech. Mr. Jardine, when he received the order from W. H. Rogers & Co., had every reason to think that he was contracting to supply these goods to Rogers and Scarf, and he did supply the substantial part of the goods on the 1st, 16th and 20th of February, before he had any notice that he was not supplying them to Rogers and Scarf. Therefore, clearly, at that time he was in the case of a person who had acted upon the faith that W. H. Rogers's authority when he gave the order still continued when he supplied the goods; and he therefore certainly had a right to hold Scarf liable on that ground. But it is quite clear from the notice, and the circular which I have already read, that on the 25th of February he became aware that, though Rogers had apparent authority, and though he having acted upon that apparent authority had a right, if he pleased, to hold Scarf liable, yet in point of fact Scarf was not really a principal, and had not given real authority; that in point of fact Rogers was not acting by Scarf's authority but by Beech's authority, and that Rogers and Beech were the real persons who had ordered the goods, the real persons who had received them, so far as they had been then received, and were the persons who were therefore liable; because in fact Rogers had authority from Beech, and had not in fact authority from Scarf.

The first question, therefore, which arises is, could a person who knew that he held both Beech and Rogers liable, and had very rightly the power to say, "I will treat this as being a joint liability of Rogers and Beech," say, "I will treat it not only as the joint liability of Rogers and Beech, but as the joint liability of Rogers, Beech and Scarf," treating them all three as jointly liable? And certainly, though counsel could not produce any precise authority upon the point, I should myself, unless I had seen what the Judges of Appeal had here said, never have entertained the slightest doubt that he could not. I should not myself have entertained a doubt that in old times a plea in abatement, in an action against Rogers and Beech for not joining Scarf, would have been bad; nor could I have doubted that in old times, if an action had been brought against Rogers,

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Scarf and Beech jointly, there would have been a non-suit entered, upon the ground that there was a variance in the proof—that there was no proof that the three were liable. I say, I should not have doubted that at all if I had not found (unless there has been some misprint, or some inaccuracy in the shorthand note) that that was not the view of the Court of Appeal. Lord Coleridge is reported to have said, "The three partners are all primarily liable clearly." I think that at the moment when he said that he could not have had the facts before him. The three never were partners at all. I cannot see how he could possibly say that that was the case if he remembered the facts. Lord Justice Brett does not say that in terms, but he does say what almost involves the same thing. When he treats it as a novation he says, "I cannot infer from the fact of his making a claim against people with respect to whom he had a valid claim" (by that he means Rogers and Beech) "that he had given up his claim against another person who was liable to him."

Now, I do not think that that other person (Scarf) was, as I have said before, liable to Jardine. Scarf was precluded or estopped from denying that he had given the authority which would have made him liable, if the fact had been so, but I do not think that it was so; and I agree with what the Lord Chancellor has said, that the difference is an important one.

There seems not only to be no distinct authority upon the subject, but there really seems to have been a doubt in the minds of those able Judges (at least, it is quite clear that they do not seem to have perceived the point clearly) whether or no the plaintiff could consider all three persons jointly liable. I think it important to say distinctly that, in my opinion, he could not, and to say that the right which the plaintiff had when he got the notice on the 25th of February was to sue either at his option. He was not bound to sue Scarf. He might very reasonably and properly say—"I think that I have a legal right to hold Mr. Scarf liable because he did not give notice to me in time; but I am not going to do so. I find now that I have a right to hold Rogers and

Beech liable, and will do so;" and if he had communicated that to the parties, there could be no doubt at all that when he had elected thus to charge Rogers and Beech, and Rogers and Beech only, there would have been no question whatever that it was a final and conclusive election, and that he could in no way after that charge Scarf. But he had also a right if he pleased, to say—"I will proceed upon the ground that Scarf has made himself liable to me. I will hold Scarf liable." But in that case I think he could not hold Beech also liable. It seems to me that he had his choice between the two: he had his choice whether he would hold Rogers and Beech liable, as in fact they were, or Rogers and Scarf liable, as he had supposed they were, though Scarf was not liable in fact; but he could not hold both sets of persons liable. And then comes the question which ought to have been decided, not whether there was a novation (upon which probably, if I had thought that that was the question, I should have agreed with the majority of the Court of Appeal), but whether the plaintiff had before the 30th of September, the date at which he, for the first time, made a claim against Scarf, made a final determination of the election by which he had to choose which of the two sets of parties he would hold liable.

Now, on that question, there are a great many cases; they are collected in the notes to *Dumpro's Case* (15), and they are uniform in this respect, that where a man has an option to choose one or other of two inconsistent things, when once he has made his election it cannot be retracted; it is final, and cannot be altered: "Quod semel placuit in electionibus amplius displicere non potest." That is *Coke upon Littleton*, 146a, and I do not doubt that there are many older authorities to the same effect; but that rule has been uniformly acted upon from that time at least down to the present. When once there has been an election to do one of the two things, you cannot retract it and do the other thing—the election once made is finally made.

But upon that comes the question which is the one that now arises, whether there

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was evidence here on which your Lordships should find as a fact that there was an election. In *Clough v. The London and North Western Railway Company* (16), the Exchequer Chamber had to consider that question a good deal in a case of some importance, in which the judgment was carefully considered. I wrote it myself, and I say nothing further about it than this, that it had the full assent of all the other Judges. The result of what is there said is that where there is a right to elect, the party is not bound to elect at once; he may wait and think which way he will exercise his election, so long as he can do so without injuring other persons; and, accordingly, in that particular case it was held that he had not lost his right to elect by a reasonable waiting under rather peculiar circumstances; but when he has once fully elected it is final.

I may also refer to the case of *Jones v. Carter* (17), as most neatly stating the point. The principle, I take it, running through all the cases as to what is an election is this: that where a party in his own mind has thought that he would choose one of two remedies, even though he has written it down on a memorandum, or has indicated it in some other way, that alone will not bind him; but so soon as he has not only determined to follow one of his remedies, but has communicated it to the other side in such a way as to lead the opposite party to believe that he has made that choice, he has completed his election and can go no further; and whether he intended it or not, if he has done an unequivocal act—I mean an act which would be justifiable if he had elected one way, and would not be justifiable if he had elected the other way—the fact of his having done that unequivocal act to the knowledge of the persons concerned is an election. In *Jones v. Carter* (17) (the principle is general, though the particular application is peculiar), the question was whether a man who had a right to avoid a forfeiture had avoided it or not. He had at first brought a writ of ejectment for the purpose of avoiding it, by which in

modern times you do not actually enter; but it had proceeded so far that the defendant had entered into a consent rule; and the defendant having entered into a consent rule by which he had admitted the entry, the Court held that it must be taken as if the plaintiff had entered, and that, inasmuch as the entry to avoid a forfeiture was unequivocal in its nature, he could not afterwards say, "The lease was not void."

Now, that is the question which I think the Court below ought to have decided, and which I think your Lordships now, having power to find all the facts, have to decide upon the evidence. Was there, before the 30th of September, which was the date when the plaintiff first came upon Scarf, an unequivocal election to take Beech as his debtor? I do not think that at first there was. I do not think that the mere fact of his having continued to enter in his books these goods along with others which he had undoubtedly contracted to supply after the 25th of February, when he had full notice (entering them in one account), would preclude him; because I think, as I said before, that it was merely an expression of his own private intention and opinion, which did not bind the matter until it was communicated to the other side, which it never was. I do not think that his having demanded money from Rogers after he knew that Rogers was carrying on the new firm of Rogers and Beech will do, for the reasons given by Lord Justice Brett, that the notice of dissolution distinctly said:—"Whatever Rogers and Scarf owe, go to Rogers, and Rogers will pay it." But then the evidence goes farther. I am not sure that taking a cheque from Rogers and Beech as payment was enough to make an election, because I think that in acting on the authority given by Scarf to Rogers to pay the debts for him and Scarf, Rogers might pay money by the new firm's cheque or otherwise as he pleased. But then the plaintiff goes on and issues a writ against Rogers and Beech—he sues Beech. I am unable to conceive a more unequivocal act, he has thereby adopted Beech as his debtor at that time. I do not think its going to judgment or not going to judgment is material. How he could possibly do a

(16) 41 Law J. Rep. Exch. 17; Law Rep. 7 Exch. 26.

(17) 15 Mee & W. 718.

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more unequivocal act than issuing a writ against Rogers and Beech I cannot imagine. The result of his issuing the writ was that Rogers and Beech, not being able to get time to obtain terms, went into liquidation, and then the plaintiff sent in his affidavit claiming to prove against Rogers and Beech for this sum which is now in dispute, and also for the subsequent debts, treating them all as one. I think that also is an unequivocal act. And taking the whole together I can bring myself in no way to doubt that, upon the facts, we ought to find that Mr. Jardine, having the right of election between holding Beech liable and holding Scarf liable, had, before he ever came upon Scarf, finally determined his election and taken Beech as liable, and that he could not hold both Scarf and Beech liable.

I am, consequently, of opinion that the judgment should be for the defendant, though not upon the ground on which it was originally put—namely, that there was a novation—but upon the ground that Scarf never was liable, for this reason, that before any step was taken to make him liable, a final and conclusive election had been made to hold Beech liable, which involved impliedly that Scarf was not.

LORD WATSON.—This case has been disposed of by the Court of Appeal upon the assumption that the position of the appellant is, in law, precisely the same as if he had been, in fact, a partner of the firm by which the debt sued for was contracted. Had the appellant actually been a member of the firm of W. H. Rogers & Co. on the 30th of January, 1878, when the goods—the price of which is now in question—were ordered, he would thereby have become the debtor of the respondent, and it would in that case have been necessary for him to satisfy your Lordships that the facts, admitted or proved, are sufficient to sustain the inference that the respondent has agreed to discharge his claim against the appellant, and to accept the new firm of W. H. Rogers & Co. as his debtors. In such circumstances, the original debtor must continue to be liable, unless there has been payment or novation of the debt.

The appellant had, in point of fact, ceased to be a partner of the firm of W.

H. Rogers & Co. before the goods were ordered or supplied to the new firm. Notwithstanding that fact, he was estopped from asserting as against the respondent, who had been one of his customers, that the contract was not made with the old firm, because notice had not been given to the respondent of its dissolution by his ceasing to be a partner. In other words, although the goods were ordered and received by the new firm, it was the right of the respondent, if he chose to assert it, to insist that the old firm, and not the new, must be held to have contracted with him, and to be liable for the price of goods supplied under the contract, before he received the notice of the 21st of February, 1878. He had the undoubted right to select his debtor, to hold either the old firm or the new firm responsible to him for the fulfilment of the contract; but I know of no authority for the proposition that the respondent could hold his contract to have been made with both firms, or that, having chosen to proceed against one of these firms for the recovery of his debt, he could thereafter treat the other firm as his debtor.

I am accordingly of opinion that the facts of the present case raise no question of novation, and that the only question to be determined is whether the respondent did or did not elect to take the new firm of W. H. Rogers & Co. as his debtors for the price of the goods furnished by him, prior to the 25th of February, 1878, under the order given by that firm upon the 30th of January.

In this aspect of the case it becomes unnecessary to dispose of the question discussed and decided in the Courts below—namely, whether the transactions of the respondent with the new firm subsequent to the notice of February sufficiently establish the appellant's plea of *novatio debiti*. I am of opinion, with your Lordships, that the legal proceedings to which the respondent resorted in August and September, 1878, fully warrant the inference that he did elect to take the new firm as his debtors, and consequently that he has no right to recover the debt for which he sues from the appellant.

LORD BRAMWELL.—I am entirely of the

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same opinion. In this case the plaintiff had the right to maintain an action against Rogers and Scarf or against Rogers and Beech; and, indeed, subject to what would have been a plea in abatement merely, he had the right to maintain an action against each one of the three; but he would have been compelled to join one of the two with the other; he would have been compelled to join Rogers with Scarf if he had sued Scarf alone, or Rogers with Beech if he had sued Beech or Rogers alone. I imagine that under the Judicature Act and the Rules he could be compelled to sue the two jointly and not severally; otherwise the effect of the Judicature Act would be to turn every joint contract into a joint and several contract, which I imagine was not intended. It results, therefore, that the right of the plaintiff was to sue either Rogers and Scarf jointly, or Rogers and Beech jointly. I am very clearly of opinion that he had no right to sue all three jointly. It is impossible to say that there was any joint contract by the three, either in fact or by estoppel.

Now, that being the condition of things, when the truth was known to the plaintiff, I do not think that he was bound to elect at any particular time; but I am satisfied that when he did elect he was bound, and that after seeking to enforce his remedy, or indeed enforcing his rights, against one pair—that is to say, Rogers and Beech—he had not the right to maintain another action against Scarf separately. He could not maintain a second action against Scarf unless he joined Rogers with him, and the result would be that there would be two actions against Rogers for the same debt. It seems to me demonstrable, therefore, that if the plaintiff elected to go on at all he could not maintain an action against the third man either separately or jointly with one of the two whom he had originally sued.

That being so, the plaintiff was not bound to elect, but if he did elect he was concluded by his election; and, without occupying your Lordships' time further, I have only to add that it is, to my mind, absolutely plain that in this case his conduct was an election to sue and maintain his action against Rogers and Beech, and

consequently that he has lost his right to maintain any action against Scarf.

Order appealed from reversed: judgment of Denman, J., for the defendant (the appellant) restored, with costs in the Court of Appeal and in this House.

Solicitors—W. & J. Flower & Nussey, agents for Killick, Hutton & Vint, Bradford, for appellant; Buchanan & Rogers, for respondent.

1881. }
May 13. }

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Release—Inspectorship Deed—Void or Voidable Deed—Estoppel.

A deed of inspectorship and composition made between a debtor and his creditors in Great Britain contained a covenant that in a certain event the debtor would, if required by the inspector, assign all his property to the inspector for the benefit of the creditors; that upon such assignment the inspector should give a certificate that the debtor had so assigned, and that thereupon the debtor should be released from his debts. The deed contained a proviso that it should "cease, determine and be void" if all the creditors in Great Britain to a certain amount did not execute it within six months from its date. The debtor was duly required by the inspector to execute an assignment, and did so, and received a certificate:—Held, that the deed was not void, but voidable only; that the release constituted a good defence against a creditor who had executed the deed, and who, having had notice that all the creditors had not signed the deed, had endeavoured to obtain payment of a dividend out of the property assigned to the inspector.

Semble,—The proviso was inserted in the deed for the benefit of the debtor, and a creditor who had executed could not take advantage of it.

This was an action brought to recover a sum of 295*l.* 4*s.* 3*d.*, principal and interest, due on two bills of exchange drawn

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by the plaintiff and accepted by the defendant, one dated the 14th of December, 1874, the other the 3rd of March, 1875.

The statement of defence was as follows:—

2. After the said bills of exchange had become overdue, that is to say, on the 1st of February, 1877, a deed of inspectorship and licence was made between the defendant of the first part; David Cowie, therein described as "the inspector," of the second part; and the several persons, companies and partnership firms, being respectively creditors of the defendant, whose names and seals were set out and affixed in the schedule to the said deed, or to any duplicate thereof, of the third part; which said deed was duly executed by the defendant the said David Cowie, and by the plaintiff, as one of the said creditors of the defendant.

3. The said deed contained *inter alia* a recital that the defendant had in the course of his business become indebted or liable to the said creditors respectively (among whom was the plaintiff) in divers sums, which could not then be paid; and it had therefore been agreed between the parties to the deed that the creditors should accept a composition of 5s. in the pound in full satisfaction of the amount of their respective debts, and that time should be allowed to the defendant for the payment thereof by means of the carrying on of his business and management of his estate and affairs under the inspection of the said inspector David Cowie, to the extent in the said deed provided.

4. The said deed contained various stipulations, covenants and provisos for the purpose of effectuating the purpose and intent aforesaid, and, among other things, a covenant on the part of the defendant to make certain payments into the hands of the said inspector, and a further covenant on the part of the defendant, such covenant to operate separately with the said inspector and the said creditors respectively, that if at any time during the continuance of such inspectorship default should be made in the performance of any of the covenants or conditions therein contained on the part of the defendant, then and in such case the defendant would, upon notice in

writing from the said inspector, requiring an assignment to be made as in the said-mentioned, convey, assign and deliver up to the said inspector, and effectually vest in him all the defendant's said estate and effects upon trust, and to the intent that the same might be realised and the proceeds applied (after certain payments) in or towards the payment of so much of the composition upon the debts due to the said creditors as should then remain unpaid.

5. By the same deed the said creditors—and among them the plaintiff—covenanted with the defendant that if the said inspector should by writing under his hand certify that the defendant had made such conveyance and assignment of his said estate as thereinbefore mentioned (which certificate the said inspector should be bound to give immediately on such conveyance and assignment being made), then the defendant should be thenceforth absolutely released and discharged from the said debts due from him to the said creditors respectively, and the said deed should accordingly thenceforth operate as a defeasance pleadable in bar to, or might be otherwise set up as a defence and answer to, any action or actions, suit or suits, or other proceedings at law or in equity which the said creditors respectively should have at any time theretofore brought, instituted or taken, or otherwise might at any time thereafter bring, institute or take against the defendant for or on account of such respective debts.

6. After the making of the said deed of the 1st of February, 1877, the defendant made default in the performance of certain of the covenants or conditions therein, by failing to make certain payments in the said deed mentioned into the hands of the said inspector; and thereupon the said inspector, by notice in writing, required the defendant to convey and assign to him as such inspector all his said estate and effects upon the trust and to the intents already mentioned, and in accordance with such notice and requisition. He, the defendant, did, on the 31st of October, 1878, sign, seal and duly execute a proper conveyance of all his estate and effects in the said deed of inspectorship of the 1st of February, 1877, mentioned, according to the true in-

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tent and meaning thereof, to the said inspector, and delivered up and effectually vested in the said inspector all the defendant's said estate and effects.

7. On the 26th of November, 1878, the said inspector, by writing under his hand, duly certified that the defendant had made such conveyance and assignment of his said estate and effects, and thereby and by reason of the premises the defendant became and was thenceforth absolutely discharged from the said debts theretofore due from him to the plaintiff—that is to say, from the debts due on the said alleged acceptances.

By the 4th paragraph of the reply the plaintiff averred that the deed of the 1st of February, 1877, contained a proviso "that if all the creditors of the debtor in Great Britain whose debts respectively amounted to 10*l.* or upwards should not execute the deed within six months from the date thereof, then and in such case the deed, and every covenant, clause and agreement therein contained, should cease, determine and be void"; and alleged that all the creditors in Great Britain to that amount did not execute the deed within six months from its date.

By the 2nd paragraph of the rejoinder the defendant averred that on the 9th of August, 1877—that is, after the expiration of six months from the date of the deed of the 1st of February, 1877—the plaintiff knew that two creditors had not executed the deed; that the plaintiff knew that the inspector had required the defendant to execute an assignment, and that the defendant had executed the assignment of the 31st of October, 1878; that the plaintiff with such knowledge elected to affirm the deed of the 1st of February, 1877, and to take advantage of the assignment of the 31st of October, 1878, and receive any dividend that might be realised thereunder, and had, in fact, applied for payment of such dividend; and that the plaintiff was estopped from saying that the deed of the 1st of February, 1877, was void.

The action was tried before Manisty, J., without a jury; and at the hearing the several averments set forth in the above pleadings were proved or admitted on either side.

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Grantham, Q.C., and *Smallman Smith*, for the plaintiff.—The deed of the 1st of February, 1877, not having been executed by all the creditors, was absolutely void. The release, therefore, which would otherwise have been effectual by the assignment and the certificate of the inspector, had no operation.

Petheram, Q.C., and *J. G. Will*, for the defendant.—The proviso only operated to make the deed voidable. Here the defendant, pursuant to his covenant, has divested himself of all his property, and the plaintiff, with notice of the facts, acquiesced in what had been done, and attempted to obtain the benefit of a dividend from the property surrendered to the inspector. He cannot now seek to avoid the deed and recover on his original debt. They cited *Spottiswoode v. Stockdale* (1), *Whitmore v. Turquand* (2), *Holmes v. Love* (3), *Hughes v. Palmer* (4) and *In re Baber's Trusts* (5).

MANISTY, J., read the material parts of the deed of the 1st of February, 1877; and stated the facts as to the execution of the deed of the 31st of October, 1878, as required by the inspector, and proceeded: I am clearly of opinion that the plaintiff has no right to take advantage of the fact that one or more creditors did not execute the deed. In my judgment the proviso for avoiding the deed is to be construed as inserted for the benefit of the debtor, and the creditors could not take advantage of it. Authorities can be found in support of that construction. But the case does not rest there. The plaintiff executed the deed, and he knew after the expiration of six months from its date that it had not been executed by all the creditors. He acquiesced in the assignment by the debtor and in all that had been done on behalf of the creditors under the deed, and he cannot now ask the Court to say that all that has been done ought to be undone; that the

(1) *Cooper's Ch. Cas.* p. 102.

(2) 8 *De Gex, F. & J.* 107; 30 *Law J. Rep. Chanc.* 345.

(3) 3 *B. & Cr.* 242.

(4) 19 *Com. B. Rep. N.S.* 393; 34 *Law J. Rep. C.P.* 279.

(5) 40 *Law J. Rep. Chanc.* 144; *Law Rep.* 10 *Eq.* 554.

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assignment of the 31st of October, 1878, was a nullity; that the debtor is to have his property restored to him, and be liable to be sued by his creditors. I give judgment for the defendant.

Judgment for the defendant.

Solicitors—James Neal, for plaintiff; John Knight, for defendant.

1882. { THE SHEFFIELD WATERWORKS
March 23, COMPANY (appellants) v.
24; CARTER (respondent).
April 4. { BROOKS (appellant) v. THE
SHEFFIELD WATERWORKS
COMPANY (respondents).
THE SHEFFIELD WATERWORKS
COMPANY (appellants) v.
BROOKS (respondent).

Water—Waterworks Clauses Acts, 1847 (10 & 11 Vict. c. 17), s. 4—Supply of Water to Houses—Water by Measurement—Liability of Consumer to supply Meter—Waterworks Clauses Act, 1863 (26 & 27 Vict. c. 93), ss. 14 and 16—Refusal to supply Water—Non-payment of Rate in Advances.

[For the report of the above case, see 51 Law J. Rep. M.C. 97.]

1882. { THE QUEEN v. DYOTT AND
May 19, 22. { OTHERS, JUSTICES OF STAFF-
FORDSHIRE, AND LEVETT.

Poor Rate—Notice of Rate—Extra-parochial Place—Duty of Overseers—17 Geo. 2. c. 3. s. 1—7 Will. 4. and 1 Vict. c. 45. s. 2—Place where no Church or Chapel—Publication of Rate.

[For the report of the above case, see 51 Law J. Rep. M.C. 104.]

[IN THE HOUSE OF LORDS.]

1881. }
March 21, 22; } COLTNESS IRON COMPANY
April 7. } v. BLACK.

Income-Tax—Mines—Deduction from Assessment on Account of Pits Exhausted—5 & 6 Vict. c. 35. ss. 60 (Schedule A, No. 3), 100 (Schedule D) and 159—29 Vict. c. 36, s. 8.

In assessing for income-tax the gross profits derived from mines no deduction will be allowed for a sum estimated to represent the amount of capital expended on making bores and sinking pits which have become exhausted by the year's working.

Andrew Knowles & Sons v. McAdam (47 Law J. Rep. Exch. 139; Law Rep. 3 Ex. D. 23) disapproved.

Quære,—Whether deduction might in some cases be allowed for cost of sinking pits:

Per EARL CAIRNS—"I am not prepared to say that, under the words of 5 & 6 Vict. c. 35, a mine-owner might not in some cases be entitled to an allowance in respect to the cost of sinking a pit, by means of which pit the minerals are gotten which are the source of profit for the year in which the pit was sunk";

Per LORD BLACKBURN—"I do not wish to lay down any general proposition, either that money expended in sinking pits can never be in the nature of expenses incurred within the five years in working the coal so as to be properly taken into account in estimating the profits made in that period, or to say what, if any, the circumstances are under which it may be done."

This was an appeal from a judgment of the First Division of the Court of Session, as the Court of Exchequer in Scotland, in a case remitted by the House.

The case came before the House in the first instance in 1879, on appeal from a decision of the Court of Session upon a case stated under 37 & 38 Vict. c. 16. s. 9, by the Commissioners of Income-tax for the Middle Ward of Lanarkshire.

The appellants claimed to have their assessment for income-tax under schedule D reduced by the sum of 9,027*l.*, being the costs incurred in sinking new pits in the

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mineral fields worked by them. The Court of Session disallowed the claim, holding, upon the authority of *Addie v. The Solicitor of Inland Revenue* (1), that the expenditure was an expenditure of capital not to be taken into account in computing the profits for assessment to income-tax. The company appealed to the House of Lords, which, after hearing counsel, remitted the case to be amended by the finding of certain facts, the Court of Session to adjudicate on such amended case and report their adjudication to the House.

The additional facts required to be found were as follows:—

1. Statement of the amount expended by the company in sinking pits, and charged to capital account from the 30th of June, 1858, to the 30th of June, 1878.

2. Statement of pits exhausted from the 30th of June, 1858, to the 30th of June, 1878, shewing the total cost in sinking the pits, the depth of them, and the length of time they were in operation.

3. Statement of the amount expended on pit-sinking and charged to capital account, from January, 1872, till the 30th of June, 1878, giving the depth of each pit.

4. List of pits exhausted from January, 1872, to the 30th of January, 1878, giving the depth of each pit, when the sinking of the pit commenced, when each pit was exhausted, and the cost of sinking each pit.

5. List of pits at present working, giving the depth of each pit, when the sinking of each pit commenced, and when the output commenced, and the expense of sinking each pit.

Also a statement as to the schedules and rules of the Schedules of the Income-Tax Acts on which the assessment of the duty was made on the appellants; also a statement explaining how the sum of 9,027*l.* claimed as a deduction from the assessment by the appellant is arrived at.

The facts as set out in the amended case were, in substance, as follows:—

1. The amount expended annually from the 30th of June, 1858, to the 30th of June, 1878, in sinking pits (including ventilation pits and pumping pits and borings to try for mineral), and charged to

capital account, varied from 2,000*l.* to 22,000*l.* The total amount was 165,825*l.* 3*s.* 6*d.*

2. The cost of sinking the pits exhausted during the same period was 102,678*l.* 6*s.* 10*d.*, the annual amount averaging about 5,000*l.*, and varying from 639*l.* 4*s.* 4*d.* to 11,234*l.* 15*s.* 1*d.* Depth from 9 to 114 fathoms. Length of time in operation from one year to twenty-one.

3. The amount expended on pit sinking (including air-pits and borings) from January, 1872, to the 30th of June, 1878, was 71,964*l.* 10*s.* 2*d.*, annual average about 11,000*l.*

4. During the same period nineteen pits were exhausted, which cost on an average 2,300*l.* each, in all 44,013*l.* 13*s.* 1*d.* The average time each pit lasted was nine years and a half.

5. Forty-three pits were working in June, 1878. They cost on an average 2,250*l.* each, in all 97,537*l.* 7*s.* 1*d.* The earliest was sunk in 1849, the latest in 1876.

The sum of 9,027*l.* does not represent the cost of pit-sinking during the year, but is arrived at by calculating 2*s.* a ton on iron made and 1½*d.* a ton on coal sold during the year, it being estimated that this will properly represent the amount of capital expended on making bores and sinking pits which have become exhausted by the year's working. The cost of working bores and pit-sinking is charged in the books of the company to an account called "sunk capital account," and is written off annually by a sum computed at the respective rates above specified on the quantities of iron made and coal sold in the year as representing the capital expended on pit-sinking exhausted by the year's working.

The following are the schedules and rules of the Income-Tax Acts relating to the case: 29 Vict. c. 36, s. 8, which enacts that the concerns described in No. 3 of schedule A of 5 & 6 Vict. c. 35, "shall be charged and assessed to the duties hereby granted in the manner in the said No. 3 mentioned according to the rules prescribed by schedule D of the said Act, so far as such rules are consistent with the said No. 3."

(1) 2 Court of Sess. Cas. (4th Series) 431.

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5 & 6 Vict. c. 35, s. 60, schedule A, No. 3: "The annual value of all the properties hereinafter described shall be understood to be the full amount for one year, or the average amount for one year, of the profits received therefrom within the respective times herein limited:—

"First,—Of quarries of stone, slate, limestone or chalk, on the amount of profits in the preceding year.

"Second,—Of mines of coal, tin, lead, copper, mundic, iron and other mines, on an average of the five preceding years, subject to the provisions concerning mines contained in this Act:

"Third,—Of iron-works, gas-works, salt-springs or works, alum mines or works, water-works, streams of water, canals, inland navigations, docks, drains and levels, fishings, rights of markets and fairs, tolls, railways and other ways, bridges, ferries and other concerns of the like nature, from or arising out of any lands, tenements, hereditaments or heritages, on the profits of the year preceding."

By section 100 it is enacted—schedule D—that the duties thereby granted "shall extend to every description of property or profits which shall not be contained in either of the said schedules A, B or C, and to every description of employment of profit not contained in schedule E, and not specially exempted from the said respective duties. . . ."

Rules are then prescribed for ascertaining the duties in certain particular cases mentioned; and in the first place, with reference to the assessment of any trade, manufacture, adventure or concern in the nature of trade not contained in any other schedule of the Act, it is provided,—

"(Rule First)—The duty to be charged in respect thereof shall be computed on a sum not less than the full amount of the balance of the profits or gains of such trade, manufacture, adventure or concern, upon a fair and just average of three years, ending on such day of the year immediately preceding the year of assessment on which the accounts of the said trade, manufacture, adventure or concern shall have been usually made up, or on the 5th day of April preceding the year of assessment, and shall be assessed, charged and

paid without other deductions than is hereinafter allowed. . . ."

"(Third)—In estimating the balance of profits and gains chargeable under schedule D, or for the purpose of assessing the duty thereon, no sum shall be set against or deducted from, or allowed to be set against or deducted from, such profits or gains, on account of any sum expended for repairs of premises occupied for the purpose of such trade, manufacture, adventure or concern, nor for any sum expended for the supply or repairs or alteration of any implements, utensils or articles employed for the purpose of such trade, manufacture, adventure or concern, beyond the sum usually expended for such purposes according to an average of three years preceding the year in which such assessment shall be made; nor on account of loss not connected with or arising out of such trade, manufacture, adventure or concern; nor on account of any capital withdrawn therefrom; nor for any sum employed, or intended to be employed, as capital in such trade, manufacture, adventure or concern; nor for any capital employed in improvement of premises occupied for the purposes of such trade, manufacture, adventure or concern; nor on account or under pretence of any interest which might have been made on such sums if laid out at interest; nor for any debts, except bad debts proved to be such to the satisfaction of the Commissioners respectively; nor for any average loss beyond the actual amount of loss after adjustment; nor for any sum recoverable under an insurance or contract of indemnity."

Section 159 is in these terms—"And be it enacted, that in the computation of duty to be made under this Act, in any of the cases before mentioned, either by the party making or delivering any list or statement required as aforesaid, or by the respective assessors or commissioners, it shall not be lawful to make any other deductions therefrom than such as are expressly enumerated in this Act, nor to make any deduction on account of any annual interest, annuity or other annual payment to be paid to any person out of any profits or gains chargeable by this Act, in regard that a proportionate part of the duty so to be charged is allowed to be

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deducted on making such payments, nor to make any deduction from the profits or gains arising from any property herein described, or from any office or employment of profit, on account of diminution of capital employed, or of loss sustained in any trade, manufacture, adventure or concern, or in any profession, employment or vocation."

Upon hearing the amended case the Court of Session pronounced an interlocutor again disallowing the appellants' claim for deduction. The judgments of that Court are reported 6 Court of Sessions Cases (4th series) 617; 8 *ibid.* 351.

The company appealed.

The Solicitor-General (Sir F. Herschell) and *Benjamin*, for the appellants.—The money spent in sinking the pits is not represented by any value in the property when the minerals have been wrought out. Until, therefore, it is replaced out of earnings there is no profit—*Davison v. Gillies* (2). In *Knowles v. McAdam* (3) the Court allowed a deduction for diminution in the value of the property by the removal of the minerals. *Addie v. The Solicitor of Inland Revenue* (1) is at variance with *Knowles v. McAdam* (3), but was not subject to appeal in 1875.

The Lord Advocate (The Right Hon. J. McLaren) and *The Solicitor-General for Scotland (Mr. J. B. Balfour)*, (with them *Crawford*), for the respondent.—The income-tax is levied on the profits of a particular year. The assessment is upon the balance of the profits and gains of the business during the year. The deduction claimed was in respect of expenses incurred many years before the assessment complained of.

By 41 Vict. c. 15. s. 12, deduction was allowed for depreciation of machinery, but nothing was said as to pit-sinking. This indicates the intention of the Legislature not to allow deductions for sinking pits.

The appellants' contention would lead to this, that the income derived from the sale of minerals should not be treated as

(2) 50 Law J. Rep. Chanc. 192*n*; Law Rep. 16 Ch. D. 347*n*.

(3) 47 Law J. Rep. Exch. 139; Law Rep. 3 Ex. D. 23.

income at all, because it exhausts the capital. *Knowles v. McAdam* (3) is in favour of the appellants' claim, but cannot be regarded as rightly decided—*Forder v. Handyside* (4).

The Solicitor-General, in reply.

Our. adv. vult.

EARL CAIENS.—This is an appeal from the First Division of the Court of Session, in which the appellants, an iron company at Coltneß, contend that in the rating for the property and income-tax they ought not to be assessed on a sum of 9,027*l.*, a portion of the gross proceeds of their mines for the year ending the 5th of April, 1878. The description of this sum of 9,027*l.*, upon which the appellants contend that they should not be rated, as given in the case originally, was this: "The Coltneß Iron Company, carrying on business at Coltneß," "appealed against the assessment made on them under schedule D of the Act 5 & 6 Vict. c. 35," "and subsequent Income-Tax Acts referring thereto, in respect of the profits arising from their business for the year preceding (1878) in so far as the said assessment includes a sum of 9,027*l.*, being the costs incurred by them in sinking new pits; and for which they maintain they were not assessable. The Coltneß Iron Company stated, and it is the fact, that for a number of years they have carried on business as coal and iron masters, and have opened up several mineral fields, sinking new pits at their own expense from time to time as the old ones have become exhausted; and they submitted that in ascertaining the profits on which they are liable to be assessed under the said Act, there ought to be deducted from the gross annual receipts derived from their business the sums expended by them in sinking the said pits."

This and the other statements in the Special Case, when the appeal first came before your Lordships, were not deemed by your Lordships to be sufficiently explicit, and you remitted the case for amendment. This amendment has now been made, and I will read the statement as to this sum of 9,027*l.* in the amended case. "The sum

(4) 45 Law J. Rep. Exch. 809; Law Rep. 1 Ex. D. 233.

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of 9,027*l.* claimed as a deduction from the assessment by the appellants does not represent the cost of pit-sinking during the year, but is a sum arrived at by calculating 2*s.* a ton on iron made, and 1½*d.* a ton on coal sold during the year; it being estimated that this will properly represent the amount of capital expended on making bores and sinking pits which have been exhausted by the year's working. The cost of making bores and sinking pits is charged in the books of the company to an account called 'Sunk Capital Account,' and is written off annually by a sum computed at the respective rates above specified on the quantities of iron made and coal sold in the year, as representing the capital expended on pit-sinking exhausted by the year's working. The working charges deducted and allowed in ascertaining the profits for assessment include the whole cost of getting and raising the minerals after the pits are sunk, and of manufacturing the metal and selling the iron and coal, and the general expenses of the concern."

It therefore now appears that the statement in the case as it originally stood is not sustained, and that the sum in question does not represent the cost of pit-sinking during the year of which the profits are taken. I am not prepared to say that under the words of 5 & 6 Vict. c. 35, a mine-owner might not in some cases be entitled to an allowance in respect of the cost of sinking a pit, by means of which pit minerals are gotten which are the source of profit for the year in which the pit was sunk. I desire to reserve my opinion on that point until the question arises. But in the present case the question is altogether different. It is, as now explained, Can a mine-owner write off and deduct from the gross earnings of his mine in a particular year, a sum to represent that year's depreciation of all the pits in the mines whenever sunk? I am clearly of opinion that this cannot be done. It may be proper for a trader, or for a trading company, to perform in his or their books an operation of this kind every year, in order to judge of the sum that can in that year be safely taken out of the trade and spent as trade profits. But I am clearly of opinion that the owner of a mine cannot

qua owner thus manipulate his accounts when the question is, under section 60 of the principal Act, What is the "amount of profits received" from the mine in each of the five years upon which the average is to be taken?

I do not think this question is affected by 29 Vict. c. 36. That Act provides that mines shall be charged and assessed according to the rules prescribed by schedule D of the principal Act, so far as such rules are consistent with No. 3 of schedule A. But the thing to be assessed remains the same.

Your Lordships were referred by the appellants to a decision—namely, *Knowles v. McAdam* (3)—in the Exchequer Division of the High Court of Justice in England as an authority in their favour. Your Lordships are now sitting in appeal from the Court of Session; but even supposing that case were a Scotch authority, I am bound to say that it is a decision which does not seem to me to be capable of being supported, and which I could not advise your Lordships to follow.

I therefore move your Lordships that this appeal be dismissed with costs; but this should not include any costs of, or rendered necessary by, the remit, the occasion for which arose out of a want of accuracy in stating the case, chargeable to both parties alike.

LORD PENZANCE.—The argument of the appellants was based on the interpretation which they gave to the word "profit" in the Act. And it was contended that they could not be properly said to have made any profit out of their mines until a certain portion of the cost of making the bores and sinking the pits, necessary to approach the mineral-bearing strata, were deducted.

In a general, and perhaps a strict and logical, sense, I think this is true. But it is also, and equally true, I think, that the cost of the mineral strata themselves, whether they have been hired or bought, should be included in any calculation which had for its object the ascertainment of the actual profit obtained by the company out of the entire adventure:—so much for the prime cost of the mineral bed, so much for approaches to it in the shape of pits, so much for working it and getting the mineral

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to the surface, so much for getting the mineral to the market, and against all these the price obtained for the mineral sold—these would be the elements of a profit and loss account of an entire adventure of this nature. But is this the sense in which the word “profit” is used in the Act? I think not.

The intention of the Act, it is abundantly clear, was in schedule A to tax “property.” If a man had bought an estate, the tax was intended to be paid by him on the annual value of that estate, without reference to where he got it, or how he got it, or how much he paid for it. So if a man built a house, or bought a house, he was intended to pay tax on the annual value of the house, no matter what it cost. Nor does anything turn upon the fact that the estate is a permanent and undecaying species of property, while the house is a species of property of a less durable kind; he was intended to pay tax upon it as long as it lasted.

What, then, is the case of a mine? In the schedule A, which is the schedule applicable to “property,” a “mine” is in express terms included as a species of “property” and is made the subject of a tax. The only question is how shall the annual value of this species of property be ascertained? It is to this object that the rule No. 3 found in section 60 of the Act is addressed. That rule assumes the ownership of the “mine,” passes by altogether the sum of money which it may have cost, either in the way of purchase or rent, and proceeds to describe the method of calculating its “annual value” to the owners thereof, and this it declares shall be the average “profit” over a period of five years “received therefrom.” The words “profits received therefrom” are here introduced to define the annual value of the thing which is to be taxed, which is the “mine”; and it could not, I think, be intended that for the purpose of calculating the “annual value” of a “mine,” the original cost of the “mine” itself, or any part of it, should be first deducted. On the contrary, the words “profits received therefrom,” in this connection mean, I think, the entire profit derived from the “mine,” deducting the cost of working it, but not deducting the cost of making it.

I do not think the subject is elucidated,

but rather confused, by the illustration brought forward in argument of the merchant or trader who spends a sum of money or invests capital in the purchase of goods, and sells them again at an advance in price. No doubt, in such a case, the “profit” can only be ascertained by first deducting the original cost of the goods. If a man spends 100% in the purchase of goods and sells them for 140%, his profit is not 140%, but, at most, 40% only.

But when such a matter as that is brought under the provisions of this Act for taxation, the wide difference between it and the present case is at once apparent; for the merchant or trader is taxed in such a case not in respect of any “property” which he possesses, and of which he enjoys the fruits, but only upon the profits which he realises annually in his trade; whereas the owner of a “mine” is taxed in respect of that “mine” as a fixed and realised “property” which belongs to him, and from which he reaps an annual benefit; and the words “annual value,” or “profit” received from that “property,” are introduced into the statute, not as the subject of taxation, but only as the measure of the taxation to which the “property” shall be subjected.

A pit sunk to approach the mineral under ground is not unlike a road made above ground, from the pit’s mouth to the highway, as a means of transporting the mineral to the market. If a man were possessed of such a mine and such a road, it would be true that as the mineral was gradually worked out, the road, and the capital sunk in making it, equally with the pit, and the capital involved in making it, would gradually be exhausted and lost; but the decaying character of the property would not make it the less subject to be taxed, according to its annual value or the profit obtained by using it, as long as the mineral lasted.

This, I think, is the principle that runs through the entire Act, and your Lordships could not, I think, sustain the present appeal without introducing principles which would entirely subvert the method of taxation which the Legislature intended, and according to which this statute has hitherto been administered.

I agree that the judgment of the Court

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below should be affirmed, and this appeal dismissed with costs, subject to the exception mentioned by my noble and learned friend.

LORD BLACKBURN.—This case was stated in order to be able to ask your Lordships to review the decision of the Court of Session in the case of *Addie v. The Solicitor of Inland Revenue* (1), and reliance was placed on the decision of the Exchequer Division in *Knowles v. McAdam* (3). Both of those decisions were pronounced at a time when there was no appeal against either; and as they were, I think, justly considered inconsistent with each other, it is important that both should be brought under review.

The Coltneß Iron Company appealed against the assessment for the year 1878, in so far as the assessment includes a sum of 9,027*l.*, being the cost incurred by them in sinking new pits. It was thought that the statement of facts contained in the case was not sufficiently full to enable this House finally to dispose of the points of law on which its decision was asked, and it was directed that it should be amended, which was done. And the result shews that this was requisite; for the amended case, besides entering into various details as to the mode of pit-sinking and working the mines in the appellants' mineral field, contains a statement as to what the 9,027*l.* consisted of, which, I think, could not have been collected from the statements in the original case.

I think it is not necessary to enquire what other points might possibly have been raised on the other facts, still less to decide them, if that statement shews that the sum of 9,027*l.* is not properly to be deducted from the assessment. I will read that statement: "The sum of 9,027*l.* claimed as a deduction from the assessment by the appellants does not represent the cost of pit-sinking during the year, but is a sum arrived at by calculating 2*s.* a ton on iron made, and 1½*d.* a ton on coal sold during the year; it being estimated that this will properly represent the amount of capital expended on making bores and sinking pits which have been exhausted by the year's working. The cost of making

bores and sinking pits is charged in the books of the company to an account called 'sunk capital account,' and is written off annually by a sum computed at the respective rates above specified, on the quantities of iron made and coal sold in the year, as representing the capital expended on pit-sinking, exhausted by the year's working. The working charges deducted and allowed in ascertaining the profits for assessment include the whole cost of getting and raising the minerals, after the pits are sunk, and of manufacturing the metal, and selling the iron and coal, and the general expenses of the concern."

The phrase "capital exhausted" does not occur anywhere in the Income-Tax Act. It is taken from a passage in Mr. McCulloch on *Political Economy*, where he says:—"Profits must not be confounded with the produce of industry primarily received by the capitalist. They really consist of the produce on its value remaining to those who employ their capital in an industrial undertaking after all their necessary payments have been deducted, and after the capital wasted and used in the undertaking has been replaced. If the produce derived from an undertaking after defraying the necessary outlay be insufficient to replace the capital exhausted, a loss has been incurred; if the capital is merely sufficient to replace the capital exhausted, there is no surplus, there is no loss, but there is no annual profit, and the greater the surplus is, the greater the profit."

I do not feel at all inclined to dispute the sufficiency of this definition. I think that if a building society had taken a building lease, and it became necessary at any time to ascertain what profit or loss had been made by it from that lease, all the money expended in building houses would be placed on one side of the account, and on the other all that had been received for houses let or sold, and the value during the residue of the building lease of the houses then remaining in the society's hands, and that value would of course be less and less as the lease drew nearer to an end; and if in the first year of the building lease a house was built at a cost of, say, 10,000*l.*, and the profit or loss on

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the lease had to be estimated when the residue of the building lease was reduced to, say, five years, and the lease of the house for those five years would sell for only, say, 5,000*l.*, I do not think it inaccurate to say that in computing the profit or loss on the building lease, 5,000*l.* would be allowed as capital invested in building that house and now exhausted. But that is certainly not the scheme of the income-tax as far as regards building leases and other properties comprised in schedule A, No. 1. The tax is imposed on the annual value of the block of buildings, which is to be taken at the rack-rent at which the same are worth to let for the year. By no process of reasoning could that rack-rent be made to depend on the sum which had been expended in building the houses, or to be greater or less according as the building lease was longer or shorter. Mines are not comprised in schedule A, No. 1, but in schedule A, No. 3, and the tax is imposed on them by a different set of words certainly. And if the decision in *Knowles v. McAdam* (3) is correct, it is imposed on a radically different principle. I have felt myself constrained to advise your Lordships to say that the case of *Knowles v. McAdam* (3) was wrongly decided.

I think the question thus raised can hardly be decided without examining at some, I fear tedious, length the enactments on the construction of which it depends. No tax can be imposed on the subject without words in an Act of Parliament clearly shewing an intention to lay a burden on him. But when that intention is sufficiently shewn it is, I think, vain to speculate on what would be the fairest and most equitable mode of levying that tax. The object of those framing a Taxing Act is to grant to Her Majesty a revenue; no doubt they would prefer, if it were possible, to raise that revenue equally from all, and, as that cannot be done, to raise it from those on whom the tax falls with as little trouble and annoyance and as equally as can be contrived; and when any enactments for the purpose can bear two interpretations, it is reasonable to put that construction on them which will produce these effects. But the object is to grant a revenue at all events, even though

a possible nearer approximation to equality may be sacrificed in order more easily and certainly to raise that revenue, and I think the only safe rule is to look at the words of the enactments and see what is the intention expressed by those words.

Before, however, proceeding to examine the words of the Income-Tax Acts, on which, in my opinion, everything depends, I wish to point out that, long before any income or property tax was imposed for general revenue, the parochial authorities in England raised a revenue for parochial purposes, which was very much in the nature of an income and property tax. And the language used in the Income-Tax Acts is such as to convince me that the Legislature had in their contemplation what had been done in this branch of the law, which, if not exactly *in pari materia*, is at least an analogous subject. I think it more convenient to state briefly what was the state of the law as to rating real property in general, and (though, by a very narrow construction, the specific mention of coal mines was held to exclude all other mines) of coal mines, quarries, &c., in particular.

By the statute of 43 Eliz. c. 2, the churchwardens and overseers of the parish were empowered to raise, by "taxation of every inhabitant, parson, vicar, and others, and of every occupier of lands, houses, tithes, impropriate or propriations of tithes, coal mines, or saleable underwoods in the said parish," a sufficient sum. The power to rate the inhabitants as such was put an end to by a temporary Act, 3 & 4 Vict. c. 89, continued from year to year, and finally made perpetual by 37 & 38 Vict. c. 96. The power to tax the occupiers of the species of property named in the Act of Elizabeth continued.

In 1827, a case (*King v. Atwood*) (5) was stated for the Court of King's Bench as to the principle of rating coal mines. Chief Justice Abbott delivered a judgment which is so germane to the subject we are now considering that I will read the whole of it, as it is not long:

"We are all of opinion that the owner and occupier of a coal mine should be rated at such a sum as it would let for, and no more. As to the other points, the

(5) 6 B. & C. 277.

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first was that the rate should not be imposed upon the coal produced, because that was part of the realty. It is the first time that such a proposition has ever been submitted, although many coal mines in various parts of the country have constantly been rated, and the argument in support of it is wholly untenable. The Legislature has expressly made coal mines rateable, and they must be rated for what they produce, namely, the coals. Slate quarries and brick earth are also exhausted in a few years, but nevertheless the rate is always imposed on that which is produced. The other argument was, that the rate could not be imposed until the expense of planting the mine had been recouped. But I cannot discover any distinction between expenses incurred in bringing a mine to a productive state and in building a house. The attempt to distinguish them is perfectly novel, and if a house is to be rated as soon as it is built and occupied, it must follow that a coal mine is rateable as soon as it is set to work and produces coal, although it may happen that the expense of sinking it may never be recovered. If the tenant of a mine expends money in making it more productive, that is the same as expending money in improving a farm or a house, in which cases the tenant is rateable for the improved value."

I do not say that what Lord Tenterden here lays down as to the taxation of a coal mine is necessarily either just or expedient; but though this case was decided before the earlier Income-Tax Acts, it was an authoritative declaration of what had been held to be law before, and must have been well known to that large proportion of the legislators who habitually acted at quarter sessions.

The Legislature in 1836, by 6 & 7 Will. 4, c. 96, enacted that all poor-rates shall be made "upon an estimate of the net annual value of the several hereditaments rated thereunto—that is to say, of the rent at which the same might reasonably be expected to let from year to year, free of all usual tenant's rates and taxes, and tithe commutation rent-tax, if any, and deducting therefrom the probable average annual cost of the repairs, assurance and other expenses, if any, necessary to main-

tain them in a state to command such rent. And in the form of the rate prescribed there is to be in one column a statement of the 'gross estimated rental,' and in another of the rateable value."

The Act 5 & 6 Vict. c. 35, adopts without any variations which affect this question the language of the former Income-Tax Act, 46 Geo. 3. c. 65. Before that there had been an earlier Income-Tax Act, 43 Geo. 3, c. 122, from which there are changes, and I think some of those changes throw light on what was the intention of the Legislature in the substituted enactments. The first Income-Tax Act, 43 Geo. 3. c. 122, s. 31, comprised in schedule A all lands, tenements, hereditaments or heritages, and enacted that for them there shall be charged throughout Great Britain, in respect of the property thereof, for every 20s. of the annual value thereof the sum of 1s.; and enacted that "the said duty shall be construed to extend to all manors and messuages; to all quarries of stone, slate, limestone, or chalk; mines of coal, tin, lead, copper, mundic, iron and other mines; to all iron mills, furnaces and other iron works, and other mills and engines of the like nature; to all salt-springs or salt-works," and many more things.

The Legislature here classed together in one schedule, properties, such as agricultural land, which from their nature will continue permanently to exist; and properties, such as quarries, which will certainly come to an end within a period longer or shorter, but the duration of which can be generally calculated; and properties, such as ironworks, which are real property, deriving their annual value from being ancillary to trade. It imposed one tax at one rate upon them all, and gave one general rule that the annual value should be understood to be the rack-rent; and it directed that the tax should be paid by the occupier, who might deduct a proportionate part from his rent. And by No. 3 there is allowed a deduction for repairs not exceeding five per cent. on the annual value of a dwelling-house, or two per cent. on the annual value of a farm. But there is not, expressly at least, any allowance made for repairs in respect of other kinds of real property. And by schedule

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B there is imposed, in addition, a tax on the occupier of all such properties (with some exceptions not material to be noticed), and the first of the rules for estimating the annual value of properties before described in schedules A and B in England is that no such property shall be charged at less than the last poor-rate, which shews that those who framed that Act were thinking of the analogous case of the parochial taxation for the relief of the poor.

The statute 43 Geo. 3. c. 122, also, by section 84, imposes a duty, by schedule D, upon the annual profits, *inter alia*, of every trade, and by the rules therein the duty shall be computed upon a sum not less than the full amount of the profits upon a fair and just average of three years without any other deduction than is hereafter allowed; and the third rule is, no deductions shall be made on account of any sums expended on repairs of premises occupied for the purposes of such trade, nor for any sum expended for the supply or repairs or alteration of any utensils or articles employed for the purpose of such trade, beyond the sum usually expended for such purpose according to the average of three years. I conjecture that during the three years that elapsed between the passing of 43 Geo. 3. c. 122, and the passing of 46 Geo. 3. c. 65, experience had shewn that there were difficulties in working this scheme, and that claims for deductions had been made; for whilst most of the provisions of the first Act were re-enacted, those to which I have above referred were all materially altered. It is not necessary to go through 46 Geo. 3. c. 65, for the provisions of that Act are re-enacted in 5 & 6 Vict. c. 35, without any alteration which seems to me material to notice.

The third rule as to schedule D, which I have above quoted, still continued to be negative in its form, that no deductions should be made under several enumerated pretences; but the number of these was considerably increased, and—why, I do not know—instead of saying that the duty should be imposed on a fair and just average of the amount of the profits for three years, it is imposed “on the balance” of such profits. I have not been

able to discover any difference in the meaning of the two phrases.

The several rates and duties granted by 5 & 6 Vict. c. 35, are imposed by section 1, schedule A, for all lands, tenements, hereditaments or heritages in Great Britain, which shall be charged yearly, “for every 20*s.* of the annual value thereof, the sum of 7*d.*” Then, by section 60, the properties chargeable under schedule A, instead of being, as in statute 43 Geo. 3. c. 122, treated together in one schedule, are treated of under numbers. By No. 1 (which gives the general rule, which is the same as that which in 43 Geo. 3. c. 122, was applied to all in schedule A), the annual value shall be “understood to be the rent by the year at which the same are let at rack-rent, if they had been let at rack-rent within seven years before the assessment; but if the same are not so let at rack-rent, then at the rack-rent at which the same are worth to be let by the year.” And by section 63, in addition to the duties to be charged under schedule A, there shall be levied the duty under schedule B on all properties to be charged according to the general rule in No. 1, with some exceptions not material to this case.

The rules which expressly gave a power to allow for repairs a sum not exceeding a certain percentage on the annual value of houses and farms are not re-enacted. Nor are the rules above quoted, which refer to the poor-rate in England as being the test of annual value. It is not material in this case to enquire whether the rack-rent mentioned is to be measured by what, in statute 6 & 7 Will. 4. c. 96, is called the gross estimated rental, without making any allowance for those annual repairs which the tenant would certainly take into consideration when bidding that rent. It could not have been intended that the rack-rent should be less than the rateable value.

No. 2 and No. 3 comprise properties which are comprised in the general description in schedule A, but which it was not thought expedient to include in schedule B, though in the first Income-Tax Act they had been so included. One would anticipate that the duty imposed on those would be on the rack-rent which

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they would have been worth to let by the year, and something more in lieu of the duty imposed by schedule B. And as the duty imposed by the poor-law and the duty imposed by the first Income-Tax Act was precisely the same on properties like quarries, which are terminable, and properties which are permanent, one would expect that no distinction would now be made. Whether that is so or not must depend on the true construction of the words used, which, with reference to No. 3, are these: "The annual value of all the properties hereinafter described shall be understood to be the full amount for one year, or the average amount for one year, of the profits received therefrom within the respective times herein limited," that is, of quarries, &c., and what may be called miscellaneous properties, one year; of mines, &c., five years. No definition is given of profits for one year. That is left to be ascertained as a matter on the construction of the Act. The rules which are contained in sections 60, 61, 62 and 64 relate to many things—as to the place where the duties shall be assessed, and the persons by whom they are to be assessed, and also as to many allowances to be made; but I can find nothing in them to throw any light on the construction of the words, "the full amount for one year, or the average amount for one year, of the profits received therefrom within the respective times herein limited," that is, in some cases one year, and in some five.

It may be convenient here to notice two arguments, not, I think, relied on by the Solicitor-General in his argument at your Lordships' bar, though he had used them before the Exchequer Division in *Knowles v. McAdam* (3). It was said by Lord Cairns in *Gowan v. Christie* (6) that a lease of mines "is not in reality a lease at all in the sense in which we speak of an agricultural lease. There is no fruit—that is to say, there is no sowing and reaping in the ordinary sense of the term, and there are no periodical harvests. What we call a mineral lease is really, when properly considered, a sale out and out of a portion of the land." I think this is a perfectly accurate statement. But the

(6) Law Rep. 2 H.L. Sc. 273, 284.

argument that no income-tax should be imposed on what is, perhaps not quite accurately, called rent reserved on a mineral lease, because it is a payment by instalments of the price of minerals forming part of the land, any more than on the price paid down in one sum for the out and out purchase of the minerals forming part of the land, is, I think, untenable. Even if it had not been, as decided in *The King v. Attwood* (5), the constant course from the statute of Elizabeth downwards to construe an annual tax imposed on coal mines, quarries and the like, as being imposed on that which is produced from them, I should say that no other construction could be placed on the 60th section of 4 & 5 Vict. c. 35, especially after seeing in what manner the Legislature, in 43 Geo. 3. c. 122, had dealt with them, though I think that the judgment of the Exchequer Division in *Knowles v. McAdam* (3) seems an authority to the contrary. From that judgment, however, to which I shall afterwards return, I must ask your Lordships to dissent.

It has also been sometimes argued that it is very unjust to tax at the same rate a terminable interest, such as that in a mine, which must at some time be worked out, and a fee simple interest, which will endure so long as this world continues in its present state. I will not inquire whether this is just or not. There is much force in the argument on the other side, that if the interest is terminable, so is the tax, and will cease when the interest ceases. But whether just or not, there can be no doubt that the same annual charge is imposed upon a terminable annuity and on one in perpetuity; and, what seems harder, that the same annual charge is imposed upon a professional income, earned by hard labour, often extending over many years before any return is got, and, when earned, precarious as depending on the health of the earner.

In 5 & 6 Vict. c. 35, the different schedules were kept apart and complete in themselves, but I think wherever there was any provision in any one of the schedules that throws light on what is meant by annual value, or annual profits, or capital, it may be very material in construing the meaning of those words used in

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other parts of the Act. Thus I think that the provision under the fifth head of No. 2, that an allowance may be made from the amount to be taxed on fines, "if it be proved that such fines, or any part thereof, have been applied as productive capital, on which a profit has arisen or will arise, otherwise chargeable under this Act for the year in which the assessment shall be made," and the provision in schedule D, that "no deduction shall be made on account of any sum employed or intended to be employed as capital," neither of which was in 43 Geo. 3, c. 122, throw some light on each other, and may fairly be referred to in enquiring what is meant by "the average amount for one year of the profits received within the time limited." But schedules A and B were complete in themselves, and schedule D, which was regulated by section 100, was complete in itself. The duties were, however, assessed by different Commissioners, and in different places. By 29 Vict. c. 36, s. 8, "The several and respective concerns described in No. 3 of Schedule A of" "5 & 6 Vict. c. 35, shall be charged and assessed to the duties hereby granted in the manner in the said No. 3 mentioned, according to the rules prescribed by schedule D of the said Act, so far as such rules are consistent with the said No. 3. Provided that the annual value, or profit and gains arising from any railway, shall be charged and assessed by the Commissioners for special purposes."

In *Knowles v. McAdam* (3) Chief Baron Kelly says, "It is quite clear that section 8 of 29 Vict. c. 36, transfers the present case" (that of a coal mine), "from schedule A to schedule D," and the judgments of the Barons in that case seem to me to depend a good deal on this, as it seems to me, erroneous assumption. I think that the duties are to be assessed according to the rules in schedule D, and consequently all the anxiously-devised provisions for keeping the returns under schedule D secret and confidential, to be found from section 100 to section 131, are made in future to apply to returns for the concerns described in No. 3 of schedule A, and any rule expressed as to the mode of computing the balance of the profits and gains during the period of three years

given in schedule D, which is not inconsistent with No. 3, may perhaps be made in future to apply to the mode of computing the annual profits of properties chargeable under No. 3. And I see that in *Addie v. The Solicitor of Inland Revenue* (1), reliance is placed in the judgment of the Lord President on the 3rd rule as to concerns under the first case of schedule D, that no deduction is to be made "for any sum employed, or intended to be employed, as capital." But I do not think reliance can be placed on this. If, from the nature of the concerns in No. 3, an allowance ought to be made for capital, then this rule should be rejected as inconsistent with No. 3. If no such allowance should be made, the rule is not required.

In *Forder v. Handyside* (4) the Exchequer Division came to a decision as to repairs, estimated but not actually incurred, which, whether it was right or wrong, is no longer, since 41 Vict. c. 15, s. 12, to apply. And as there is no question in the case at bar as to repairs, it is unnecessary to inquire whether it was right or wrong.

If the effect of section 8 of 29 Vict. c. 36, was to transfer cases in schedule A, No. 3, to schedule D, it would change the respective times on an average for which the profits were to be assessed. Mines would be reduced from a five-year period to a three-year period. Quarries and things of that sort would be raised from a single year to three. I cannot think this was either intended or expressed. But, on the assumption that it had this effect, the Exchequer Division came, in *Knowles v. McAdam* (3), to a very startling decision. In that case a company had bought for a very large sum the minerals in beneficial leaseholds of coal mines, having an average of thirty-two years to run, and in freeholds. The decision of the Exchequer Division was that the effect of transferring the mines, as they thought, from schedule A to schedule D, was to cause the company to be assessed as persons carrying on the trade of vendors of coal, who had bought wholesale a large quantity of coal, not stored in warehouses but in the earth, and which they were going to sell in the course of their trade, and that

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they ought to be assessed on the principle of valuing the stock-in-trade, that is, the coals thus stored in the earth, at the beginning of the three years, and again valuing the stock at the end of the three years; and taking the difference between them as being to be added to or deducted from the net receipts during that period in estimating the profits for the three years. The effect of this would be that though the mines were worked so as to produce a large profit above the working expenses, yet if they were worked by a purchaser who had over-estimated the value of the minerals, and paid such a price for them that he was a loser, no income-tax was to be paid in respect of those mines. That is a result which never could have been intended by the Legislature, and if it follows by legitimate reasoning from the interpretation put upon 29 Vict. c. 36, s. 8, it seems to me a *reductio ad absurdum*, shewing that the interpretation was wrong.

I therefore advise your Lordships to hold that the decision in *Knowles v. McAdam* (3) was erroneous. I do not wish to lay down any general proposition, either that money expended in sinking pits can never be in the nature of expenses incurred within the five years in working the coal, so as to be properly taken into account in estimating the profits made in that period; or to say what, if any, the circumstances are under which it may be done. That, I think, had better be left to be determined when the case arises. I think it enough to say that this sum of 9,027*l.*, described in the case, is not such as ought to be deducted.

The result is that, in my opinion, the interlocutor below should be affirmed, and the appeal dismissed with costs, with the modification proposed by the noble and learned Earl.

*Interlocutor appealed from affirmed,
and appeal dismissed with costs,
except the costs incurred by reason
of the remit.*

Agents—Grahames, Wardlaw & Currey, for appellants; W. H. Melvill, Solicitor of Inland Revenue, for respondent.

1882. }
March 9. }

BABBAGE v. COULBOURN.

Landlord and Tenant—Agreement to deliver up a furnished house in good order, and pay for loss, &c., a sum to be settled, in case of dispute, by two Valuers—Right to sue for Damage before Amount settled—Arbitration—Condition Precedent.

A tenant of a furnished house agreed, in writing, to deliver up possession of the same, together with the furniture, at the expiration of the tenancy in good order; and in the event of any loss, damage or breakage, to make good or pay for the same an amount, in case of dispute, to be settled by two valuers:—Held, that the lessor could not bring an action for damage or loss until the amount to be paid had been settled by two valuers.

The plaintiff in this case agreed to let, and the defendant to take a furnished house, with a garden, at a certain rent, and one of the terms of the agreement, which was in writing, was that the defendant would keep, and at the expiration of the tenancy quit and deliver up quiet and peaceable possession of the residence, gardens and grounds, with the furniture and effects, in accordance with the inventory, in as good order, state and condition as the same were at the time of his taking possession (reasonable use and wear, and accidental damage by fire, storm or tempest only excepted), and in the event of any loss, damage or breakage, would make good the same, or pay an amount which, in case of dispute, was to be settled by two valuers.

After the expiration of the tenancy the plaintiff brought an action for the sum of 13*l.* 15*s.*, being the amount of dilapidations assessed by a surveyor appointed by himself.

The defendant contended that the assessment of the amount by two valuers, according to the provisions of the agreement, was a condition precedent to the plaintiff's right to sue for the amount.

The issue was sent for trial in the Westminster County Court, and a verdict passed for the defendant on the claim, the learned Judge holding that the contention of the defendant was right. The plaintiff ob-

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tained a rule *nisi* for a new trial on the ground of misdirection.

Swinfen Eady shewed cause.—This case is governed by the principle of *Scott v. Avery* (1), and there are not two separate and independent covenants. The proper construction of this agreement is that the tenant shall pay such an amount for damages and breakage as shall be found by two valuers to be due.

In *Dawson v. Fitzgerald* (2) there were two separate and independent covenants. If the contention on the other side be correct, the mere breakage of a glass would render the tenant liable for damages for not delivering up the identical glass, although he replaced it before the end of the tenancy.

The agreement is, not to refer the question of amount to two valuers, but to pay such sum as they shall find to be due.

Clay, in support.—*Dawson v. Fitzgerald* (2) is in point. There are two distinct agreements, and an action is maintainable for not delivering up, as agreed. The agreement amounted to an absolute covenant not to do damage, to pay what is reasonable, and in the event of dispute to refer the question of amount to two valuers.

FIELD, J.—I think this rule must be discharged, and that the ruling of the learned County Court Judge was correct. We have to discover the intentions of the parties to this agreement by construing the words of it, as in the construction of a will we have to look at the terms of the will itself.

In the case of a furnished house, both lessor and lessee doubtless contemplate some damage by breakage and so on, that would not be included in the clause as to reasonable wear and tear. There might be, as the plaintiff contends there is, an absolute covenant not to do a particular act, as in *Dawson v. Fitzgerald* (2); but I do not think that in this case there was any independent covenant, but rather that the agreement was not to do it wilfully,

but if it were done, to pay for the damage resulting therefrom.

I think *Dawson v. Fitzgerald* (2) is distinguishable, and the reasoning of Mr. Baron Bramwell in that case in the Court below really supports my view. In that case, however, there was a distinct and separate covenant to pay a reasonable compensation, and a further covenant to arbitrate. Here there is only a covenant to pay a sum assessed by two valuers.

HUDDLESTON, B.—We have to construe this agreement for the purpose of seeing whether or not there are two separate and independent covenants—one to do a certain act, and another to refer the matter to two valuers if it be not done. If there be the action will lie before the reference. Here the defendant agreed, by one and the same covenant, to deliver up the premises on a certain condition, and to pay any sum awarded by the valuers. This distinguishes the case from *Dawson v. Fitzgerald* (2), and I therefore think the rule should be discharged.

Rule discharged with costs.

Solicitors—Freeman & Bothamley, for plaintiff;
C. F. Emmott, for defendant.

1882. { THE QUEEN (on the prosecution
May 22, of the Penarth Local Board)
25, 26. { v. THE LOCAL GOVERNMENT
BOARD AND GEORGE TAYLOR.

Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 150 and 268—*Paving Streets—Apportionment of Expenses—Disputing Apportionment—Notice of Demand—Appeal by Party aggrieved—Time for Appeal—Memorial to Local Government Board—Grounds of Appeal—Prohibition.*

[For the report of the above case, see 51 Law J. Rep. M.C. 121.]

(1) 25 Law J. Rep. Exch. 308; Law Rep. 5 H.L. Cas. 811.

(2) 45 Law J. Rep. Exch. 894; Law Rep. 1 Ex. D. 257.

1882. }
June 12, 13. } GREEN v. HUTT.

Action—Notice of Action—False Imprisonment—Larceny Act, 1861 (24 & 25 Vict. c. 96), s. 113—Incorrect Particulars in Notice—Date of Arrest.

A notice of action given under 24 & 25 Vict. c. 96. s. 113, was correct in all particulars, except that it specified the arrest as having taken place on the 13th of April instead of the 12th of April:—Held (by MATHEW, J., and NORTH, J.; dubitante GROVE, J.), that such notice was not invalidated by a mere mistake in the date not calculated to injure or prejudice the defendant.

This was a rule calling upon the defendant to shew cause why a nonsuit should not be set aside, under the circumstances hereinafter mentioned.

The defendant, who was a police constable, was employed by Broad, a trustee in liquidation of certain co-operative stores, to prevent thefts from being committed at the stores. One of the orders given to the defendant was to stop any person who attempted to leave the premises without producing a voucher or receipt for the goods he was taking away. The plaintiff, on the 12th of April, 1881, attended the sale, and made purchases, which were duly paid for, but threw away the vouchers. On leaving the premises, he was stopped by the defendant, who insisted on detaining him for a considerable time.

The plaintiff afterwards served the defendant with the following notice of action:—

"I, R. C. Green, &c., according to the form of the statute in such case made and provided, give you notice that I, the said R. C. Green, will, at or soon after the expiration of one calendar month from the time of your being served with this notice, cause a writ of summons to be served out of Her Majesty's High Court of Justice, against you, at the suit of me, the said R. C. Green, and proceed thereupon, according to law: for that you, the said W. Hutt, did, on the 13th of April, 1881, at the warehouse of the City of London Co-operative Association (Limited), Nos. 25 &c. Newgate Street, in the said city of

London, unlawfully and maliciously, and without reasonable and probable cause, assault, detain and imprison me, and keep me so imprisoned at the said warehouse for the space of one hour and upwards, to the damage of me, the said R. C. Green, &c."

At the trial, before Pollock, B., the plaintiff was nonsuited, on the ground, *inter alia*, that the above notice was bad, by reason of the variance between the date of the arrest specified in the notice and the date proved at the trial (1).

A rule *nisi* was afterwards obtained to set aside the nonsuit, against which

Waddy, Q.C., shewed cause.—The nonsuit was right. The defendant was entitled as a police officer, acting in pursuance of the Larceny Act, 1861, to notice, under section 113 of that Act; and such notice must be precise, both as regards time and place. He cited *Martin v. Upcher* (2) and *Forbes v. Lloyd* (judgment of Palles, C.B.) (3).

Henry Matthews, Q.C., (*C. H. Anderson* with him), for the plaintiff, in support of the rule.—The notice is sufficiently precise to comply with the requirements of the statute under which it was given. A mere variance of a day between the date of the arrest assigned in the notice and the date proved at the trial does not invalidate the notice.

They cited *Jones v. Bird* (4) and *Smith v. West Derby Local Board* (5).

GROVE, J.—I am of opinion that this rule must be made absolute. The action was for a wrongful arrest on the part of the defendant. The plaintiff was non-

(1) By 24 & 25 Vict. c. 96. s. 113, "All actions and prosecutions to be commenced against any person for anything done in pursuance of this Act shall be laid and tried in the county where the fact was committed, and shall be commenced within six months after the fact committed, and not otherwise; and notice in writing of such action, and of the cause thereof, shall be given to the defendant one month at least before the commencement of the action."

(2) 3 Q.B. Rep. 662; 11 Law J. Rep. Q.B. 291.

(3) 10 Ir. Rep. C.L. 552.

(4) 5 B. & Ald. 837.

(5) 47 Law J. Rep. C.P. 607; Law Rep. 3 C.P. D. 423.

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sued at the trial. The ground on which he was so nonsuited was that the notice of action required to be given by 24 & 25 Vict. c. 96. s. 113, was bad, inasmuch as the date of the arrest was wrongly stated in such notice to have taken place on the 13th of April, whereas the arrest, as a fact, took place on the 12th of April. For my own part, I should have thought the notice sufficient, had it not been for certain *dicta* which seem to shew that both time and place must be accurately stated in the notice, and ought not to vary in the particulars from the evidence given at the trial. It is, however, unnecessary for me to express any definite opinion on this point, because I think the learned Judge was wrong in removing from the jury the question of Hutt's reasonable suspicion and belief that a felony had been committed by the plaintiff.

MATHEW, J. — I think the notice given was sufficient. There was admittedly a slip in the date; but the place, the nature of the charge and the parties are all accurately described; indeed, the notice is properly in accordance with the facts, except that the 13th of April is substituted for the 12th of April. The observations of certain learned Judges, tending to shew that absolute accuracy in the notice is a necessity, are mere *obiter dicta*, and are not binding upon us. I am of opinion that mere verbal inaccuracy as to time and place is not fatal to the validity of a notice under the Larceny Act; and that the judgment of the learned Judge at the trial on this point was wrong.

NORTH, J. — I agree. The notice should, no doubt, specify the time and place of the wrongful act complained of. This notice does specify the offence, and everything in it is accurate except the date, which should have been the 12th of April instead of the 13th of April. This was not a material variance indicating that what was alleged in the notice was different from that which really took place, and so possibly calculated to injure and prejudice the defendant. In my judgment, therefore, the notice was sufficient.

Rule absolute for a new trial.

Solicitors—J. & M. Pontifex, for plaintiff; H. Montague, for defendant.

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1882. } DAVIES (*appellant*) v. EVANS
March 28. } (*respondent*).

Bastardy Act (35 & 36 Vict. c. 65), s. 4—*Order for Payment of Weekly Sum—Distress—Order of Committal—Discretion of Justices*—"May, if it shall seem fit."

[For the report of the above case, see 51 Law J. Rep. M.C. 132.]

1882. } THE QUEEN v. VANE AND OTHERS
June 27. } (*Justices of Cumberland, &c.*).
In re THE GUARDIANS OF PEN-
RITH UNION v. THE OVERSEERS
OF CASTLE SOWERBY.

Elementary Education Acts, 33 & 34 Vict. c. 75. ss. 50 and 74; 39 & 40 Vict. c. 79. s. 32—*Contributory Districts—School Attendance Committee of a Union—Parish not under any other Local Authority.*

[For the report of the above case, see 51 Law J. Rep. M.C. 114.]

1882. } ABBOTT AND ANOTHER v.
April 25. } ANDREWS.

Practice—Costs—Nonsuit—Costs of Issues on which Plaintiff is Nonsuited—Ambiguity as to Costs in Judgment—Procedure.

If a plaintiff succeeds on some issues but is nonsuited on others, and no order is made as to costs in the judgment, the defendant is entitled to the costs of the issues on which the plaintiff has been nonsuited.

Application ought to be made to the Judge who tried the case, in the event of there being any ambiguity as to costs in the judgment.

This was an appeal by motion from a decision at Chambers of North, J. The plaintiffs in the action claimed damages under two distinct heads—namely, for trespass to their dwelling-house and garden, and for obstruction of light and air to their

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premises; and particulars of the same were duly delivered.

At the trial before Lord Coleridge, C.J., and a jury at Winchester Summer Assizes, 1881, the plaintiffs were nonsuited as to their claim for damages for trespass, and obtained a verdict in their favour for 40*l.* on the other issues. No order was asked for or made as to costs. The formal judgment, as drawn up, stated that it was adjudged that the plaintiffs be nonsuited as to such part of the claim as was referred to in the particulars, and that it was further adjudged that the plaintiffs recover against the defendant on the residue of their claim 40*l.*, and their costs to be taxed.

The Master refused to tax the defendant's costs of the issues upon which the plaintiffs were nonsuited, on the ground that the judgment only directed the plaintiffs' costs to be taxed, and it was uncertain whether the Judge intended to make any order as to costs or not. On appeal, North, J., affirmed the Master's order.

Winch, for the defendant, relied on *Myers v. Defries* (1), in support of the defendant's right to have the costs of the issues on which the plaintiffs were nonsuited.

R. H. Simonds, for the plaintiffs, contended that Order L.V. rule 1 (2) did not apply, as these issues had not been tried by a jury, and did not follow the event of the decision of a jury. There should have been an application at the trial as to costs, and not an appeal from the Master.

LORD COLERIDGE, C.J.—I think that the defendant is entitled to have the costs of the issues on which the plaintiffs were

(1) 49 Law J. Rep. Exch. 266; Law Rep. 5 Ex. D. 180.

(2) Order L.V. rule 1: "Subject to the provisions of the Act, the costs of and incident to all proceedings in the High Court shall be in the discretion of the Court; but nothing herein contained shall deprive a trustee, mortgagee or other person of any right to costs out of a particular estate or fund to which he would be entitled according to the rules hitherto acted upon in Courts of equity: Provided that where any action or issue is tried by a jury, the costs shall follow the event, unless, upon application made at the trial for good cause shewn, the Judge before whom such action or issue is tried, or the Court shall otherwise order."

non-suited. Though these issues were not tried by a jury the action was, and Order L.V. rule 1 (2) clearly applies. But the defendant ought to have applied to the Judge who tried the action, instead of bringing this appeal, which will therefore be refused, with costs.

GROVE, J., concurred.

Motion refused.

Solicitors—Geare & Sons, agents for Bowker & Son, Winchester, for plaintiffs; Pickett & Mytton, agents for Bailey & White, Winchester, for defendant.

1882. }
June 19. } PAYNE v. LORD LECONFIELD.

Principal and Agent — Auctioneer — Warranty.

An auctioneer entrusted with goods for sale by public auction has no implied authority from the vendor to warrant them.

Rule for a new trial, on the ground that the Judge misdirected the jury, in directing them to find a verdict for the defendant.

The action was for damages for a breach of warranty on the sale of a horse. At the trial at Guildhall, before Bowen, J., and a special jury, on the 17th of May, evidence was given that the mare Polyxo was sent by the defendant to the horse depository of Messrs. Tompkins & Sons, at Reading, for sale by public auction. At the time the mare was sent a form supplied by Tompkins was filled up on the defendant's behalf, and returned. The form as returned was as follows:—

"Polyxo.

"Form to be filled up and returned four days prior to sale for catalogues. For advertisements, ten days prior.

Colour	Brown.
Mare	Yes.
Gelding	
Age	Aged.
Height	
If quiet in harness	
If quiet to ride	

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If clever hunter

If veterinary surgeon's examination allowed

Reserve price (if any)

Date of sale

Remarks— Has carried a hunt servant.

Name and address of owner—

Leconfield, Petworth.

"In all cases where a request is not sent to the contrary, the name and address of the owner will be given in the catalogue."

Evidence was given that on the day of the sale the mare, when brought out, was observed by a bystander to have a discharge from her nostrils, whereupon Tompkins, the auctioneer, said, in the plaintiff's hearing, "You need not be afraid. The mare comes from Lord Leconfield; she has only got a cold upon her, and I shall sell her as only having a cold." The mare was knocked down to the plaintiff for eight and a half guineas. The mare was subsequently pronounced to be suffering from chronic glanders, and, with other horses belonging to the plaintiff, and alleged to have been infected by her, was eventually shot under an order of the local authority. The learned Judge left certain questions to the jury; but they were unable to agree on their verdict. Whereupon he directed a verdict to be entered for the defendant, on the ground that there was no evidence of authority by the defendant to warrant the horse.

Russell, Q.C., and *J. D. Fitzgerald*, shewed cause for the defendant. — There was no express authority to the auctioneer to warrant the horse, and the paper sent excludes authority for the warranty alleged to have been given. There is no implied authority given to an auctioneer by his employer to warrant, and there was no evidence of custom.

Gates, Q.C., and *Willoughby*, for the plaintiff, contended that, under the circumstances in question, the auctioneer had authority to warrant. They cited the following passage from *Story on Agency* (section 85): "A literal adherence to the common course of business may sometimes, under peculiar circumstances, defeat the very objects of the agency: and

new and unexpected emergencies and necessities of such a critical nature may arise, as, if one may use the expression, will expand the authority beyond its ordinary limits, and justify even a deviation from its ordinary limitations and import." The mare could not have been sold but for the explanation given by the auctioneer. They also cited *Wilde v. Gibson* (1), *Udell v. Atherton* (2), *Barwick v. The English Joint Stock Bank* (3), *Williams v. Millington* (4) and *Woolf v. Horne* (5). They further cited the following passage from *Story on Agency* (section 107): "The verbal declarations of an auctioneer at the sale, at least where they do not contradict the written particulars of the sale, are admissible against the principal, and binding on him, as an incident to his authority to sell." Story adds, in a note, "whether an auctioneer has, *virtute officii*, a right to warrant the goods, does not seem to be perfectly clear upon the authorities."

GROVE, J.—The only question upon which there is any doubt in my mind in this case is whether the Judge ought to have directed a verdict. I should have had no hesitation in discharging the rule if the question had been left to the jury. The question is whether an auctioneer, in the absence of express authority from his principal, or even in spite of his authority, can warrant an article sold at a sale. In regard to that naked proposition, I say he cannot. I do not say that there may not be cases or circumstances in which he would have authority, but no case goes the length contended for. The only authority is a passage from Story, in regard to representations, and he says that the question has never been decided as to a warranty. There may be hardships in deciding either way. A person who goes to a sale has no means of testing the authority of the auctioneer to make statements, so that there is some hardship in his case. It is not very great,

(1) 1 H.L. Cas. 605 (*per* Lord Campbell).

(2) 7 Hurl. & N. 172 (*per* Martin, B.); 30 Law J. Rep. Exch. 337.

(3) 36 Law J. Rep. Exch. 147; Law Rep. 2 Exch. 259 (*per* Willes, J.)

(4) 1 H. Black. 81 (*per* Lord Loughborough)

(5) 46 Law J. Rep. Q.B. 534.

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because the auctioneer may be sued. There is a still greater hardship on the vendor. If a picture were sent without any authority to warrant the painter, and the auctioneer warrant it, the owner might be involved in enormous liability. The rule, if it existed, would be a very formidable rule, and there would be examples of it. It has been held at Nisi Prius that a servant going to a fair to sell a horse has authority to warrant it; but in *Brady v. Todd* (6) a servant of the owner of a horse entrusted to sell it on that occasion only was held not to bind his master. It is different in the case of dealers' servants. An auctioneer receives miscellaneous articles of all descriptions to sell for others. He is *simpliciter* an agent to sell. His duty would be to enquire of his principal if it were desirable that a warranty should be given. The auctioneer is naturally anxious to sell and to enhance the price. In this case there was no complete delegation of authority, but there was enough to shew an intelligent auctioneer that he had no authority to warrant. The form was filled up as to colour, age and sex, and the horse is described as a kennel hack. The answers to all the other questions are left blank, meaning that as to them the owner says nothing. He filled up what he gave authority to warrant, he omitted what he did not give authority to warrant. It was not argued that the auctioneer could warrant so as to bind the defendant, in spite of a refusal on the part of the defendant to warrant; but the argument if good at all must go as far.

MATHEW, J. — I agree that this rule should be discharged. The question is whether there was evidence that Tompkins was held out to warrant that the animal was not suffering from glanders. It was agreed that the defendant gave no such authority in fact, but it was said that the fact of his sending the horse to an auctioneer gave an implied authority. There was no evidence given on behalf of the plaintiff of the character of the employment of an auctioneer, and when such evidence was tendered by the defendant the plaintiff's counsel objected. The course pursued was the ordinary course, according to com-

(6) 9 Com. B. Rep. N.S. 592; 30 Law J. Rep. C.P. 223.

mon knowledge. The defendant wanted to get rid of this horse. He sent it to Tompkins, and refrained from giving information on the heads where there is a blank. It is said that the auctioneer had authority to give a warranty. The plaintiff bought the horse at eight guineas and a half, and might have known the conditions on which it was sold. Did the defendant hold out Tompkins as having authority to dispense with the conditions? In my opinion, the authority to Tompkins was to sell as described in the catalogue.

Rule discharged.

Solicitors — Bury Hutchinson, for plaintiff;
Harvey, Oliver & Capron, agents for Albery & Lucas, Midhurst, for defendant.

1881. }
Dec. 16. } *In re CLEW.*

Licensing Acts (35 & 36 Vict. c. 94), s. 3 and s. 51, sub-s. 2—*Punishment for Selling Liquors without Licence—Alternative Penalties* — "Or" — *Summary Jurisdiction Act*, 1879, s. 21.

[For the report of the above case, see 51 Law J. Rep. M.C. 140.]

1882. }
March 7. } *HANCE v. FAIRHURST.*

Elementary Education Act, 1876, ss. 11 and 12—*Attendance—Order on Father—Enforcement on Mother*—39 & 40 Vict. c. 79.

[For the report of the above case, see 51 Law J. Rep. M.C. 139.]

1881. {
Dec. 7. { *THE QUEEN v. HANDSLEY AND OTHERS, JUSTICES OF THE BOROUGH OF BURNLEY; ex parte KING.*

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[For the report of the above case, see 51 Law J. Rep. M.C. 137.]

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— *registration: affidavit of execution and attestation: bills of sale act, 1878 (41 & 42 Vict. c. 31), ss. 8 and 10*—The affidavit of execution and attestation filed on the registration of a bill of sale is not sufficient if it merely verifies the signature of the attesting solicitor to the attestation clause; it must state clearly that the attesting solicitor did, in fact, attest the deed—that is, that he was present when the grantor executed it. *Ford v. Kettle (App.)*, 558

Sharpe v. Birch (Ante, p. 64; Law Rep. 8 Q.B. D. 111) followed. *Ibid.*

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Carrier—negligence: temporary loss of goods: carriers act (11 Geo. 4 and 1 Will. 4. c. 68), s. 1: consequential damages—The plaintiff delivered to the defendants, carriers for hire from London to Rome, a trunk to be sent by rail from London to Liverpool, and thence by ship to Italy. The trunk contained wearing apparel consisting of silk dresses and other articles within the Carriers Act exceeding 10*l.*, but no declaration of their value was made. Owing to the defendants' negligence the trunk was sent to the Victoria Docks in London, and thence shipped to New York. It was eventually recovered, and, after considerable delay, delivered to the plaintiff in Rome. Some of the contents were injured owing to the Custom House officer in New York unpacking and negligently repacking the trunk. The plaintiff having claimed for the loss of the trunk and injury to its contents, and also for

the cost of repurchase of other articles in Rome at enhanced prices, it was,—*Held* (by LOPES, J.), on further consideration—first, that the defendants were protected by the provisions of the Carriers Act from liability for the loss of the trunk and injury to its contents, notwithstanding that the loss was temporary; secondly, that the trunk was lost on the land journey within the meaning of the Act the moment it was despatched on its wrong road to the Victoria Docks; thirdly, that the plaintiff was entitled to recover as damages for non-delivery within due time the cost of the repurchase of other articles at Rome at enhanced prices. *Millen v. Brash & Co.*, 166

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Certificate. See SOLICITOR.

Charging of Stock—statutes 1 & 2 Vict. c. 110 s. 14, and 3 & 4 Vict. c. 82. s. 1: funds held upon trust for debtor and others: limitation over upon attempt to charge or aliene trust fund—A charging order can be made under 1 & 2 Vict. c. 110, upon stocks, &c., standing in the name of trustees for the debtor and other persons, the words "in trust for him" including the case of divided funds. *The South-Western Loan and Discount Co. v. Robertson*, 79

A testator bequeathed her personal property, including certain Bank of England stock, to trustees, in trust as to one moiety thereof for her niece, and as to the remaining moiety upon trust to pay the annual income thereof to her nephew, the judgment debtor, so long as he should continue entitled to receive the same, for his personal use and benefit, or until he should charge or aliene the same, or attempt to charge or aliene the same, with a gift over, upon the determination of the preceding trust, in favour of the judgment debtor's wife for life, and afterwards of his children who should attain the age of twenty-one years. There was an ultimate remainder in favour of the judgment debtor absolutely in the event of there being no children who attained a vested interest under the testator's will:—*Held*, that an order could properly be made under the provisions of 1 & 2 Vict. c. 110, and 3 & 4 Vict. c. 82, charging the judgment debtor's interest in dividends which had accrued due, and also his contingent interest, which was quite independent of the forfeiture clause. *Ibid.*

Cheque—overdue draft: rights of bona fide holder—The rule of law that the holder of an overdue bill of exchange or promissory note payable at a fixed date has it with the

same title, and no other, as the person from whom he receives it, has no application to cheques. The mere fact, therefore, that a person is the holder of a cheque eight days after its date does not of itself place him in the position of a taker at his peril so as to make him stand in the same position as the person from whom he receives it. The proper question for the jury in such a case is, whether the cheque was taken under such circumstances as ought reasonably to have created suspicion that it was in any way tainted with fraud. *The London and County Bank v. Grooms*, 224

Down v. Halling (4 B. & C. 330) explained and distinguished. *Ibid.*

Child. See ELEMENTARY EDUCATION ACT.

Clergy. See ECCLESIASTICAL COURT.

Collision. See SHIP AND SHIPPING.

Commission. See EVIDENCE.

Commitment. See DEBTORS ACT.

Committal. See JUSTICE OF PEACE.

Common Rights. See LANDLORD AND TENANT.

Company—articles of association: board to be appointed by subscribers: appointment of quorum: qualification: casual vacancy: estoppel: allotment of shares—By the articles of association the business of a company was to be managed by a board, which was to consist of the directors for the time being, or a quorum of such directors assembled at a meeting constituting a board for the transaction of business. The number of the board was not to be less than three, nor more than seven. The first directors were to be determined by the subscribers to the memorandum of association, and until the directors were appointed the subscribers were to be the directors. The first directors had power to add any persons to their number, within a certain time, provided the total number of the board did not at any time exceed seven. No person, except the first directors and such persons as were added to their number, was qualified to be a director, unless he was the registered holder of shares of a certain value for at least three months. Any casual vacancy in the board was to be filled up by the board, which was empowered to continue to act notwithstanding such vacancy. The board was also empowered to determine the quorum necessary for the transaction of business. All acts of the board, or of any person acting as

one of the board, were to be valid, notwithstanding the discovery afterwards of any defect in the appointment or qualification of any of the board. Four out of seven of the original subscribers only were present at the first meeting of the company; three of their number were elected first directors, and a resolution was passed that two of such directors should form a quorum. At the next meeting of the board, F., H. and E. were appointed directors, and at a subsequent meeting the resignations of the three original directors were accepted. F. shortly afterwards sent in his resignation by letter. At a meeting of the board on the 28th of October, 1880, at which H. and E. were the only directors present, fifty shares were allotted to the defendant; F.'s resignation was accepted, and the defendant was appointed director to fill up the casual vacancy caused thereby. The defendant joined the board, and on the 15th of November acted as a director, confirming, amongst others, the resolution passed at the previous meeting allotting fifty shares to him. In an action for calls on the shares allotted to the defendant,—*Held*,—that the first directors had been properly appointed by four out of seven subscribers to the memorandum of association; that the quorum appointed by the subscribers at the first meeting was not properly appointed, and ought to have been appointed by the board; that the defendant having been added to the board by the first directors, was duly qualified to be a director without being the registered holder of shares for the period of three months. *York Tramways Co. (Lim.) v. Willows* (App.), 257

Held (per LORD COLERIDGE, C.J.; BRETT, L.J. HOLKER, L.J., *diss.*),—that the defendant, in the absence of any proper quorum, was duly appointed by a majority of the board, namely, two out of three, to fill up the casual vacancy caused by F.'s resignation; and that the allotment of shares to the defendant on the 28th of October was a valid allotment. *Ibid.*

Held (per BRETT, L.J.),—that what took place at the meeting on the 15th of November amounted to an allotment of the shares to himself by the defendant, who was therefore estopped from saying that they had not been allotted to him. *Ibid.*

— *companies act, 1862* (25 & 26 Vict. c. 89), s. 4: *unregistered association of more than twenty members: acquisition of gain by individual members: action on promissory note by trustees: consideration: loan in pursuance of illegal object*—By 25 & 26 Vict. c. 89. s. 4, no company, association or partnership, consisting of more than twenty persons, shall be formed for the purpose of carrying on any business (other than banking) that has for its object the acquisition of gain by the company, association or partnership, or by the

individual members thereof, unless it is registered as a company under that Act. *Jennings v. Hammond*, 493

A mutual benefit society, of more than twenty persons, formed for the purpose of carrying on the business of money-lending, such business having for its object the acquisition of gain by the individual members of the association, requires to be registered under 25 & 26 Vict. c. 89, even though the business of the association is not to lend money generally, but only to members of the association. *Ibid.*

In an action brought against the defendant to recover the balance of a promissory note made by the defendant in favour of the plaintiff, an individual member of an illegal association, it was admitted that the plaintiff had no beneficial interest in the note or the money claimed, but was suing only on behalf of and as trustee for an association, illegal by virtue of section 4 of the Act of 1862:—*Held*, that the action could not be maintained, inasmuch as the loan to the defendant was made in pursuance of an illegal object, and the promissory note in question was given for an illegal consideration, and consequently could not be sued upon either by the society, or by any one suing merely as a trustee for the society, or even for his own benefit, if he took the note with a knowledge that it was given for an illegal consideration. *Ibid.*

— See CONTRACT; SET-OFF.

Compensation. See LANDS CLAUSES ACT; PUBLIC HEALTH.

Condition Precedent. See LANDLORD AND TENANT.

Construction. See LANDS CLAUSES ACT; WILL.

Contract—*implied warranty that a specified article shall be fit for use*—The plaintiff contracted with the defendants to navigate for a lump sum a tug, which was named, towing several barges on a sea voyage. The tug was, unknown to the defendants, out of repair, and the voyage consequently occupied longer than it would otherwise have done. In an action by the plaintiff to recover as damages the loss of profit thus caused,—*Held* (by BRETT, L.J., and COTTON, L.J.; *dissentiente* BRAMWELL, L.J.), that he could not recover, for that there was no implied warranty that the named tug should be fit to perform the voyage. *Robertson v. The Amazon Tug and Lighterage Co.* (App.), 68

— *monthly delivery of goods: non-payment by buyer for one delivery: repudiation of contract: set-off against claim of company in li-*

quidation of a claim against the company for unliquidated damages: mutual credit clause: bankruptcy act, 1869, s. 39: judicature acts, 1873, s. 24. sub-s. 5; 1875, s. 10; rules of court, 1875, order XIX. rule 3—There is no absolute rule to shew whether the breach of a contract by one of the contracting parties is to exonerate the other party from his liability to further perform the contract. The true test in each case is whether the acts and conduct of the one party evince an intention to abandon and be no longer bound by the contract—and this is a question of evidence. Non-payment for a parcel of goods supplied, or non-delivery of a parcel of goods contracted to be supplied, is not of itself necessarily evidence of any such intention. Nor is any distinction to be drawn between a contract not performed at all and one that has been part performed. The question is not as to the right to rescind a contract, but as to the right to treat a wrongful rescission of a contract as a complete renunciation of it. *The Mersey Steel & Iron Co. (Lim.) v. Naylor, Benson & Co.* (App.), 576

By the joint operation of section 10 of the Judicature Act, 1875, and Order XIX. rule 3, the defendant to an action brought by a company in liquidation may in the same action set off by way of counter-claim against the claim of the company a claim for unliquidated damages, to an amount not exceeding the claim of the company. *Ibid.*

Semble, Order XIX. rule 3, being only a rule of procedure, would not by itself be sufficient. The words “Rules as to debts and liabilities provable,” in section 10 of the Judicature Act, 1875, must be held to comprise the rules which regulate not only what are debts and liabilities provable, but also the manner of their proof. *Ibid.*

So as unliquidated damages are provable under section 158 of the Companies Act, 1862, section 10 imports into the liquidation of a company the mode adopted in bankruptcy of proving such damages, which is to take an account between the bankrupt and the party claiming, and to set off against the amount claimed any sum due from the claimant to the bankrupt's estate, and to allow only the balance to be proved. In other words, the mutual credit clause (section 39) of the Bankruptcy Act, 1869, is now, by section 10, imported into the winding-up of a company. *Ibid.*

— See DAMAGES; PRINCIPAL AND AGENT.

Contractor. See NEGLIGENCE.

Contumacy. See ECCLESIASTICAL COURT.

Conveyance. See VENDOR AND PURCHASER.

Conviction. See MARKET OVERT.

Copyright—*reproduction of picture in chromo: licence to reproduce imitation of picture: assignee of copyright: 25 & 26 Vict. c. 68: registration of licence*—The assignees, duly registered, of the copyright in a picture sold to the plaintiff the sole right to reproduce it in chromo for two years. This agreement of sale was not registered. While it was in force the defendant published the same subject by chromolithography, independently, not directly copying plaintiff's chromo-lithograph. The plaintiff's chromolithograph plate was not engraved with the name of the proprietor or date of publication, as required by the Act 15 & 16 Vict. c. 12. s. 14. It was objected that the plaintiff could not recover damages from the defendant for piracy of his copyright, because, first, the plaintiff's chromo was not duly engraved; and secondly, there was no registration of the assignment to the plaintiff within 25 & 26 Vict. c. 68. But, *held* by MATHEW, J., on the first point, that the copyright in the original picture had been violated by the production of the defendant's chromo-lithograph, which was not simply an imitation of the plaintiff's chromolithograph; and, on the second point, that the plaintiff was not an assignee of the copyright within the meaning of the Act, but a licensee to reproduce an imitation of the picture, as to whose licence no registration is required. *Tuck v. Canton*, 363

— *musical composition: sole liberty of performing: place not of dramatic entertainment: 5 & 6 Vict. c. 45. s. 20*—A musical composition was publicly performed without the consent of its proprietor:—*Held*, that the performance, although not at a place of dramatic entertainment, was contrary to 5 & 6 Vict. c. 45. s. 20. *Wall v. Taylor*. *Wall v. Martin*, 547

Corporation. See INCOME TAX; PUBLIC HEALTH.

Corrupt Practices (municipal elections) act, 1872 (35 & 36 Vict. c. 60), s. 14, sub-s. 5 and s. 22: *expenses of court for trial of municipal election petition: court of record: power to make retrospective rate: mandamus*—In March 1875, a petition against the return of certain town councillors was tried before a barrister, pursuant to the provisions of 35 & 36 Vict. c. 60, when he directed by order that the expenses of the petition and proceedings in Court should be borne by the respondents; but he made no order with respect to the expenses of the Court, although it was alleged that he expressed his intention in his judgment of ordering one of the respondents to pay them. The Treasury paid these expenses, and issued a certificate requiring the borough

to repay the amount. A rate was accordingly made in August, 1875; but the Treasury withdrew that certificate, and the rate was abandoned. In December, 1875, the Treasury issued another certificate, requiring the borough to repay the amount paid for the expenses of the Court; and as the amount was not paid, a *mandamus* was applied for, and after a return and trial, a Special Case was stated:—*Held* (affirming the judgment of the Queen's Bench Division, *Ante*, p. 209), that the Court of a barrister appointed to try a municipal election petition is made, by 35 & 36 Vict. c. 60. s. 14. sub-s. 5, a Court of record, and that its judgment can only be proved by the record; that the issuing the certificate by the Commissioners of the Treasury was a ministerial and not a judicial act, so that it was competent for them to cancel the first and to issue the second certificate; that section 22 of 35 & 36 Vict. c. 60 gives power to a borough to raise in such circumstances a retrospective rate; that there had been no undue delay on the part of the commissioners, and that they were entitled to a peremptory *mandamus*. *Reg. v. The Mayor and Treasury of Maidenhead* (App.), 444

Costs. See ARBITRATION; COUNTY COURTS; INDICTMENT; LANDS CLAUSES ACT; PRACTICE; RAILWAY COMMISSIONERS.

Councillor. See MUNICIPAL ELECTION.

Counsel. See PRACTICE.

Counter-claim. See CONTRACT; PRACTICE.

County Court—*cause remitted from superior court, under 30 & 31 Vict. c. 142, s. 10: jurisdiction of county court judge: power to stay proceedings*—Where an action of *tort* has been remitted to a County Court Judge, under section 10 of 30 & 31 Vict. c. 142, and the writ and order duly lodged with the Registrar, the County Court Judge has jurisdiction to order all proceedings in the action to be stayed until payment by the plaintiff of the costs of a prior action against the same defendant in the High Court, in respect of the same matter. *Reg. v. Bayley*; *in re Mason v. Aird*, 244

— *costs: charges in "conduct of a suit": business done out of court: scale of costs, 1875: statutes 38 & 39 Vict. c. 50. s. 8; 19 & 20 Vict. c. 108. s. 36*—The County Courts Act, 1856 (19 & 20 Vict. c. 108), s. 36, enacts that, where in any action the debt or damage claimed shall not exceed twenty pounds, an attorney shall not be entitled to recover from his client any further costs or charges in the conduct of such suit than those mentioned in 9 & 10 Vict. c. 95. s. 91:—

Held, that the words "conduct of such suit" did not include work done out of Court before the commencement and after the termination of a suit. *Druff & Co. v. Joel, Emmanuel & Co.*, 490

— *person not a solicitor acting for another person in an action: claim for services and disbursements*: 6 & 7 Vict. c. 73 (*The Solicitors Act*, 1843), s. 2: 9 & 10 Vict. c. 95 (*The County Courts Act*, 1846), s. 91: 37 & 38 Vict. c. 68 (*The Attorneys and Solicitors Act*, 1874), s. 12]—A person not a solicitor sued for the amount of Court fees paid by him on commencing a County Court action on behalf of the defendant, and as a preliminary to the hearing of it, and for remuneration for services rendered in it out of Court:—*Held*, that the claim was, by 37 & 38 Vict. c. 68 (*The Attorneys and Solicitors Act*, 1874), s. 12, not maintainable. *Vorlander v. Eddolls*, 55

— See PRACTICE.

County Court Rules, 1875 (order VIII. rule 7): *practice: procedure: action to recover land: delivery of summons to bailiff: time: appeal: prohibition*]—The County Court Rules, 1875 (Order VIII. rule 7), provide that "the summons in an action brought under section 11 of the County Court Act, 1867, to recover lands, shall be delivered to the bailiff forty clear days at least before the return day, and shall be served thirty-five clear days before the return day thereof." The plaintiff brought an action under section 11 of the above Act to recover land. It was admitted that the summons had not been delivered to the bailiff forty clear days before the return day, though the bailiff had served such summons upon the defendant more than thirty-five clear days before the return day. The defendant objected to the hearing on the ground that the summons had not been delivered in proper time to the bailiff; but the objection was overruled by the County Court Judge, and judgment given for the plaintiff:—*Held*, that the provision contained in Order VIII. rule 7, as to the time of delivery of the summons to the bailiff, was obligatory and not directory only, and that the defendant's proper remedy was by way of appeal from the judgment in the County Court, and not by prohibition. *Barker v. Palmer*, 110

County Palatine. See ECCLESIASTICAL COURT.

Court. See CORRUPT PRACTICES.

Covenant—assignment: covenant not running with the land: liability of assignee with notice: affirmative and restrictive covenants]—Land

was granted to J. in fee subject to a rent-charge. The grantee covenanted for himself, his heirs, executors and administrators, that he, his heirs or assigns, would pay the rent, would erect buildings on the land, and would thereafter keep them in repair. The grantor afterwards assigned the rent-charge with the benefit of all covenants to the plaintiff, and the land and buildings which had been erected came by assignment to A. who mortgaged them, subject to the covenants, to the defendants, who afterwards entered into possession. In an action on the covenant to repair,—*Held*, that the defendants were not liable, that the covenant did not run with the land, that it was a collateral affirmative covenant, and did not impose a burden on the land, so that the defendants could not, as assignees with notice, be compelled to perform it. *Haywood v. The Brunswick Permanent Benefit Building Soc.* (App.), 73
Cooke v. Chilcott (Law Rep. 3 Ch. D. 694) questioned. *Ibid.*

— See DAMAGES; LANDLORD AND TENANT.

Gross Actions. See PRACTICE.

Damages—covenant to build a wall: cost of wall: injury to plaintiffs' land]—In an action upon a covenant entered into by the purchaser on the sale of land that the land bought should be enclosed on the side adjoining the land of the vendor with a wall or railing, the measure of damages is not the cost of building the wall or railing, but the injury to the adjoining land of the vendor. *Wigzell v. The Corporation of the School for the Indigent Blind*, 330

— *measure of: breach of contract: wrongful act of bailee: negligence*]—The defendant contracted to warehouse certain goods of the plaintiff for the plaintiff at a particular place; but took them to another place, where they were destroyed by fire. The plaintiff, by reason of the goods not being warehoused where the defendant had contracted to warehouse, lost the benefit of the insurance:—*Held*, that the defendant was liable to pay the value of the goods. *Lilley v. Doubleday*, 310

— *measure of: merchant and commission agent: purchase ordered through agent: inferior goods forwarded*]—A commission agent who is instructed to buy goods of a specific description on account of a merchant, and who buys and forwards goods of an inferior description, is liable to recoup the merchant the amount of the loss which he has actually sustained, and is not liable to pay the difference between the value of the goods sent and the market

value of the goods ordered as if he were a vendor. *Cassaboglen v. Gibbs*, 593

— See ADMINISTRATION; CARRIER; LIBEL; SET-OFF; SHARES; SHIP AND SHIPPING.

Day—Fractions of. See WRIT OF SUMMONS.

Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 5: *order of commitment: means of judgment debtor: wife's separate estate*—The defendant had allowed judgment for 29l., due for hay and oats supplied by the plaintiffs, to go by default. An affidavit was filed by the plaintiffs that the goods were supplied to the defendant for horses kept at his residence, Cherrington Park, where he kept up a large establishment, and was to all appearances a man of means, though the furniture, carriages and effects at Cherrington Park were claimed by the defendant's wife or her trustees. The defendant filed an affidavit in answer, stating that he was an undischarged bankrupt and quite unable to pay the plaintiff's claim, though his wife had an income settled to her separate use. Upon this evidence a Divisional Court refused to discharge an order made at chambers for the committal of the defendant to prison for six weeks in default of payment. On appeal the defendant filed a further affidavit, in which he entered more fully into the details of the establishment kept up by his wife at Cherrington Park:—*Held*, that the defendant had displaced the *prima facie* case made by the plaintiffs as to his means, and that the order for committal ought to be discharged. *Charl v. Jarvis* (App.), 442

Harper v. Springour (Law Rep. 5 C.P.D. 366) not followed. *Eadaile v. Visser* (Law Rep. 13 Ch. D. 421) commented upon. Ibid.

Detention. See SHIP AND SHIPPING; RAILWAY AND CANAL TRAFFIC ACT.

Disclaimer. See BANKRUPTCY.

Discovery—*practice: ship's papers: marine insurance: "all persons interested": form of order*—In an action on a policy of marine insurance to recover the amount of a particular average loss the defendant is entitled without an affidavit and under the old practice, which has not been affected by the Judicature Act, to an order staying proceedings until the ship's papers and other documents have been produced by the plaintiff and all persons interested in the proceedings and in the insurance the subject-matter of the action. *The China Transpacific Steamship Co. v. The Commercial Union Assur. Co.* (App.), 132

— See PRACTICE.

Disqualification. See LOCAL BOARD.

Distress. See LODGER.

Dower, release of—*mortgage of land: redemption: revival of dower*—A right to dower in favour of a widow attached to land of which her son was seised in fee. The son mortgaged the land, the widow joining in respect of her right to dower. The deed of mortgage witnessed that the son granted and conveyed, and "for the purpose of extinguishing her right to title or dower," the widow granted and released the said land to the mortgagee "discharged from all right and title to dower." The mortgage was subsequently paid off and the land reconveyed to the son:—*Held*, that the widow released her right to dower only for the purposes of the mortgage; that the right therefore was merely suspended for the time and revived on reconveyance of the land. *Meek v. Chamberlain*, 99

Dawson v. The Bank of Whitehaven (46 Law J. Rep. Chanc. 884; Law Rep. 6 Ch. D. 218) distinguished. Ibid.

Draft Overdue. See CHEQUE.

Dramatic Entertainment. See COPYRIGHT.

Easement—*highway: right to support: wall adjoining and supporting a highway: liability to repair: servitude oneris ferendi*—Where a servitude of support to a highway by a wall has been acquired, the owner of the highway, and not the owner of the wall, in the absence of express stipulation to that effect in the instrument (if any) creating the easement, is bound to repair the wall when out of repair and insufficient to support and maintain the highway. *The Highway Board of the Highway District of the Stockport and Hyde Division of the Hundred of Macclesfield v. Grant*, 357
Semle, such stipulation covenant or obligation cannot be inferred merely from the fact that the wall has been on several occasions repaired by the owner of the wall or his predecessors in title. Ibid.

— See PUBLIC HEALTH.

Ecclesiastical Court—*contumacious clerk: writ de contumace capiendo: jurisdiction of Lord Penzance: issue of significavit: transmission of writ to county palatine: public worship regulation act, 1874* (37 & 38 Vict. c. 85), ss. 8, 9, 13, 16: 53 Geo. 3. c. 127. s. 1: 5 Eliz. c. 23. s. 11: *rules and orders: costs on habeas corpus*—The "matter of a representation" transmitted to the Judge appointed under

the Public Worship Regulation Act is a cause cognizable by an Ecclesiastical Court within the meaning of 53 Geo. 3. c. 127, and any orders made in such a cause are enforceable by *significavit* and writ *de contumace capiendo*. *In re The Rev. S. F. Green* (H.L.), 25

The direction to the Judge under the 9th section of the Public Worship Regulation Act, "to hear the matter of the representation," empowers him "to hear, determine and dispose of" the whole proceedings of the ecclesiastical matter from beginning to end, including all incidental and consequential applications, whether as regards costs, suspension or enforcement of monition, or punishment for disobedience—in other words, the whole proceedings until the will of the Court be finally executed—at any place mentioned by the Archbishop in the requisition sent to him, even though such place be outside the province, as Official Principal of which he is acting. *Ibid.*

Where G., a clerk in the diocese of Manchester, in the province of York, having been found guilty of illegal practices, had disobeyed both the monition and also the inhibition issued against him,—*Held*, that Lord Penzance was empowered, under a requisition from the Archbishop, "to hear the matter of the representation at any place in London or Westminster, or within the province of York, or within the diocese of Manchester, as you may deem fit," to direct a *significavit* to issue of the contempt committed by G., while his Lordship was sitting at Westminster, and that he need not go into the province of York for that purpose. *Ibid.*

As regards the transmission of the writ *de contumace capiendo* to the County Palatine, the method of procedure to be followed is that provided by the 11th section of 5 Eliz. c. 23; 53 Geo. 3. c. 127. s. 1, incorporating into the proceedings with regard to the writ *de contumace capiendo* all that was contained in the Act of Elizabeth with regard to the writ *de excommunicato capiendo*. *Ibid.*

Therefore, where the clerk resides within the jurisdiction of the County Palatine of Lancaster, instead of the writ *de contumace capiendo* being issued directly from the Petty Bag Office, that office transmits the tenor of the *significavit* by *mittimus* to the Chancellor of the County Palatine, or his deputy, who, on receiving the *mittimus*, may direct the writ *de contumace capiendo* to issue, without any further hearing of the parties, and such writ may be issued by the Vice-Chancellor when sitting out of the local limits of the County Palatine. *Ibid.*

The *mittimus* is not such a writ as by Order II. rule 8 of the Rules under the Judicature Acts is required to be tested in the name of the Lord Chancellor, but is properly tested in the name of the Queen as usual before the Judicature Acts were passed. *Ibid.*

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Ejection. See LIMITATIONS, STATUTE OF.

Election. See CORRUPT PRACTICES; PARTNERSHIP.

Elementary Education Act, 1876 (39 & 40 Vict. c. 79), s. 11: *order for attendance: child between the ages of thirteen and fourteen: "child prohibited from being taken into full time employment."*—Justices have no power, under section 11 of the Elementary Education Act, 1876, to order the attendance at school of a child above thirteen and under fourteen years of age, whose parent has neglected to provide for him efficient elementary education, unless such child is found habitually wandering or not under proper control, or in the company of rogues, vagabonds, disorderly persons or reputed criminals. *Saunders v. Crawford*, 460

— 39 & 40 Vict. c. 79, ss. 12 and 34: 30 & 31 Vict. c. 106 (Poor Law Amendment Act, 1867), s. 27: jurisdiction of justices over offences under by-laws: attendance order: petty sessional district comprising parts of several counties: union extending into several distinct jurisdictions. *Reg. v. Eaton and others, Justices of the County of Northampton* (M.C. 31), 273

— 39 & 40 Vict. c. 79, ss. 11 and 12: attendance: order on father: enforcement on mother. *Hance v. Fairhurst* (M.C. 139), 644

— 33 & 34 Vict. c. 75, ss. 50 and 74: 39 & 40 Vict. c. 79, s. 32: contributory districts: school attendance committee of a union: parish not under any other local authority. *Reg. v. Vane and others (Justices of Cumberland, &c.)*. *In re The Guardians of Penrith Union v. The Overseers of Castle Sowerby* (M.C. 114), 641

— 33 & 34 Vict. c. 75, s. 74: 1873 (36 & 37 Vict. c. 86), 1876 (39 & 40 Vict. c. 79), 1880 (43 & 44 Vict. c. 23): causing a child to attend school: reasonable excuse. *The School Board Attendance Committee of Belper Union v. Bailey* (M.C. 91), 480

Employers' Liability Act—(43 & 44 Vict. c. 42), ss. 4 and 7: *accident to workman: presence of employer when injury sustained: whether notice required: form of notice: waiver*—In order to maintain an action against an employer under 43 & 44 Vict. c. 42, the workman must in all cases give a written notice within the time specified in the 4th section, containing his name and address, the cause of the injury, and the date at which it was sustained. *Moyle v. Jenkins*, 112

Section 4 of 43 & 44 Vict. c. 42 merely deals with the time within which a notice must be given. Section 7 contains the requisites of such notice. *Ibid.*

B

Employers' Liability Act (continued)—(43 & 44 Vict. c. 42, ss. 4 and 7: *notice of injury: requirements of*)—The plaintiff, a workman, was injured by an accident while in the employ of the defendants; he at once told an inspector of the defendants the circumstances of the accident, and the inspector made a written report on the accident to the defendants. The solicitor of the plaintiff wrote to the defendants within a week asking for compensation, mentioning that the defendants' superintendent knew the particulars, but not referring in terms to the written report made by the inspector; no other notice was given within six weeks:—*Held*, that there was no sufficient notice in writing to satisfy the requirements of the Employers' Liability Act, 1880. *Keen v. The Millmill Dock Co.* (App.), 277
Moyle v. Jenkins (Ante, p. 112) approved. *Ibid.*

— (43 & 44 Vict. c. 42, s. 7): *invalid or defective notice*—A notice under the Employers' Liability Act, 1880, omitted to state the cause of the injury:—*Held*, that such omission was a "defect" in the notice which in the absence of evidence of an intent to mislead did not render the notice invalid. *Stone v. Hyde*, 452

— (43 & 44 Vict. c. 42), s. 1: *injury to workman: contract by workman against act applying: Lord Campbell's act* (9 & 10 Vict. c. 93), s. 2: *widow's right of action where husband has contracted himself out of the employers' liability act*, 1880 (43 & 44 Vict. c. 42)]—A workman may contract for himself and his representatives in case of death not to claim compensation under section 1 of the Employers' Liability Act, 1880 (43 & 44 Vict. c. 42). *Griffiths v. The Earl of Dudley*, 543
 That section does not render such contract invalid, but removes the legal presumption of an implied contract between employer and employed that the former should not be liable to the latter for injuries caused by the negligence of a person in the common employment. *Ibid.*

Such a contract by a workman is not contrary to public policy, and binds his widow suing under Lord Campbell's Act (9 & 10 Vict. c. 93). *Ibid.*

— See PRACTICE.

Enclosure Act. See LANDLORD AND TENANT.

Entry, Right of. See VENDOR AND PURCHASER.

Equity, Rule of. See LIMITATIONS, STATUTE OF.

Estoppel. See COMPANY; PRINCIPAL AND AGENT; RELEASE.

Event. See PRACTICE.

Evidence—deposition under a commission: irregularity in taking: foreigner: objection to oath: affirmation by person not qualified to affirm: time for taking objection—A commission was issued abroad for the purpose of taking the evidence of a witness touching certain matters relating to an action brought by the plaintiffs against the defendant. The witness objected to be sworn and was allowed by the commissioner to affirm. His evidence was then taken. The deposition was regular upon the face of it, and was returned by the commissioner in the following terms: "Affirmed before me, the witness objecting to an oath." The plaintiffs were represented at the commission, but took no objection at the time to the evidence being given upon affirmation; subsequently, however, they applied at chambers to have the deposition taken off the file on affidavits, shewing that the witness was not a person who was entitled to affirm:—*Held*, that the objection should have been taken at the time, and ought not now to be entertained, there being nothing on the face of the deposition itself to shew that it was not properly taken. *Richards, Tweedy and Co. v. Hough*, 361

— See LIBEL.

Execution. See BANKRUPTCY; CHARGING OF STOCK; INTERPLEADER; SOLICITOR AND CLIENT.

Execution, Stay of. See PRACTICE.

Extradition—Netherlands, treaty with: extradition act, 1870 (33 & 34 Vict. c. 52), ss. 10, 15 and 26: *alleged criminal not subject of state requiring surrender: foreign warrant of arrest: authentication of warrant*—By the Extradition Treaty between the United Kingdom and the Netherlands, it is provided that each Government shall, on requisition by their respective diplomatic agents, reciprocally deliver up persons accused or convicted of certain crimes committed within the jurisdiction of the requiring party, when found within the territories of the other party, so, however, that neither Government shall deliver up its own subjects. If a person be arrested in either country upon a warrant issued by competent authority on information, he shall, nevertheless, be discharged, unless within fourteen days a requisition for his surrender be "made by the diplomatic agent of his country." Prisoner was arrested upon information of a crime having been committed by him in the Netherlands. His surrender was demanded by the diplomatic agent of the Netherlands. It was objected that he was not

subject to the extradition law as between the United Kingdom and the Netherlands, because he was not shewn to be a subject of the Netherlands, but, on the contrary, there was evidence of his being a naturalised American citizen:—*Held*, that he must be surrendered, as the provisions were of general application to all persons who had committed crimes in the territory of the Government whose diplomatic agent required the extradition, save only and except subjects of the State upon which the demand for surrender is made. *Reg. v. Ganz*, 419

By section 10 of the Extradition Act, 1870 (33 & 34 Vict. c. 52), the police magistrate has authority to commit a fugitive criminal "if the foreign warrant authorising his arrest is duly authenticated." And by section 26 "warrant" is defined "in the case of any foreign State to include any judicial document authorising the arrest of a person accused of crime." *Ibid*.

A document bearing the official seal of the department of justice at the Hague, signed by the Vice-President and councillors of the Court, and purporting to be a copy of a decree of the Court, in which were recited the charges made against the prisoner, and the decision of the Criminal Court of Appeal that proceedings should be taken against him, and which in terms authorised his arrest, was produced before a police magistrate as the foreign warrant under section 10. *Held*, that it was sufficient as a judicial document authorising arrest, and was duly authenticated, and satisfied the provisions of the section. *Ibid*.

Per MANISTY, J.—That it was for the purpose not a copy but an original document. *Ibid*.

Factory Acts. See ELEMENTARY EDUCATION ACT.

False Imprisonment. See ACTION.

Fares. See RAILWAY COMPANY.

Fire. See DAMAGES; SHIP AND SHIPPING.

Firm. See PRACTICE.

Fishery without licence: Freshwater Fisheries Act, 1878 (41 & 42 Vict. c. 39), s. 7: Severn fishery district: certificate of Secretary of State: tributary. *Merricks v. Cadwallader* (M.C. 20), 233

Foreclosure. See LIMITATIONS, STATUTE OF.

Forfeiture. See LANDLORD AND TENANT.

Franchise. See PARLIAMENT.

Frauds, Statute of—29 Car. 2. c. 3. s. 4: *right to share shooting and to carry away game: interest in land*—The plaintiff agreed to allow the defendant to take a one-fourth share of a shooting, and to take away one-fourth of the game killed:—*Held* (affirming the Queen's Bench Division, reported p. 174), that this was a contract for an interest in land, and required to be authenticated by a memorandum in writing, so as to comply with the provisions of section 4 of the Statute of Frauds. *Webber v. Lee* (App.), 485

—See BANKRUPTCY; LIMITATIONS, STATUTE OF.

Garnishee. See PRACTICE.

General Average. See SHIP AND SHIPPING.

Guarantee. See PRINCIPAL AND SURETY.

Habeas Corpus. See ECCLESIASTICAL COURT.

Hackney Carriage—*cab proprietor and driver, relation between: bailor and bailee: negligence: master and servant: hackney carriage act* (6 & 7 Vict. c. 86)—The Hackney Carriage Act (6 & 7 Vict. c. 86) does not, under all circumstances, create the relation of master and servant between the cab proprietor and the driver. The plaintiff was injured through the negligent driving of a cabdriver, and brought his action for damages against the cab proprietor. By the terms of arrangement between the proprietor of the cab and the driver the proprietor let the cab to the driver by the week, the driver providing the horse and harness, and paying 10s. a week for the hire of the cab:—*Held*, that the proprietor was not liable for the negligent driving of the cab driver, for that the relation between them was that of bailor and bailee, and the relation of master and servant was not created between them by the statute 6 & 7 Vict. c. 86. *King v. Spurr*, 105

Powles v. Hider (6 E. & B. 207; 25 Law J. Rep. Q.B. 331) and *Venables v. Smith* (46 Law J. Rep. Q.B. 470; Law Rep. 2 Q.B. D. 279) distinguished. *Ibid*.

Highway—Highways and Locomotives Amendment Act, 1878 (41 & 42 Vict. c. 77), s. 23: excessive weight and extraordinary traffic: carting building materials. *Pickering Highway Board v. Barry* (M.C. 17), 233

—Highways and Locomotives Amendment Act, 1878, ss. 23 and 36: limitation of summary proceedings: certificate of surveyor. *Pool and Forden Highway Board v. Gunning and Others* (M.C. 49), 432

— liability to repair : main road : portion of a road ceasing to be a turnpike road : 41 & 42 Vict. c. 77. s. 13. *The Mayor, &c., of Rochdale v. The Justices of Lancashire* (M.C. 1), 101

— See EASEMENT; METROPOLIS LOCAL MANAGEMENT ACT.

House. See INHABITED HOUSE DUTY; PARLIAMENT.

Husband and Wife—*married women's property act amendment act, 1874, ss. 2 and 5: debts contracted by wife before marriage: extent of husband's liability: "subsequent action"*—By the Married Women's Property Act (1870) Amendment Act, 1874 (37 & 38 Vict. c. 50), ss. 2 and 5, a husband married after the passing of the statute is made liable by action for his wife's debts contracted before marriage to the extent, *inter alia*, of the personal estate in possession of the wife which shall have vested in the husband; but it is provided that "when the husband after a marriage pays any debt of his wife, or has a judgment *bona fide* recovered against him in an action, . . . then to the extent of such payment or judgment the husband shall not in any subsequent action be liable." The plaintiff on the 7th of March, 1881, commenced an action against the defendants, who were married in January, 1881, for a debt contracted by the wife whilst a *feme sole*. At the time of the marriage the wife was in possession of personal estate to the value of 50*l.*, which had vested in the husband. On the 5th of March, 1881, a similar action had been brought against the defendants by a third party, and judgment signed on the 19th of March following for 50*l.*, in respect of the assets already referred to, which were subsequently seized by the sheriff and sold:—*Held*, that the plaintiff's action was a "subsequent action" within the meaning of the proviso above referred to, though commenced before judgment had been obtained in the first action. *Fear v. Castle*, 279

— *married woman: separate estate: liability for debts contracted before marriage*: 33 & 34 Vict. c. 93. s. 12: *practice: interpleader: orders I. rule 2 and XL. rule 10*—The plaintiff sued the defendant, a married woman, without her husband, for debts contracted before her marriage, and recovered judgment against her, and the sheriff seized jewels which had been presented to her on her marriage. The husband claimed the jewels as his property. An order was made for the trial of an interpleader issue, and upon the trial of the issue the husband obtained a verdict in his favour. A settlement had been executed on the marriage, which declared that jewels of the wife should

belong to her for her separate use. Upon a motion for a new trial, the settlement not being before the Court, and it being assumed that the settlement did not affect the articles in dispute,—*Held*, by MATHEW, J. (CAVE, J., dissenting), that the jewels were in the nature of paraphernalia, and could not be alienated during coverture without the husband's consent. *Williams v. Mervier* (App.), 594

But upon the settlement being produced before the Court of Appeal,—*Held*, that the jewellery, being thereby declared to be the separate property of the wife, was liable to be seized by the execution creditor, and that it was not necessary for the husband to be made a party to the action. *Ibid.*

Order XL. rule 10 applies as well to proceedings in interpleader as to ordinary actions, although the old practice in interpleader is preserved by Order I. rule 2; therefore, on a rule for a new trial of an interpleader issue, the Court has jurisdiction to direct judgment to be entered instead of ordering a new trial. *Ibid.*

Income-Tax—*foreign corporation with English agency: telegraph company transmitting messages to foreign countries*: 16 & 17 Vict. c. 34. s. 2. *sched. D*—A foreign telegraph company, with an agency in the United Kingdom, had, besides certain lines abroad, three marine cables which landed on the shores of the United Kingdom, through which it despatched and received messages between the United Kingdom and foreign parts. It had in the United Kingdom a separate line worked by its own servants. A message received by the company for transmission passed partly over lines belonging to the Post Office, over the marine cables of the company, over cables belonging to foreign governments or companies, and in some cases over cables abroad belonging to the company. The proprietors of each of the cables received a portion of the sum paid for the transmission of the message, and the company retained the balance. No profit accrued to the company from its land lines in the United Kingdom:—*Held* (affirming the judgment of the Queen's Bench Division), that the company exercised a trade within the United Kingdom within the meaning of 16 & 17 Vict. c. 34. s. 2. *sched. D*, and that income-tax was payable on the profits accruing therefrom—that is, on the difference between the sum received and the cost of earning that sum. *Erichsen v. Last* (App.), 86

— *mines: deduction from assessment on account of pits exhausted*: 5 & 6 Vict. c. 35. ss. 60 (*schedule A, No. 3*), 100 (*schedule D*) and 159: 29 Vict. c. 36. s. 8—In assessing for income-tax the gross profits derived from mines no deduction will be allowed for a sum estimated to represent the amount of capital expended on making bores and sinking pits which have

become exhausted by the year's working. *Coltness Iron Co. v. Black* (H.L.), 626
Andrew Knowles & Sons v. McAdam (47 Law J. Rep. Exch. 139; Law Rep. 4 Ex. D. 23) disapproved. *Ibid*.

Quere.—Whether deduction might in some cases be allowed for cost of sinking pits:—*Per* EARL CAIRNS—"I am not prepared to say that, under the words of 5 & 6 Vict. c. 35, a mine-owner might not in some cases be entitled to an allowance in respect to the cost of sinking a pit, by means of which pit the minerals are gotten which are the source of profit for the year in which the pit was sunk"; *Per* LORD BLACKBURN—"I do not wish to lay down any general proposition, either that money expended in sinking pits can never be in the nature of expenses incurred within the five years in working the coal so as to be properly taken into account in estimating the profits made in that period, or to say what, if any, the circumstances are under which it may be done. *Ibid*."

— "profits": statutory restrictions: corporation]—The Mersey Docks and Harbour Board were constituted, by an Act of Parliament, a corporation for the management of the Mersey Dock Estate. Under the Act the surplus revenue of the board, which was derived from dock dues, &c., after payment of interest on moneys borrowed, was to be applied towards a sinking fund for the extinguishment of the principal moneys spent in the construction of the dock, and for no other purpose whatsoever:—*Held* (reversing the judgment of the Queen's Bench Division), that the surplus moneys which remained after payment of the expenses of earning the same, and which under the statute could only be applied in a particular manner for the purpose of reducing the past debt, were available as "profits," and could be assessed to the income-tax. *The Mersey Docks and Harbour Board v. Lucas* (App.), 114

Indictment—*information: corrupt practices prevention act, 1854* (26 Vict. c. 29), s. 7]—On an information for perjury laid by the Attorney-General against a person who has given evidence before a committee or commission for enquiring into corrupt practices, evidence of statements made by the person charged with perjury, in answer to questions put by or before such election committee or commissioners, is inadmissible. *Reg. v. Slater*, 246

Information. See INDICTMENT.

Inhabitant. See PARLIAMENT.

Inhabited House Duty—*building let in separate rooms: tenements used for business purposes: exemption from duty: 41 Vict. c. 15. s. 13*]—

A building divided into different sets of rooms, but having one outer door common to all the rooms, was occupied partly as business offices and partly as residential chambers; a servant appointed by the landlord resided on the premises, and attended to the offices and to the residents. It was claimed that the part used as offices should be exempted from the payment of the inhabited house duty, on the ground that the building came within the provisions of 41 Vict. c. 15. s. 13, which exempts from the duty, on certain steps being taken, those parts of a house, being one property, which being "divided into and let in different tenements," are used for business or trade purposes only:—*Held* (affirming the judgment of the Queen's Bench Division), that the claim to exemption ought not to be allowed, for that the house, although let in different offices and rooms, was not divided into different tenements within the meaning of the statute. *The Yorkshire Fire and Life Ins. Co. v. Clayton* (App.), 82

Injury to Workman. See EMPLOYERS' LIABILITY ACT.

Inspectorship Deed. See RELEASE.

Inspection. See PRACTICE.

Insurance. See MARINE INSURANCE.

Interpleader—*seizure under or over 50l.: legal and incidental expenses and possession money: judgment for under 50l., including costs: bankruptcy act, 1869* (32 & 33 Vict. c. 71), s. 6. sub-s. 5. s. 87: "sale"]—Where execution has issued against the goods of a trader debtor upon a judgment for a sum which together with the expenses would exceed 50l., but the sheriff by order of the creditor has realised by sale less than 50l., the creditor is entitled to the proceeds of the levy as against the trustee in bankruptcy of the debtor. The amount to be calculated under section 87 of the Bankruptcy Act, 1869, is the amount actually realised by the sale. *Turner v. Bridgett: Wright (claimant)*, 374

— See HUSBAND AND WIFE; PRACTICE.

Interrogatories. See PRACTICE.

Judgment. See PRACTICE.

Judgment Debtor. See CHARGING OF STOCK.

Judicature Act. See LIMITATIONS, STATUTE OF.

Judicial Act. See WRIT OF SUMMONS.

Jurisdiction—*high court: bankruptcy court: claim for fraud: declaration against trustee in liquidation of right of proof*—In an action against certain of the defendants for advances obtained by fraud, a declaration may be claimed against another defendant, the trustee in liquidation of such defendants, that the plaintiffs are entitled to prove for the amount of such advances either against the joint estate of the liquidating debtors, or their separate estate, as they may elect. *Hale v. Boustead*, 255

— See SOLICITOR AND CLIENT.

Justice of Peace—*expenses of conveying prisoners to gaol: 27 Geo. 2. c. 3. s. 1; 11 & 12 Vict. c. 42. s. 26; 28 & 29 Vict. c. 126. ss. 5 and 8: the prison act, 1877 (40 & 41 Vict. c. 21), ss. 4, 28, 57: period of committal: prison authority*—The expenses of conveying to prison a person summarily convicted or committed for trial in all counties except Middlesex are "expenses incurred in respect of the maintenance of prisons, to which" the Prison Act, 1877, applies, "and of the prisoners therein," within the meaning of section 4, as interpreted by section 57 of that Act, and are therefore payable out of moneys provided by Parliament. *Mullins v. The Treasurer of the County of Surrey* (H.L.), 145

— jurisdiction of: reasonable claim of right: tidal river: fishery. *Reece v. Miller* (M.C. 64), 560.

— jurisdiction of: interest or bias: town council: penalties: borough fund. *Reg. v. Handsley and others* (Justices of Burnley); *ex parte King* (M.C. 137), 644

— bias: *judec in sua causa*: special assessment sessions. *Reg. v. The Great Yarmouth Justices* (M.C. 39), 388

Justification. See LIBEL.

Landlord and Tenant—*agreement to deliver up a furnished house in good order, and pay for loss, &c., a sum to be settled, in case of dispute, by two valuers: right to sue for damage before amount settled: arbitration: condition precedent*—A tenant of a furnished house agreed, in writing, to deliver up possession of the same, together with the furniture, at the expiration of the tenancy in good order; and in the event of any loss, damage or breakage, to make good or pay for the same an amount, in case of dispute, to be settled by two valuers: *Held*, that the lessor could not bring an action for damage or loss until the amount to be paid

had been settled by two valuers. *Babbage v. Coulbourn*, 638

— *breach of covenant by lessee: reddendum clause: proviso for re-entry: forfeiture: rights of lessor: alternative remedy*—A lease granted by the plaintiffs for a term of years contained a covenant, on the part of the lessees and their assigns, not to carry on upon the premises demised any offensive trade or occupation, nor to do or suffer to be done anything which might be or grow to the damage or annoyance of the lessors. The reddendum clause of the deed in question contained a provision that, in addition to the rent reserved, a further rent should become payable if any offensive trade or occupation were carried on, or things were done which were covenanted not to be done upon the premises. There was also a proviso for re-entry in the lease for non-payment of the rent reserved, or of the further rent, in case the same should become payable and were in arrear, or if and whenever there should be any breach of covenant on the part of the lessees or their assigns. In an action brought against the defendants, as assignees of the lease, to recover possession of the premises for a breach of the above covenant,—*Held*, that the lessors were entitled to re-enter for the breach of covenant complained of, they having the right, under the terms of the lease, either to demand the increased rent or to treat the act complained of as a forfeiture. *Weston v. The Managers of the Metropolitan Asylum District* (App.), 399

— *lease: general words: common rights: extinguishment, effect of: the commons enclosure act, 1845 (8 & 9 Vict. c. 118), ss. 69, 93, 94*—T. was owner in fee in possession of a farm with common rights attached to it. An order to enclose the common having been made under the Commons Enclosure Act, 1845, all the common rights were extinguished under section 69 of the Act, and T. thereupon sent in his claim for an allotment. T. died, and the tenant-for-life under his will demised the farm, "together with all commons, ways, water courses, rights, privileges, easements, commodities and appurtenances whatsoever to the said hereditaments, or any part thereof, belonging or usually held or enjoyed therewith," to W. for sixty years. The lessee entered into possession, and three years later an allotment of lands in respect of T.'s claim was made to the defendants, who were his successors in title to the freehold of the farm. In an action of ejectment brought by W.'s executors to recover possession of the lands so allotted,—*Held*, that no right to the allotment, when made, passed to W. either under the lease or by virtue of the Commons Enclosure Act, 1845, and therefore that the plaintiffs were not entitled to maintain their action. *Williams v. Phillips* (App.), 102

— See LODGER.

Land, Interest in. See STATUTE OF FRAUDS.

Land Recovery. See COUNTY COURT.

Lands Clauses Consolidation Act—*abortive enquiry: costs of and incidental to: 8 & 9 Vict. c. 18, ss. 34 and 51: order LV. rule 1*—An inquisition for assessing compensation under the Lands Clauses Act was removed by *certiorari* into the Queen's Bench Division, and there quashed, on the ground that the undersheriff had misdirected the jury. A further enquiry was then held on the same warrant by the sheriff, and compensation was duly awarded to the claimants by the jury:—*Held*, that the claimants were entitled as well to the costs of and incidental to the abortive enquiry, as to the costs of and incidental to the inquisition which resulted in a good verdict. *Reg. v. The North London Rail. Co.*, 241

— (8 Vict. c. 18), ss. 23 and 31: *construction: arbitration: award: umpire*—The three months allowed by the 23rd section of the Lands Clauses Consolidation Act, 1845, for an umpire to make his award, is to be calculated from the date of his appointment, and not from the time when the awarding power of the arbitrators came to an end. *In the matter of an Arbitration between R. W. Pullen and the Corporation of Liverpool*, 285

— (8 Vict. c. 18), ss. 34, 51, 52, 53, 76: *costs: arbitration: payment before execution of conveyance*—The owner of land taken under the compulsory powers of the Lands Clauses Act, 1845, is entitled to the taxed costs of the arbitration, so soon as his title has been accepted by the promoters of the undertaking; and his right to recover such costs is not postponed until the conveyance of the land has been executed. *Capell v. The Great Western Rail. Co.*, 601

— See LIMITATIONS, STATUTE OF.

Larceny Act. See ACTION.

Law and Equity—rules of. See PRACTICE.

Lease. See BANKRUPTCY; LANDLORD AND TENANT.

Lessor and Lessee. See PRACTICE.

Libel—*plea of justification: evidence of rumours to same effect as allegations in libel: evidence*

of particular acts of misconduct on the part of the plaintiff: general evidence of reputation of the plaintiff in mitigation of damages: material facts on which the defendant relies: order XIX. rule 4—Action for a libel alleging that the plaintiff, a journalist and dramatic critic, had extorted money by threatening to publish defamatory matter of a deceased actress. Statement of defence, *inter alia*, plea of justification:—*Held*, by MATHEW, J., and CAVE, J., that—first, evidence of the existence of rumours to the same effect as allegations in the libel is not admissible; secondly, evidence of particular acts of misconduct on the part of the plaintiff is not admissible; though, thirdly, *semble* that general evidence of the reputation of the plaintiff may be given in mitigation of damages—but to entitle the defendant to give such evidence it must be stated or referred to in his pleadings, as a material fact on which the defendant relies, within Order XIX. rule 4. *Scott v. Sampson*, 380

— *privilege: public policy: society to suppress mendicity*—A society established for the suppression of mendicity published a libellous report of the plaintiff. The report was prepared for and communicated to persons who made enquiries of the society respecting the plaintiff with the view of assisting her or of recommending her to others. In an action by the plaintiff against the society for damages for the libel contained in the report:—*Held*, that the report, having been published in the discharge of a moral and social duty, was privileged. *Waller v. Lock* (App.), 274

— See PLEADING.

Licensing Acts—*grounds of refusal of licences specified in writing, but only orally communicated to the applicant: qualification: 3 & 4 Vict. c. 61. s. 1: beerhouse act, 1869 (32 & 33 Vict. c. 27), s. 8: licensing act, 1872 (35 & 36 Vict. c. 94), s. 45: construction*—The appellant applied to the Justices for the county of Cumberland at the general licensing sessions, for an off-licence, but his application was refused by the Justices on the ground that he had not a sufficient qualification, as required by 3 & 4 Vict. c. 61. s. 1. After having heard the evidence the Justices retired to consider the appellant's among other applications, and the clerk of the Court made a minute of the grounds of the refusal of the appellant's among other applications refused. Those minutes were read by the clerk on the Justices returning into Court, and the appellant was present when the same were read, but no copy in writing was asked for by him or given to him:—*Held*, that the minute made by the clerk of the Justices' refusal was a

sufficient specification in writing to satisfy the requirements of the Beerhouse Act, 1869, s. 8. And, further, *Held*, that section 45, the Licensing Act, 1872, does not repeal 3 & 4 Vict. c. 61. s. 1. *Reg. v. The Licensing Justices of Cumberland*; *ex parte Waiting* 142

— intoxicating liquors, sale of: Sunday Closing (Wales) Act, 1881 (44 & 45 Vict. c. 61), s. 3: time of commencement of Act: construction. *Richards v. Macbride* (M.C. 15), 155

— (35 & 36 Vict. c. 94), s. 3: sale of intoxicating liquor by retail without licence: club. *Graff v. Erans* (M.C. 25), 417

— (35 & 36 Vict. c. 94), s. 3 and s. 51, sub-s. 2: punishment for selling liquors without licence: alternative penalties: "Or": Summary Jurisdiction Act, 1879, s. 21. *In re Clew* (M.C. 140), 644

Lien. See SOLICITOR AND CLIENT.

Limitations, Statute of—fraud: concealment of cause of action: discovery of original fraud: time from which statute runs in case of fraud: absence of reasonable means of discovery of fraud: judicature act: application of rule of equity—Concealed fraud and the absence of reasonable means of discovery of such fraud may be pleaded in reply to a defence of the Statute of Limitations. Where to a claim for damages for fraudulent representations, whereby the plaintiff was induced to purchase certain shares which were always worthless, the defendant pleaded the Statute of Limitations, and the plaintiff replied that he did not discover, and could not by reasonable diligence have discovered the fraud, or that the defendant was a party to it, and that the defendant had actively concealed the fraud to prevent discovery till within six years before action,—*Held* (affirming the Queen's Bench Division, *Ante*, p. 228), on demurrer, by LORD COLEBRIDGE, C.J., and BRETT, L.J. (HOLKER, L.J., *dissentiente*), a good reply. *Gibbs v. Guild* (App.), 313

— (3 & 4 Will. 4. c. 27. ss. 2, 3, 4, 24: 7 Will. 4. & 1 Vict. c. 28): mortgagee out of possession: foreclosure: ejectment—The bringing of an action for foreclosure stops the Statute of Limitations from running to defeat the mortgagee's right to recover in an action of ejectment the property comprised in the mortgage. *Pugh v. Heath* (H.L.), 367

A mortgagee who obtains a decree for foreclosure thereby acquires a new title, namely, that of absolute owner, and his right to bring an action upon that title first accrues at the date of the decree. *Ibid*.

— lands actually required for the purposes of the railway: lands clauses act, 1845, s. 127: 3 & 4 Will. 4. c. 27. s. 7: 37 & 38 Vict. c. 57. s. 1: order XL. rule 10—Action for the recovery of land taken by a railway company in 1881 as being actually required for the purposes of their undertaking. The land had for some years before 1863 been in the possession of one Beale, who used it as a coal wharf, and was from that time up till 1881 used by the plaintiff, who had purchased Beale's business. The company's servants occasionally, at the plaintiff's request, repaired a fence which was between the coal wharf and a siding whereon the company's trucks which took the plaintiff's coals were shunted. No rent was ever agreed on or paid or contemplated for the plaintiff's use of the land:—*Held*, that the mere fact that the land taken was not superfluous land, but land required for the purposes of the undertaking, would not prevent the plaintiff acquiring a title as against the company under the Statute of Limitations; even although the plaintiff acquired title by the laches of the company's servants. *Bobbett v. The South Eastern Rail. Co.*, 161

Liquidation. See SET-OFF.

Local Acts. See INCOME-TAX.

Local Authority. See PUBLIC HEALTH ACT.

Local Board—contract of member with board: disqualification of member: penalty for acting: public health act, 1875 (38 & 39 Vict. c. 55), sched. II. rules 64 and 70—The Public Health Act, 1875, provides by schedule II. rule 64, that any member of a local board who in any manner is concerned in any bargain or contract entered into by the board shall cease to be a member, and his seat shall become vacant; and by rule 70, that any person who, being disabled from acting as a member of the board by any provision of the Act does act as such member, shall be liable to a penalty of 50l.:—*Held* (by BRETT, L.J., and COTTON, L.J.; *dissentiente* BRAMWELL, L.J.), that a person who, being duly qualified and duly elected a member of a local board, became afterwards concerned in a contract entered into by the board, ceased thereby to be a member of the board, and that he could not, when the contract was at an end, continue to act as a member of the board, for that he was disabled within the meaning of rule 70 from acting as a member, and was liable to a penalty if he did so act. *Fletcher v. Hudson* (App.), 48

Local Government Board—power to state a special case: common law procedure act, 1854 (17 &

18 Vict. c. 125), s. 5: "*arbitration by consent*": 38 & 39 Vict. c. clxiii. s. 93]—The reference of disputes between a local board and any constituent authority or parish to the Local Government Board for decision, which decision, it is declared by 38 & 39 Vict. c. clxiii. s. 93, shall be final and conclusive, is not a "reference by consent" within the meaning of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), s. 5, and the Court will refuse to hear a Special Case stated by the Local Government Board for its opinion upon such reference. *The Local Board of Bealey v. The West Kent Main Sewerage Board*, 456

Lodger—or under-tenant: lodgers' protection act, 1871 (34 & 35 Vict. c. 79)]—To constitute a person a lodger so as to entitle him to the protection of the Lodgers' Protection Act, 1871, against a levy on his goods for rent due from his immediate landlord to the superior landlord, there must be evidence of the retention by the immediate landlord, by himself or his servants, of some such dominion and power over the house which he sub-lets, as the master of a house let in lodgings usually has; although it is not absolutely necessary that the immediate landlord should himself reside on the premises so sub-let by him:—*So held* by the Court of Appeal. *Morton v. Palmer* (App.), 7

— See PARLIAMENT.

Loss. See SHIPPING.

Malicious Injuries to Property Act (24 & 25 Vict. c. 97), s. 52—damage to right of herbage: real and personal property: information: prosecutor; ownership. *Lane v. Eltringham* (M.C. 13), 415

Malicious Prosecution—direction to jury: reasonable and probable cause: probable cause how far question for jury: evidence of malice, what is: burden of proof]—An action for malicious prosecution for perjury was founded on the following circumstances: The plaintiff's father had been tenant of a house to the defendant, and was sued in the County Court for rent in arrear. The defence was surrender before any rent due, and the plaintiff as a witness swore that he, at the defendant's request, gave him up the key on a particular day. Upon this evidence perjury was assigned, and the plaintiff was indicted, tried and acquitted. He then brought this action. The Judge directed the jury—first, if they believed that the plaintiff did give up the key, and the defendant, knowing that he had done so, indicted him for perjury, they should find for the plaintiff; secondly, if

they did not believe the plaintiff, they should find for the defendant; thirdly, if they were in doubt as to which party was speaking the truth, they should find for the defendant, as the plaintiff would not have made out his case; fourthly, alternatively, if they thought that the plaintiff did give up the key, but the defendant having forgotten the fact prosecuted him under an honest impression that he had corruptly sworn that he had done what he had not done, they would not be justified in finding that the defendant had maliciously and without reasonable and probable cause prosecuted the plaintiff, but might find for the defendant:—*Held*, a right direction. *Hicks v. Faulkner*, 268

Mandamus. See CORRUPT PRACTICES.

Marine Insurance—partial loss: sale of ship without repairing: liability of underwriter to owner: measure of loss]—An insured ship was damaged during the continuance of the risk by perils insured against, and was sold by the owners without being repaired. The amount required to restore her to the same condition as she was in at the commencement of the risk would have exceeded her value when repaired so that no reasonable uninsured owner would have repaired her. The owners having done some slight repairs for the purposes of sale, sold the ship, and then claimed to recover from the underwriters two-thirds of the cost of the repairs estimated as necessary to put the ship in the same condition as she was before the injury:—*Held*, by JESSEL, M.R., and COTTON, L.J., *disentente* BRETT, L.J., that the plaintiffs were not entitled to recover the amount claimed, and that the underwriters were only liable to pay the amount of the difference between the value of the ship at the port of departure and the amount of the net proceeds of the sale after deducting the sum spent on repairs. *Pitman v. The Universal Marine Ins. Co.* (App.), 561

By BRETT, L.J., that the estimated cost of repairs was the subject-matter of the insurance, and that the plaintiffs were entitled to recover the amount claimed. *Ibid*.

— **valued policy: total loss: Alabama claims: compensation paid by state for difference between real and insured value: right of underwriters to recover**]—The valuation in a valued policy is conclusive between the parties only for the purpose of the contract itself and of the rights arising from it. *Burnand v. Rodocanachi* (H.L.), 548

Compensation paid *aliunde* to the assured, in respect of loss not covered by a valued policy, cannot be recovered by an underwriter who has paid as for a total loss; since the loss insured against is not diminished by the compensation, and the assured is not estopped

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from alleging that there was an excess in value above the amount agreed in the policy. *Ibid.*

— See DISCOVERY; SHIP AND SHIPPING.

Market Overt—*sale in : bona fide purchase of stolen beasts : costs of keeping beasts till restitution : conviction of thief : 24 & 25 Vict. c. 96, s. 100*—Defendant *bona fide* purchased some beasts sold in market overt, which had, in fact, been stolen. On conviction of the thief, the original owner claimed the return of the beasts, the property having re-vested in him by virtue of 24 & 25 Vict. c. 96, s. 100; whereupon the defendant counter-claimed for the cost of their keep between the date of his purchase and the conviction:—*Held*, that the counter-claim could not be maintained. *Walker v. Matthews*, 243

Married Woman. See HUSBAND AND WIFE; PRACTICE.

Master and Servant—See EMPLOYERS' LIABILITY ACT; HACKNEY CARRIAGE; NEGLIGENCE.

Merchant Shipping Act. See SHIP AND SHIPPING.

Metropolis Local Management Act (18 & 19 Vict. c. 120), ss. 96 and 116 : negligence : surveyors of highways : vestry : water meter—The plaintiff while walking along a street which was vested in the defendants as surveyors of highways, under 18 & 19 Vict. c. 120, s. 96, fell over the iron flap cover to a water-meter box, which was imbedded in the pavement, and broke his leg. The meter had been supplied by a water company to the defendants to enable them to water their streets under the powers given to them for that purpose by section 116, and the flap had been worn smooth by traffic. In an action to recover damages for the injuries sustained by the plaintiff,—*Held*, that the defendants were liable, not as surveyors of highways, but as owners of the meter, for their negligence in not keeping the iron flap in repair. *Blackmore v. The Vestry of Mile End Old Town* (App.), 496

White v. The Hindley Local Board of Health (44 Law J. Rep. Q.B. 114; Law Rep. 10 Q.B. 119) followed. *Ibid.*

— new street: width and openings: street open at only one end: Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), s. 98. *The Metropolitan Board of Works v. Steed and Another* (M.C. 22), 413

— 18 & 19 Vict. c. 120, and 25 & 26 Vict. c. 102: practice: right of appeal: order

made under 25 & 26 Vict. c. 102, s. 75: demolition of building: appeal in respect of penalties and forfeitures: meaning of forfeiture. *Ex parte Elsdon* (M.C. 94), 528

— 18 & 19 Vict. c. 120, s. 105: 25 & 26 Vict. c. 102, s. 77: expenses of paving new street on bridge with side walls belonging to railway company: liability of company as owner of land bounding or abutting on a street. *The Board of Works of the Hackney District v. The Great Eastern Rail. Co.* (M.C. 57) (App.), 451

Mines. See INCOME TAX; PUBLIC HEALTH.

Mortgage. See DOWER; LIMITATIONS, STATUTE OF.

Municipal Election—*nomination of councillor : burgess subscribing more nomination papers than there are vacancies : 38 & 39 Vict. c. 40 (the municipal elections act, 1875), s. 1. sub-s. 2*—At an election of town councillors, a burgess, after he had subscribed as many nomination papers as there were vacancies, and the same (otherwise duly subscribed) had been delivered to the town clerk, subscribed another nomination paper. Upon objection to all those nomination papers upon the ground that his subscriptions thereto were void under the Municipal Elections Act, 1875, s. 1. sub-s. 2 (which enacts that a burgess may subscribe as many nomination papers as there are vacancies, but no more), the mayor allowed the objection against all:—*Held*, upon petition questioning the return of candidates returned as the only candidates duly nominated, that only the last of the nomination papers considered invalid was invalid. *Burgoyne v. Collins*, 335

— See CORRUPT PRACTICES.

Musical Composition. See COPYRIGHT.

Mutual Credit. See BANKRUPTCY; CONTRACT; SET-OFF.

Navigation—contract of. See CONTRACT.

Negligence—*action on behalf of relatives of deceased : Lord Campbell's act (9 & 10 Vict. c. 93) : pecuniary interest in life of deceased*—The plaintiff, as administrator, sued the defendants, under the provisions of 9 & 10 Vict. c. 93, to recover damages for the death of his son, who had been killed by their negligence. At the trial, the plaintiff gave evidence to the effect that he was nearly blind, and was

injured in his leg and hands, and that the deceased was always very kind to him, and used to contribute to his support five or six years ago when he required it:—*Held*, upon the above facts, that there was some evidence for the jury of a reasonable expectation of benefit from the continuance of the son's life, entitling the plaintiff to sue under 9 & 10 Vict. c. 93. *Hetherington v. The North-Eastern Rail. Co.*, 495

— *contract: supply of defective article: injury to stranger: right of action*—The plaintiff, a painter, had been employed by G., who had contracted with a shipowner to paint a vessel. The defendant had contracted with the shipowner to erect a staging round the vessel for the purpose of having the vessel painted. While engaged in painting the vessel the plaintiff fell from the staging into the dock, owing to the defective state of one of the ropes of the staging. In an action for damages in consequence of injuries sustained, — *Held*, that the action was not maintainable. *Heaven v. Ponder*, 485
George v. Skirington (39 Law J. Rep. Exch. 8; Law Rep. 5 Exch. 1) not followed. *Ibid*.

— *principal and agent: liability of employer for injury caused by negligence of contractor's workmen: duty of employer to take necessary precautions to prevent injury*—The plaintiff and defendant were the owners of two adjoining houses with a party wall between them. The defendant employed a competent architect and contractor to pull down and rebuild his house. Before the works were completely executed the contractor's workmen, in order to erect a wooden staircase, so negligently and unskilfully cut into the party wall of another house, which adjoined the defendant's house, as to cause it to fall, and in consequence thereof damage was done to the plaintiff's house. The workmen had no authority to cut into the party wall. The building contract provided that no deviations from the contract were to be made without the written consent of the defendant and his architect; and also that the contractor was to be responsible for all damage to property caused by the negligent acts or want of care of himself or his workmen. In an action to recover damages for the injury done to the plaintiff's house,—*Held* (per BAGGALLAY, L.J., BRETT, L.J.; HOLKER, L.J., dissenting), that the defendant was liable, inasmuch as a duty was imposed upon him to take all such precautions as were necessary to prevent any injury happening to the plaintiff's house during the execution of the works. *Percival v. Hughes* (App.), 388

— See CARRIER; DAMAGES; EMPLOYERS' LIABILITY ACT; HACKNEY CARRIAGE; ME-

TROPOLIS LOCAL MANAGEMENT ACT PRACTICE.

Nomination. See MUNICIPAL ELECTION.

Nonsuit. See PRACTICE.

Note. See BANK OF ENGLAND NOTE.

Notice. See EMPLOYERS' LIABILITY ACT; PRACTICE.

Notice of Action. See ACTION.

Novation. See PARTNERSHIP.

Oath. See EVIDENCE.

Objection, notice of. See PARLIAMENT.

Occupation. See POOR.

Official Referee. See PRACTICE.

Owner and Occupier. See POOR-RATE.

Parliament—borough vote: amendment: notice of objection: place of abode omitted: 41 & 42 Vict. c. 26. s. 28]—A Revising Barrister may amend a notice of objection by adding the place of abode. *Adams v. Bostock*, 175
 In a notice of objection to a borough voter, the objector omitted to state his place of abode. The objector was a solicitor practising in the borough. He was clerk to the magistrates, and coroner. He had resided in the borough all his life, and was well known to the inhabitants. No one was misled by the omission:—*Held*, that the omission was a mistake which the Revising Barrister could amend under 41 & 42 Vict. c. 26. s. 28. sub-s. 2. *Ibid*.

— *borough vote: registration: new lodger claim: sufficiency of declaration annexed to notice of claim: prima facie evidence of qualification: representation of the people act, 1867* (30 & 31 Vict. c. 102), s. 4: *parliamentary and municipal registration act, 1878* (41 & 42 Vict. c. 26), ss. 22, 23, 25, and sched. H, form 2]—By section 23 of 41 & 42 Vict. c. 26, "in the case of a person claiming to vote as a lodger, the declaration annexed to his notice of claim shall, for the purposes of revision, be *prima facie* evidence of his qualification": —*Held* (reversing the decision of the Revising Barrister), that the section applied to all lodger claimants, both new and old—as well to those who claim in respect of lodgings for

the first time under 30 & 31 Vict. c. 102. s. 4, as to those who, being already on the list of voters, claim to be placed on the list under 41 & 42 Vict. c. 26. s. 22—so that a person claiming to be put on the list as a lodger for the first time is not bound to appear before the Revising Barrister, either personally or by an agent, in support of his claim; but the notice of claim and declaration annexed thereto are to be taken as *prima facie* evidence of his qualification, and the Revising Barrister, in the absence of any objection thereto, is bound to allow such claim. *Nuth v. Tamplin* (App.), 177

Parliament (continued)—*borough vote: occupation franchise: lodger or inhabitant occupier: part of a house: separately occupied: joint use of other parts of the house: general control by landlord: 30 & 31 Vict. c. 102. ss. 3 and 4: 41 & 42 Vict. c. 26. s. 5*—Where the owner of a house does not let out the whole of it, but retains part of it for his own use and resides therein, and also does not let out the passages and staircases, but only gives a right of ingress and egress to the tenants, retaining a control over the passages and staircases so as to interfere and turn out trespassers, there the inmate of part of that house (whether he has the exclusive use of the room or not) is a "lodger" within the meaning of 30 & 31 Vict. c. 102. s. 4, as explained by 40 & 41 Vict. c. 26. s. 5. *Bradley v. Baylis. Morfee v. Norris. Kirby v. Biffen* (App.), 183

Where the owner of a house lets out the whole of it in separate apartments so as to demise the passages, but reserving to the inmates of the several floors a right of ingress and egress, and retaining no control over the house either by himself or his servants, there each inmate is an "inhabitant occupier" within the meaning of 30 & 31 Vict. c. 102. s. 3, as explained by 40 & 41 Vict. c. 26. s. 5. *Ibid.*

Per JESSEL, M.R.—The question whether a person is an "inhabitant occupier" or a "lodger" within the meaning of these statutes depends upon the circumstances of each particular case, and no exhaustive definition can be given. *Ibid.*

A claimant, furnished and occupied with his wife and family, during the qualifying year, a room in a dwelling-house. The landlord, who resided on the premises, exercised a general control over them, but rendered no services to the claimant either by himself or his servants. In all other respects the claimant was entitled to be put on the occupiers' list:—*Held* (reversing the judgment of the Queen's Bench Division), that the claimant was not an inhabitant occupier as tenant of a dwelling-house within the meaning of 30 & 31 Vict. c. 102. s. 3, but was a "lodger" within section 4 of the same Act, as explained by 41 & 42 Vict. c. 26. s. 5. *Ibid.*

A claimant furnished and occupied two rooms on the first floor of a dwelling-house. One

room was used as a bedroom, and the other as a sitting or living room. The claimant's landlord was the tenant of and resided in the rest of the house. Both the claimant and his landlord had keys of the outer door, and used a certain wash-house attached to the house in common, but the landlord alone was rated and paid the rates. In all other respects the claimant was entitled to be put on the occupiers' list:—*Held* (reversing the judgment of the Queen's Bench Division), that the occupation of the claimant was that of a "lodger" within the meaning of 30 & 31 Vict. c. 102. s. 4, as explained by 41 & 42 Vict. c. 26. s. 5. *Ibid.*

A claimant occupied, during the qualifying year, two rooms on the first floor of a dwelling-house which contained eight rooms. Such rooms were not structurally severed from the rest of the house nor separately rated. The remaining rooms were also let out to tenants. The landlord did not reside in the house, nor did he either by himself or his servants render any services to the tenants or retain any control over the house or any part of it. The passages and staircases were not demised to the claimant or the other tenants, but, together with the outer door and other conveniences, were used by them in common. The landlord paid all the rates and taxes, and repaired the house both inside and out:—*Held* (affirming the judgment of the Queen's Bench Division), that the claimant was an "inhabitant occupier" of a dwelling-house within the meaning of 30 & 31 Vict. c. 102. s. 3, as explained by 41 & 42 Vict. c. 26. s. 5. *Ibid.*

— See WRIT OF SUMMONS.

Partnership—*change by substitution of new for retiring partner: continued dealings with firm without notice of change: right to charge either old or new partner: election*—Where a change is made in a partnership by the retirement of an old and the admission of a new member, a customer of the original partnership who, after the change, but without notice thereof, supplies goods to the firm, has the option to charge the firm as composed before the change, or as existing when the goods were sold. He cannot hold both outgoing and incoming partners liable. *Scarff v. Jardine, H.L.*, 613.

A customer under such circumstances, after subsequently receiving notice of the change, sued the new partnership, and upon their becoming bankrupt proved in the bankruptcy:—*Held*, that he had made his election to charge the new firm, and that such election was irrevocable and barred his right to sue an outgoing partner. *Ibid.*

Penalty. See LOCAL BOARD; SOLICITOR AND PROCTOR.

Perils. See SHIP AND SHIPPING.

Pharmacy Act, 1868 (31 & 32 Vict. c. 121), s. 17: sale of poisons: name and address of seller. *Templeman v. Trafford* (M.C. 4), 78.

Pleading—libel: general denial that “defendant falsely and maliciously published of and concerning the plaintiff”: *Order XIX. rules 17, 18 and 19*—In an action for libel the defendant may not deny generally in his statement of defence that “the defendant wrote or published the same falsely or maliciously, as alleged,” but must set out the facts upon which he relies, either to shew justification or privilege. *Belt v. Lawes*, 359

— See CONTRACT; PRACTICE.

Poll, right to. See PUBLIC LIBRARIES.

Poor—rating of owner or immediate lessor instead of occupier: house let at rent or rate not exceeding 20*l.* a year: weekly tenancies: *construction of 59 Geo. 3. c. 12. s. 19*—By 59 Geo. 3. c. 12. s. 19, the vestry of any parish are empowered to resolve and direct that “the owner or owners of all houses, apartments or dwellings in such parishes, being the immediate lessor or lessors of the actual occupier or occupiers, which shall respectively be let to the occupiers thereof at any rent or rate not exceeding 20*l.* nor less than 6*l.* by the year, or for any less term than one year on any agreement by which the rent shall be reserved or made payable at any shorter period than three months, shall be assessed to the rates for the relief of the poor, for and in respect of such houses, apartments or dwellings,” instead of the actual occupiers; and the vestry are also authorised from time to time to rescind, renew, vary and amend every such resolution and direction as they shall see occasion, “so as no such resolution or direction shall extend to assess or charge the owner of any house, apartment or dwelling which shall be let at a greater rent than 20*l.* or less than 6*l.* as aforesaid”—*Held* (by LORD COLERIDGE, C.J., and BRETT, L.J.—BAGGALLAY, L.J., dissenting—reversing the judgment of HUDDLESTON, B., but affirming that of HAWKINS, J.), that this section was limited in its application to houses let at a rent not exceeding 20*l.* nor less than 6*l.* a year; and consequently that the owner of houses let to weekly tenants at a rent exceeding 20*l.* a year was not liable to be assessed to the poor-rate instead of the actual occupiers. *Iles v. The Assessment Committee of West Ham Union* (App.), 17

— notice of rate: extra-parochial place: duty of overseers: 17 Geo. 2. c. 3. s. 1: 7

Will. 4. and 1 Vict. c. 45. s. 2: place where no church or chapel: publication of rate. *The Queen v. Dyott and others (Justices of Staffordshire)*, and *Lovett* (M.C. 104), 626

— rateable value: buildings occupied by municipal corporations for purposes defined by statute—The gross estimated rental and rateable value of buildings occupied by municipal corporations and other public bodies are to be ascertained for the purpose of parochial assessment by reference to the amount of rent which a tenant, unfettered as to user and unrestricted as to charges, would give if the premises were in the market, and not by reference to the annual profit, if any, made or capable of being made by those using the premises for public purposes. *The Overseers of the Poor of the Township of Chorlton-upon-Medlock v. The Guardians of the Poor of the Chorlton Union and the Overseers of the Poor of the Township of Ardwick*, 458

— rating: market tolls: user of the soil: tolls in the nature of stallage. *The Duke of Bedford v. The Overseers of St. Paul, Covent Garden* (M.C. 41), 388

— rating: occupation: bookstalls in a rail way station. *Smith v. The Assessment Committee for Lambeth and others* (M.C. 106), 528

— order of removal: exemption by residence: widow: residence partly during life of husband: 9 & 10 Vict. c. 66. s. 1: 11 & 12 Vict. c. 111. s. 1. *Reg. v. The Overseers of the Township of Manchester* (M.C. 6), 327

— settlement by residence: removal to parish in the same union: 39 & 40 Vict. c. 61. s. 34. *The Guardians of the Poor of Sunderland v. The Clerk of the Peace of the County of Sussex* (M.C. 33), 398.

Practice—appeal: interpleader: appeal on costs: judicature act, 1873, s. 49: rules of court, order I. rule 2—The provision in section 49 of the Judicature Act, 1873, that no order of the Court or of any Judge thereof as to costs only shall be subject to any appeal, except by leave, applies to orders made in interpleader proceedings as well as to orders in other proceedings in the High Court.—*So held* by the Court of Appeal. *Hartmont v. Foster* (App.), 12

— attachment of debt: trust money: absence of suggestion by garnishee: equitable jurisdiction of judge: *order XLV. rules 6 and 7*—Where, in garnishee proceedings, there is reasonable suspicion that money sought to be

attached does not belong to the judgment debtor, but is trust money, the Judge has jurisdiction over the matter (even though no suggestion has been made by the garnishee under Order XLV. rule 6, that the money belongs to some third person), and can order an issue to be tried whether or not the money is trust money. *Roberts v. Death. Castile (garnishee); Wells and Wife (claimants)* (App.), 15

The Judge also has power, under Order XLV. rule 7, to make such an order (*per* COTTON, L.J., and LINDLEY, L.J.). *Ibid.*

Practice (continued)—*cause remitted to county court for trial: appeal from judgment of divisional court: 30 & 31 Vict. c. 142. s. 10: judicature act, 1873, s. 45*—An action brought in the High Court, but remitted for trial before a County Court, under 30 & 31 Vict. c. 142. s. 10, becomes thereby a cause in the County Court, so that there can be, under section 45 of the Judicature Act, 1873, no appeal from the judgment of a Divisional Court on a motion in the cause, unless leave to appeal be obtained. *Bowles v. Drake & Co.* (App.), 66

— *costs: nonsuit: costs of issues on which plaintiff is nonsuited: ambiguity as to costs in judgment: procedure*—If a plaintiff succeeds on some issues but is nonsuited on others, and no order is made as to costs in the judgment, the defendant is entitled to the costs of the issues on which the plaintiff has been nonsuited. *Abbott and another v. Andrews*, 641.

Application ought to be made to the Judge who tried the case, in the event of there being any ambiguity as to costs in the judgment. *Ibid.*

— *costs: reference by consent: costs of the action to abide event: award for less than 20l. in action of contract: plaintiff not entitled to costs: county courts act, 1867 (30 & 31 Vict. c. 142), s. 5*—Where an action has been referred by consent upon the terms that the costs of the action shall abide the event, and the award is for less than 20l. in an action founded on contract, the plaintiff is deprived of his costs by section 5 of the County Courts Act, 1867, unless an order or certificate has been obtained. *Ferguson v. Davison* (App.), 266

Jones v. Jones (7 Com. B. Rep. N.S. 832; 29 Law J. Rep. C.P. 151) overruled. *Ibid.*

— *costs: taxation between solicitor and client: employment of counsel at chambers: rules of court, 1875: costs, rule 14*—Rule 14 of Special Allowances (Costs), 1875, by which no costs of counsel attending Judges' chambers shall in any case be allowed on taxation unless the Judge certifies the case to be a proper one

for counsel to attend, applies to taxation of costs between solicitor and client, as well as between party and party. *In re Chapman*, 337

— *costs: oral examination of party: omitting to answer: order XXXI. rule 10: order LV. rule 1*—An order was made by the Master at chambers that the plaintiff, who had insufficiently answered interrogatories, should be examined *viva voce*, and should pay the costs of and occasioned by the examination in any event:—*Held*, that the Master had jurisdiction to make such order as to costs. *Vickary v. The Great Northern Rail. Co.*, 462

— *counter-claim by the plaintiff in reply as to matters arising after writ, and before delivery of statement of defence and counter-claim: judicature act, 1873 (36 & 37 Vict. c. 66), s. 24, sub-ss. 3 and 7: orders XIX. rule 19, XX. rules 1 and 2, XXIV. rules 2 and 3, XXVII. rule 1*—The plaintiff brought an action to recover arrears of rent of a farm down to Midsummer, 1881. The defendant by his counter-claim, delivered after the 29th of September, claimed the amount due to him on a valuation as outgoing tenant. The plaintiff in reply, "by way of set-off and counter-claim," claimed the quarter's rent due on the 29th of September, and also a sum paid by him for tithe rent-charge left unpaid by the defendant. On application by the defendant to strike out this reply,—*Held*, that the plaintiff was entitled to set up such counter-claim in reply. *Toke v. Andrews*, 281

— *county court: county courts act, 1875 (38 & 39 Vict. c. 50), s. 6: employers' liability act, 1880 (43 & 44 Vict. c. 42), s. 7: notice of injury, sufficiency of*—At the trial of an action in the County Court the Judge took a note of the evidence, and gave the defendants leave to move on one point, no other question of law being raised:—*Held*, that on the appeal the defendants could not be heard on a point of law which had not been raised before the County Court Judge at the trial. *Clarkson v. Musgrave & Son*, 525

A notice of action under the Employers' Liability Act, 1880 (43 & 44 Vict. c. 42), s. 7, is good which in substance states the cause of injury, and which, although inaccurate or defective, does not, in the opinion of the Judge who tries the action, prejudice or mislead the defendant in his defence. *Ibid.*

— *cross actions: summons to stay: party to be plaintiff: burden of proof: judicature act, 1873 (36 & 37 Vict. c. 66), s. 24. sub-s. 7*—When application is made to stay one of two cross actions arising out of the same subject-matter, no inflexible rule exists as to which action ought to be stayed or as to which litigant ought to be allowed to proceed as

plaintiff with his action. Generally that plaintiff will be allowed to proceed on whom the burden of proof substantially lies, although the circumstances of each case, such as priority of issue of writ and comparative importance of the claim or cause of action, are matters to be considered in determining the question. *Thomson v. The South Eastern Rail. Co. The South Eastern Rail. Co. v. Thomson* (App.), 322

— *inspection of documents: shorthand notes of trial of previous action: privilege*—An issue had been directed in an action to determine whether the defendant in such action had executed a certain agreement. The defendant, during the trial of such issue, caused a shorthand note of the proceedings to be taken, having meanwhile commenced an action against other persons for conspiring to defraud him, and to utter, knowing it to be a forgery, the agreement in question in that issue. The defendants in such second action sought inspection of the shorthand notes. The plaintiff claimed that they were privileged from inspection, on the ground stated in his affidavit that they were taken "for the purpose, amongst others," of his case in the second action:—*Held*, that the shorthand notes were privileged from inspection, and that it was not essential that the affidavit claiming privilege should shew that they came into existence exclusively for the purpose of the second action. *Nordon v. Defries*, 415

— *interpleader: appeal: order made by court in a summary manner: common law procedure act (23 & 24 Vict. c. 126), ss. 14 and 17*—When a Judge at chambers refers an interpleader summons to the Court, and the Court gives judgment and makes an order thereon without directing an issue, that order is final, and no appeal can be brought from that judgment. *Turner v. Bridgett; Wright (claimant)* (App.), 377

— *interrogatories: sufficiency of answer: judgment act, 1873, s. 25. sub-s. 11*—Action for libel. Interrogatory administered to B the defendant, by A the plaintiff, as to the contents of a letter alleged by A to have been written by B to a third person. B in answer swore she had no recollection of the exact words in the said letter contained:—*Held* (by GROVE, J., on appeal from order of LINDLEY, J., reversing order of MASTER POLLOCK for further and better answer), that B could not be called on to answer further as to the contents of a document of which she swore she had no recollection. *Held* also (by BOWEN, J.), that on principle B ought not to be called on to give secondary evidence of a document as to which it is not proved that it is in her possession, or in that of any one whom she could compel to produce it, but which might

even be in the possession of A himself. *Dalrymple v. Leslie*, 61

Semble (per GROVE, J.), section 25 (sub-section 11) of the Judicature Act, 1873, refers to "rules" of equity, not to "practice." *Ibid*.

— *married woman suing without husband: special leave: security for costs: separate property: order XVI. rule 8*—A married woman who has obtained leave to sue without her husband under Order XVI. rule 8, and has separate property available for costs in the event of judgment being obtained against her, will not be required to give security for costs. *Brown v. North* (App.), 365

— *motion for judgment on admissions in the pleadings: counter-claim: default in delivering reply: orders XXIX. rule 12, XXXVI. rules 4 and 4a, and XL. rule 11*—Where a defendant delivers his statement of defence and counter-claim, and plaintiff does not deliver his reply within the time limited, the defendant is entitled upon motion to sign judgment on the claim and counter-claim on the admissions in the pleadings under Order XL. rule 11. *Lumsden v. Winter*, 413

— *order XIV. rule 1: action against married woman: form of order*—Judgment cannot be signed against a married woman personally for the price of goods supplied to her during coverture. An order for leave so to sign judgment under Order XIV. rule 1 is therefore wrong in form. The order should be for an enquiry as to the existence of separate estate chargeable with the debt sued for, and a declaration that such separate estate (if any) is chargeable therewith. *Durrant v. Rickotts and Wife*, 425

— *order XLIV. rule 2: attachment: notice to party sought to be attached*—A writ of attachment must be moved for on notice of motion to the party sought to be attached. The Court will not hear an *ex parte* application for a rule nisi. *Ex parte the Sheriff of Yorkshire; in re Eynde v. Gould*, 425

— *plaintiff ordered to pay costs: stay of proceedings*—There is no rule of practice by which a plaintiff ordered to pay costs in the course of an action, but not paying them, is liable to have his action stayed until they are paid. *Morton v. Palmer*, 307
Reversal of an order to stay proceedings made at chambers on the strength of an order of the Court of Appeal, setting aside the verdict for the plaintiff, and granting a new trial, and further directing the plaintiff to pay the costs of the appeal and of the motion below *Ibid*.

Practice (continued)—reference of issues of fact for trial by official or special referee: form of report: judicature act, 1873, ss. 57 and 58: order XXXVI. rule 34]—A referee acting under section 57 of the Judicature Act, 1873, is not bound to set out in his report the reasons or grounds upon which he has arrived at the findings of fact referred to him for trial; but the Court has power, under Order XXXVI. rule 34, to require any explanation or reasons from the referee as to the principle upon which the findings of fact have been arrived at by him. *Miller v. Pitling* (App.), 481

—reference of matters requiring prolonged examination of documents or scientific or local investigation: discretion of judge to refer: jurisdiction of Court of Appeal to review discretion: judicature act, 1873, s. 57]—The Court of Appeal has jurisdiction to review the discretion exercised by a Judge under the provisions of section 57 of the Judicature Act, 1873, which empower him to refer any question or issue of fact which may arise "in any cause or matter requiring any prolonged examination of documents or accounts, or any scientific or local investigation," which cannot in the opinion of such Judge conveniently be made before a jury. But as a general rule the Court will only interfere where it clearly appears that such discretion has been improperly exercised:—*So held*, per BRETT, L.J., and HOLKER, L.J.; LORD COLERIDGE, C.J., *dissentiente*. *Omerod v. The Tudmorden Joint Stock Mill Co. (Lim.)* (App.), 348

—reply: non-delivery within time: judgment on admissions in pleadings: rules of court, order XXIV. rule 1; order XXIX. rule 12; order XL. rule 11]—Where the plaintiff failed to deliver a reply to the defendant's statement of defence within the three weeks prescribed by Order XXIV. rule 1, but subsequently delivered a reply before the defendant gave notice of motion to enter final judgment, the Court refused to order final judgment to be entered for the defendant. *Graves v. Terry*, 464

—solicitor: charging order on money in court: substituted service of summons to pay out money in court to solicitor]—M. having obtained a charging order under 23 & 24 Vict. c. 127. s. 28, on a sum in Court belonging to the defendant, in respect of his taxed costs as solicitor for the defendant, took out a summons calling on the defendant to shew cause why the money should not be paid out of Court to him, in part satisfaction of his costs. The defendant successfully evaded service of the summons. The Court of Appeal ordered a notice to be put up in the Master's office, to the effect that the summons had been issued, and would be taken to have been

duly served upon the defendant if he did not appear within one month from the date of such notice; that a similar notice should be inserted in the *Times* newspaper; and should also be sent to one L., who was the last person who acted as the defendant's solicitor; and to one H., who was one of the defendant's friends. *Hunt v. Austin; ex parte Mason* (App.), 455

—staying execution pending appeal to house of lords: appeal as to amount of damages only]—An application to stay execution will not be granted by the Court of Appeal in order to give a party who is dissatisfied with the amount of damages assessed by a jury an opportunity to decide whether he will appeal or not to the House of Lords. *Webber v. The London, Brighton and South Coast Rail. Co.* (App.), 154

—third party: costs of all proceedings: discretion of court: appeal: judicature act, 1873, ss. 24 (sub-s. 3) and 49: order XVI. rule 18: order LV. rule 1: sub-lease: implied contract of indemnity]—The plaintiff let certain premises to the defendant by a lease, which contained a covenant to repair. The defendant under-let the premises to H. by an agreement made "subject in all respects to the terms of the existing lease and the covenants and stipulations contained therein." The plaintiff sued the defendant for breaches of the covenant to repair; and notice of the plaintiff's claim was given by the defendant to H., who was subsequently made a third party under Order XVI. rule 18. The two cases were tried separately by an official referee, who reported that 54l. 2s. 6d. was due in each case as damages for non-repair. Judgment was given for the plaintiff for that sum against the defendant, who, in his pleadings, claimed from the third party the amount of the judgment and the costs of defending that action. The third party demurred to the claim for costs, but the Divisional Court overruled the demurrer, and also ordered the third party to pay all the costs of the action, including the costs of the proceedings between the plaintiff and defendant:—*Held* (affirming the decision of the Divisional Court), that the demurrer was properly overruled; and that, as H. had been duly made a third party to the action under the Judicature Act, 1873, s. 24. sub-s. 3, and Order XVI. rule 18, the costs of all the proceedings, including the costs of the proceedings brought by the plaintiff, were in the discretion of the Court within the meaning of Order LV., so that there was no appeal by reason of section 49 from an order dealing with those costs. *Held* also (per BRETT, L.J., and COTTON, L.J.), that the defendant could recover these costs from the third party as damages, since the agreement between them

amounted to an implied contract to indemnify him against such costs. *Hornby v. Cardwell. Hanbury (third party)* (App.), 89

— *writ in name of firm : service of partner, good service on firm : default of appearance of one of several partners : judgment : order IX. rule 6 : order XLII. rule 8*]—Where one of the partners of a firm has failed to enter an appearance to a writ which has been issued in the name of the firm, and which has been served on one of the partners under Order IX. rule 6, the plaintiff is not entitled to enter judgment against that partner individually, but must proceed with the action, and having obtained judgment against the firm, may then, under Order XLII. rule 8, issue execution against such partner. *Jackson v. Litchfield and Sons* (H.L.), 327

— See DISCOVERY; HUSBAND AND WIFE.

Principal and Agent—*foreign consignor and London consignee : contract : unnamed foreign principal : goods insured by consignee and lost : right of parties to insurance moneys : custom of trade*]—The plaintiffs, merchants at Havannah, employed D. & Co., commission agents at Havannah, to ship and consign goods for sale to the defendants, the bankers and agents in London of D. & Co. The defendants knew nothing of the plaintiffs, and only dealt with D. & Co.; and the goods were consigned in the name of D. & Co., and all the shipping documents were in their names. The general course of business between D. & Co., and the defendants was for the defendants to make advances to D. & Co. on general account, on the understanding that D. & Co., should remit them cash, bills or goods to cover such advances. On the 28th of July, 1881, the defendants received a telegram from D. & Co., requesting them to insure the goods in question. The next day the defendants wrote in reply, acknowledging the telegram, and stating that they had taken out a provisional policy for the amount named. On the 9th of August the defendants received a letter from D. & Co., written on the 24th of July, which informed them that there was an unnamed principal (who were in fact the plaintiffs). This letter the defendants answered on the 10th of August. The policy was perfected in the usual way on the 18th of September on behalf of all parties interested. D. & Co. failed a few days before the 18th of September. The goods were lost at sea; but before the underwriters paid the defendants the insurance moneys the plaintiffs claimed to be entitled to the proceeds of the policies. The defendants knew of this claim, but claimed to retain and set off the policy moneys against the balance due to them on the general account between them

and D. & Co. To an action by the plaintiffs for the insurance moneys the defence was—First, that there was no privity of contract between the plaintiffs and defendants; secondly, that the contract between D. & Co. and the defendants was governed by the Spanish law which prevailed at Havannah, and by which the defendants were entitled to treat D. & Co. as principals; and, thirdly, that there was a well-known course of business between foreign consignors and London merchants, for the latter to make advances to the former against goods and shipping documents, on the terms that the London merchants were entitled to hold the proceeds of all goods so consigned; or, if they were lost at sea, the insurance moneys against any balance that might be due to them on their general account current with the consignors:—*Held*, that the contract between D. & Co. and the defendants was governed by English law, and that the persons who could sue and be sued on that contract in England must also be determined by English law; that by English law it was settled that the plaintiffs, as unnamed principals, could, under the circumstances, sue the defendants, and the fact that the plaintiffs were foreigners carrying on business abroad made no difference; that the alleged usage of trade was not proved; and that the plaintiffs were therefore entitled to the insurance moneys, freed from the claims of the defendants, but subject to any set-off which D. & Co. might have against the plaintiffs, for the balance due from them to D. & Co. on the account current between them. *Maspons y Hermano v. Mildred, Goyeneche and Company* (App.), 604.

The New Zealand Land Company v. Watson (50 Law J. Rep. Q.B. 433; Law Rep. 7 Q.B. D. 374) discussed and distinguished. *Ibid.*

— *property held by agent charged with a trust : estoppel : bankruptcy of agent : goods in order and disposition of bankrupt*]—The defendants employed one F. to buy barley, and to malt it for them only. F., for the purpose of purchasing such barley, was empowered to draw upon a certain fund paid into a bank in the name of the defendants. F. bought barley upon credit, and at the same time fraudulently drew out money from the fund so supplied by the defendants, representing by his conduct that the money so drawn out was used for the purpose of paying for barley approved of by the defendants. F. was paid by a commission, which included all the expenses of purchasing and malting the barley, the cost of insurance, the necessary licences and the duties on the malt due to the Excise, the defendants being his sureties to the Excise for the payment of such duties. F. also bought malt which he represented to have been made from barley bought with the defendants' money. The defendants, F. having become bankrupt, seized

all the barley and malt upon his premises, the value of which was less than the moneys which he had drawn out. In an action brought by the trustee in bankruptcy of F. to recover the value of the barley and malt so seized,—*Held*, that the relation created by the course of business between the defendants and F. was that of principal and agent; that the barley and malt which were seized by the defendants were charged in trust with the amount of the price which was, or ought to have been, and which F. represented by his conduct to have been, paid for them with the defendants' money; and that, as F. (who never had been reputed owner) was estopped from saying that he was not trustee of the barley and malt for the defendants, the trustee in his bankruptcy was also estopped from disputing the equitable right of the defendants; and that the defendants were entitled to judgment. *Harris v. Truman, Hanbury & Co.* (App.), 338

— See NEGLIGENCE.

Principal and Surety—*continuing guarantee: death of co-surety: notice to creditor*—A firm of bankers took a continuing guarantee for advances to a customer in the form of a joint and several bond from two sureties. One of the sureties died, and after notice thereof the bank made further advances to the customer:—*Held*, that the surviving surety was liable to the bank in respect of such advances. *Beckett and Company v. Addyman* (App.), 597.

Prison Act (40 & 41 Vict. c. 21), ss. 48 and 60: *prison act, 1865* (28 & 29 Vict. c. 126), ss. 23 and 44: *land purchased for prison purposes resting in prison commissioners*—A deed of conveyance stated by way of recital that certain land was purchased and held upon trust by the defendant for the Justices of Middlesex, "for the purposes of the Prison Act, 1865, and upon or for no other trust, intent or purpose whatsoever." In an action by the Prison Commissioners claiming the title-deeds and the rents and profits from a certain date,—*Held*, that the Justices were bound by the recital in the deed as to the purposes for which the land in question was purchased; and that as the only purposes for which land could be purchased under the Prison Act, 1865, ss. 23 and 44, were prison purposes, the land passed to and vested in the Prison Commissioners under the provisions of sections 48 and 60 of the Prison Act, 1877, without payment. *The Prison Commissioners v. The Clerk of the Peace for Middlesex* (App.), 433

— See JUSTICE OF THE PEACE.

Privilege. See LIBEL.

Proctor. See SOLICITOR AND PROCTOR.

Profit a prendre. See STATUTE OF FRAUDS.

Profits. See INCOME-TAX.

Prohibition. See COUNTY COURT; PUBLIC WORSHIP REGULATION ACT; RAILWAY COMMISSIONERS.

Promissory Oaths Act. See WRIT OF SUMMONS.

Proof, burden of. See PRACTICE.

Property Tax. See REVENUE.

Public Health Act (38 & 39 Vict. c. 55), ss. 4, 15, 16, 175, 308, 334: *sewer constructed upon land: duty on landowners to preserve subjacent support: right to work mines under the sewer: compensation for loss of such right and for risk of percolation from sewer*—The Public Health Act, 1875 (38 & 39 Vict. c. 55), requires by section 15 certain local authorities to make all necessary sewers, authorises them by section 16 to carry such sewers under or through any land within their district, empowers them by section 175 to purchase lands (which term by section 4 includes easements), and by section 308 gives to any person who sustains damage by reason of the exercise of the powers of the Act compensation, the amount to be settled by arbitration. By section 334, nothing in the Act is to be construed to extend to mines so as to interfere with or obstruct the efficient working of the same. *In re An Arbitration between the Corporation of Dudley and the Trustees of the Earl of Dudley* (App.), 121

A local authority carried under this Act a sewer through private lands. It did not purchase any lands or easement, and an arbitration was held to determine the amount of compensation. The owner of the land claimed compensation for the loss caused by his being obliged to leave his land under and adjacent to the sewer in such a condition as to give support to the sewer, and for being thus prevented from working the mines and minerals in that land; he also claimed compensation for the risk of injury to the mines caused by percolation from the sewer into the mines:—*Held*, that the local authority was entitled to support for the sewer, that such a right must be implied even though not expressly given by the statute, and that the owner of the land was therefore entitled to compensation for the burden thus imposed upon his land, and for the limitation thus imposed upon the user by him of his land. *Held* also,

that this being so, injury from percolation could only be caused by a wrongful working on the part of the owner, and that therefore he was not entitled to compensation for any injury so caused. *Ibid.*

- (38 & 39 *Vict. c. 55*), ss. 150 and 257: *notice of apportionment: time limited for appeal: defaulting owners: separate notice to owner in default*—The respondents gave notice to the appellant to pave, sewer, &c., a certain road, which his premises adjoined. The appellant failed to pave, sewer, &c., whereupon the respondents, the local urban authority, executed the work; and on the certificate of their surveyor that 213*l.* 13*s.* 6*d.* was the amount due for such paving, &c., gave notice to the appellant, in pursuance of section 150 of the Public Health Act, 1875, that the amount he was required to pay was 213*l.* 13*s.* 6*d.* The appellant did not dispute the apportionment within three months, and the respondents on the 15th of October, 1879, served a notice on the appellant, requesting him to pay that sum. The appellant not having paid the said sum, the respondents on the 13th of March, 1880, commenced summary proceedings to recover the same; and on the 23rd of April, 1880, an order to pay the amount was made by the Justices:—*Held*, on appeal, first, that the respondents were not out of time, as the words in the notice of apportionment did not constitute a demand from the making of which the time limited for instituting summary proceedings would run; second, that where an owner fails to do the work in obedience to the collective notice, he is not entitled to a separate notice, before proceedings are commenced against him. *Simcox v. Handsworth Local Board*, 168

- (38 & 39 *Vict. c. 55*), s. 174: *urban authority: municipal corporation: contract not under seal: executed contract*—A contract entered into with a municipal corporation acting as an urban authority under the Public Health Act, 1875, is not enforceable against it unless the provisions of section 174 of that Act as to affixing the common seal of the corporation thereto have been complied with, notwithstanding that such contract has been executed, and that the corporation is actually enjoying the benefit of it. *Young & Co. v. The Mayor and Corporation of the Royal Leamington Spa* (App.), 292

- 1875 (38 & 39 *Vict. c. 55*), s. 47: *nuisance: not injurious to health. The Banbury Urban Sanitary Authority v. Page* (M.C. 21), 161

- 1875 (38 & 39 *Vict. c. 55*), s. 211: *assessment of premises let on short tenancies: assessment of owner instead of occupier: rateable value where owner assessed for tene-*

ments whether occupied or unoccupied. Reg. v. Barclay (Justice of Essex) (M.C. 47), 322

- 1875 (38 & 39 *Vict. c. 55*), ss. 150 and 268: *paving streets: apportionment of expenses: disputing apportionment: notice of demand: appeal by party aggrieved: time for appeal: memorial to local government board: grounds of appeal: prohibition. Reg. v. The Local Government Board and George Taylor* (M.C. 121), 639

— See LOCAL BOARD.

Public Libraries Act (18 & 19 *Vict. c. 70*), s. 6: *public meeting of ratepayers: common law right to demand poll: 40 & 41 *Vict. c. 54*, s. 1*—Any qualified person present at a meeting called under section 6 of 18 & 19 *Vict. c. 70*, to consider whether or not the Public Libraries Act shall be adopted for a district, has a right when the sense of the meeting has been obtained on a shew of hands to demand that a poll be taken; and the right to a poll, which exists at common law, has not been taken away by 40 & 41 *Vict. c. 54. Reg. v. The Wimbledon Local Board* (App.), 219

Public Worship Regulation Act, 1874 (37 & 38 *Vict. c. 85*): *monition: inhibition for offences not specifically mentioned in the monition: prohibition*—A clerk, having been charged under the Public Worship Regulation Act with offences against the ecclesiastical law, was found by the judgment of the Archdeacon Court to have offended in respect of certain specified acts—among others, the wearing while officiating at divine service certain vestments called an albe, a chasuble and a biretta, and the forming an unlawful procession at the commencement of morning prayer. A monition was then issued requiring him to abstain from the acts specifically mentioned in the judgment, “and also from all practices, acts, matters and things of the same or a like nature to those hereinbefore particularly set forth, or any of them, or from unlawfully permitting the same or any of them”:—*Held*, that it was not an excess of jurisdiction to admonish against the practice of which the specific acts were instances, and that the question whether in this case the monition should or should not have extended to practices of a like nature, was matter for appeal only, not for prohibition. *Enraght v. Lord Penzance* (H.L.), 506
An inhibition was subsequently issued to enforce obedience to the monition. It recited that the clerk had disobeyed by (amongst other things) permitting his curate to wear a biretta and a stole, and to form a procession between morning prayer and the Communion service; and for such his dis-

obedience inhibited him for three months :—*Held*, that the Ecclesiastical Judge had jurisdiction to decide that the wearing of a stole and the forming a procession between morning prayer and the Communion service were practices of a like nature to those specified in the judgment, and that his decision could not form the ground of a prohibition. *Held* also, that even if the Judge had acted in excess of jurisdiction in treating the wearing of a stole and the procession between morning prayer and Communion service as breaches of the monition, the inhibition might well have been good, since there were other acts of disobedience charged which were sufficient to sustain the sentence. Prohibition will not be granted against a judgment merely because of a defect within the principle of *O'Connell's Case* (11 Cl. & F. 155). *Ibid*.

— See ECCLESIASTICAL COURT.

Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), s. 7 : *conditions limiting liability of company : alternative rate of charge : exemption for detention in delivery : refusal to deliver : wilful misconduct*—The defendants charge two rates for the conveyance of goods—one where they take the ordinary liability of the carrier, and the other a reduced rate known as the "owners' risk rate," in which they make it a condition of carriage that they shall not be liable in respect of loss or detention of or injury to the goods in the receiving, forwarding or delivery thereof, except upon proof that such loss or damage arose from wilful misconduct on the part of the company's servants. The plaintiff delivered to the defendants at W. some cattle to be carried to G., and there delivered to his agents. The cattle were consigned and the carriage prepaid at "owners' risk rate." On their arrival at G. they were unloaded and placed in cattle-pens by the defendants' servants, but in consequence of the clerk at W. having negligently omitted to enter the cattle on the consignment note as "carriage paid," the defendants refused to deliver the cattle to the plaintiff until two days afterwards, alleging that the carriage had not been paid. In an action brought by the plaintiff to recover damages for the wrongful detention of the cattle,—*Held*, that the defendants were liable, inasmuch as the condition as to "detention" did not include the case of an intentional refusal to deliver by reason of a supposed claim or lien which turned out to be unfounded. *Gordon v. The Great Western Rail. Co.*, 58

Whether, upon the above facts, there was evidence of wilful misconduct on the part of the defendants, *quære*. *Ibid*.

Railway Commissioners—jurisdiction : discretion as to costs : ordering successful defendant

to pay costs : prohibition : regulation of railways act, 1873 (36 & 37 Vict. c. 48), s. 28]—The discretion as to costs given to the Railway Commissioners under section 28 of the Regulation of Railways Act, 1873 (36 & 37 Vict. c. 48), is not greater than that given to the High Court under Order LV., rule 1, of the Rules of the Supreme Court; the Commissioners therefore have no jurisdiction to make a successful defendant pay the costs of an unsuccessful applicant. The Railway Commissioners, in dismissing an application, ordered the defendants to pay half the costs of the applicants, on the ground that the defendants were responsible for the litigation, because they had not given public notice that they had ceased to be owners or managers of a certain canal. The defendants applied for an order to prohibit or stay proceedings upon the order of the Commissioners:—*Held* (reversing the judgment of the Queen's Bench Division, *Ante*, p. 51), that the Commissioners in making the order had exceeded the jurisdiction as to costs given to them by 36 & 37 Vict. c. 48. s. 28. *In re Foster v. The Great Western Rail. Co.* ; *ex parte The Great Western Rail. Co.* (App.), 233

Railway Company—by-laws : rates for carriage of goods : "just and reasonable condition" : alternative rate : railway and canal traffic act, 1854 (17 & 18 Vict. c. 31), s. 7]—The plaintiff, by a contract in writing, undertook and agreed to free and relieve the defendant company, and all other companies over whose lines fish consigned to the defendants for carriage might be sent, from "all claims or liability for loss or damage by delay in transit, or from whatever cause arising," in consideration of the defendants carrying the same at a rate one-fifth lower than if no such undertaking were given :—*Held*, that there being an alternative rate, the condition that the company should be free from all claim or liability, though absolute and containing no exception, was nevertheless just and reasonable. *Brown v. The Manchester, Sheffield and Lincolnshire Rail. Co.*, 999

— *passenger's fares : Great Western railway company's acts : equalisation of fares over the whole system of amalgamated railways : "rates, tolls and charges" : absence of mile posts on railway : railways clauses consolidation act, 1845* (8 Vict. c. 20), ss. 94 and 95]—By their original Act a railway company had a scale of authorised charges for passengers according to distance. By a subsequent Act the company were empowered to make a short extension line, and charge a lump sum for passengers over that extension. A still later Act allowed the company to amalgamate with another existing company, on condition of their reducing their charges to the same scale

as that of the other company. That scale was 1*d.* a mile for each third-class passenger. The plaintiff travelled over the company's line, including the short extension, and was charged a sum which was at the rate of more than 1*d.* per mile calculated over the whole distance travelled, but of not more than 1*d.* per mile over the distance exclusive of the extension, assuming that the company could also charge the lump sum for the latter piece. To this fare the company added five per cent. for Government duty. On action brought to recover the excess above 1*d.* per mile over the whole distance,—*Held* (affirming the Queen's Bench Division, *Ante*, p. 156), on appeal, that the effect of the later Act was to restrict the charge of the company as carriers to the same charges over the whole line as the amalgamated company could make, and therefore the plaintiff was entitled to recover. *Held*, further, that the company were entitled to add the Government duty. *Brown v. The Great Western Railway Company* (App.), 529

By the original Act authorising the construction of a railway the company were empowered to demand certain tolls for the carriage of passengers and goods, and upon payment of the tolls demandable all persons should be entitled to use the railway. The company were required to set up mile posts along the whole line at the distance of one quarter of a mile from each other, and it was enacted that "no tolls should be demanded or taken by the company during any time at which the mile posts should not be set up and maintained." The plaintiff having travelled in one of the company's trains along their line at a time when two of the mile posts had been removed, sued to recover the fare which he had been compelled to pay for his journeys, on the ground that it was not, by reason of the above-mentioned enactment, demandable:—*Held*, that he could not recover, because the provisions as to mile posts applied to tolls strictly so-called, and not to passenger rates. *Ibid.*

— See LIMITATIONS STATUTE OF; VENDOR AND PURCHASER.

Rateable Value. See POOR.

Ratepayers, Meeting of. See PUBLIC LIBRARIES.

Rate retrospective. See CORRUPT PRACTICES.

Rate, Water. See WATERWORKS COMPANY.

Reasonable and Probable Cause. See MALICIOUS PROSECUTION.

Record, Court of. See CORRUPT PRACTICES.

Re-entry. See LANDLORD AND TENANT.

Referee, Trial by. See PRACTICE.

Reference. See ARBITRATION; PRACTICE.

Registration. See BILL OF SALE; PARLIAMENT.

Release—*inspectorship deed: void or voidable deed: estoppel*—A deed of inspectorship and composition made between a debtor and his creditors in Great Britain contained a covenant that in a certain event the debtor would, if required by the inspector, assign all his property to the inspector for the benefit of the creditors; that upon such assignment the inspector should give a certificate that the debtor had so assigned, and that thereupon the debtor should be released from his debts. The deed contained a proviso that it should "cease, determine and be void" if all the creditors in Great Britain to a certain amount did not execute it within six months from its date. The debtor was duly required by the inspector to execute an assignment, and did so, and received a certificate:—*Held*, that the deed was not void, but voidable only; that the release constituted a good defence against a creditor who had executed the deed, and who, having had notice that all the creditors had not signed the deed, had endeavoured to obtain payment of a dividend out of the property assigned to the inspector. *Dunn v. Wyman*, 623

Semble,—The proviso was inserted in the deed for the benefit of the debtor, and a creditor who had executed could not take advantage of it. *Ibid.*

Rent. See BANKRUPTCY.

Reply. See PRACTICE.

Restitution. See MARKET OVERT.

Revenue—*succession duty: voluntary settlement of property: payment of income for fixed period to settlor, if he live so long: remainder in trust after fixed period, or on death of settlor within period: death of settlor within period: succession duty act, 1853 (16 & 17 Vict. c. 51), s. 2*—Conveyance, by two separate deeds, of certain Government annuities, and also a sum of 16,000*l.* consols to trustees, on trust to pay the annuities and the current income arising from the consols to B. for the period of four years from the date of the respective deeds, if he should so long live, and then immediately from and after the expiration of such period, or the death of B., whichever event should first happen, on trust to pay the same as

directed to certain of his nieces. B. died before the expiration of the period of four years:—*Held* (reversing the judgment of the Queen's Bench Division), that succession duty at three per cent. was payable under 16 & 17 Vict. c. 51. s. 2, not on the amount of income accruing between the death of B. and the expiration of the period of four years, but in respect of the entire annuities and the whole amount of 16,000*l.* consols. *The Attorney-General v. Noyes* (App.), 135

Revenue (continued) — *property tax: assize courts: income tax acts, schedules A and B: 5 & 6 Vict. c. 35*—Property tax, under schedules A and B of the Income Tax Acts, is not payable in respect of a building consisting partly of a central County Police Station, but mainly of Assize Courts with their appurtenances used only by the Judges on Circuit, the Justices in Petty and Quarter Sessions and the County Court Judge, for the purpose of administering justice. *Coomber v. The Justices of Berks*, 297

Revising Barrister. See PARLIAMENT.

Riot—unlawful assembly. *Beatty v. Gillbanks* (M.C. 117), 613

Sale. See DAMAGES, MEASURE OF; INTERPLEADER; WARRANTY.

Sale of Food and Drugs Act (38 & 39 Vict. c. 63), ss. 6, 12, 13 and 14: adulterated article: purchase by private individual: notification to seller: analysis. *Parsons v. The Birmingham Dairy Co.* (M.C. 111), 613

Sale of Goods. See SET-OFF.

Seal, contract not under. See PUBLIC HEALTH ACT.

Security. See PRACTICE.

Separate Estate. See HUSBAND AND WIFE.

Servant. See WAGES ATTACHMENT ABOLITION ACT, 1870.

Service substituted. See PRACTICE.

Servitude. See EASEMENT.

Set-off—*bankruptcy: unliquidated damages for breach of contract: mutual dealings: bankruptcy act, 1869* (32 & 33 Vict. c. 71), s. 39] —To an action by a trustee in liquidation for

a debt due under a contract made by the defendant with the liquidating debtor, the defendant can set off a claim for unliquidated damages arising out of a breach by the liquidating debtor of the same contract, and not exceeding the amount sought to be recovered in the action. *Peat v. Jones & Co.* (App.), 128

— *contract of sale of goods by limited company: delivery of goods after winding-up in pursuance of previous contract*—Where an action was brought by a limited company, in the course of compulsory winding-up by the Court, for the recovery of the price of goods delivered by the company after the commencement of the liquidation but in execution of a contract entered into before liquidation, the defendants sought to set off against this debt, a debt due to them from the plaintiffs incurred prior to the liquidation:—*Held* (by WILLIAMS, J.), that such set-off could not be maintained, the previous contract not amounting to a bargain and sale of specific goods. *The Ince Hall Rolling Mills Co. (Lim.) v. The Douglas Forge Co.*, 238

— See BANKRUPTCY; CONTRACT.

Settlement. See REVENUE.

Sewer. See PUBLIC HEALTH.

Shares—*sale of: joint stock bank: custom of stock exchange: negligence: requirements of 30 Vict. c. 29. s. 1: damages*—The defendant, in pursuance of directions given him by the plaintiff, sold on the 4th of December, for the account on the 15th of December, on the Bristol Exchange, to B, a jobber, certain shares in a joint stock bank. Bought and sold notes were exchanged, and the defendant sent to the plaintiff on the 4th of December a contract note. The bought and sold notes did not contain the name of the person in whose name the shares stood at the time of the sale, so that the contract was, by 30 Vict. c. 29. s. 1, void. B gave on the name-day the name of a person as the transferee, but as the bank had suspended payment before that day, the transferee refused to accept the shares, and repudiated the contract. The defendant alleged that there was a custom on the Exchange to disregard the provisions of 30 Vict. c. 29. The plaintiff remained the possessor of the shares, lost the price, and became liable for calls. In an action for damages,—*Held*, that the duty of the defendant was to make a valid contract on the 4th of December, that the custom alleged was not legal or reasonable, and could not bind the plaintiff, and that he was entitled to recover the price for which

the shares were sold. *Neilson v. James* (App.), 369

— See COMPANY.

Sheriff, direction to. See SOLICITOR AND CLIENT.

— See BANKRUPTCY.

Ship and Shipping—*exceptions in bill of lading: collision between ships belonging to same owners: default of servants: excepted perils: measure of damages: both ships in fault*—Goods were shipped by the plaintiffs on a vessel of the defendants, under a bill of lading containing exceptions, among others, “of loss and damage from collision . . . and accidents, loss or damage from any act, neglect or default whatsoever of the pilots, master or mariners or other servants of the company in navigating the said ship.” The ship came into collision on the voyage with another ship belonging also to the defendants, and the jury found that, though both ships were in fault, the chief blame was to be attached to the latter ship. The goods were lost, and the plaintiffs sued to recover their full value on the contract to carry safely contained in the bill of lading:—*Held*, that the defendants were liable—first, because the exception of “collision” did not apply to a collision which was brought about mainly by the negligence of the defendants’ servants engaged in navigating the other ship. Secondly, because the defendants had failed to shew that the loss was occasioned wholly by the neglect or default of those who were navigating the carrying ship, and, consequently, they were not protected by the other exceptions in the bill of lading. *The Chartered Mercantile Bank of India, London and China v. The Netherlands India Steam Nav. Co. (Lim.)*, 393

— *general average: damage to goods not on fire by water used to extinguish fire*—The act of pouring water into a ship in order to extinguish a fire in the hold, and so save both ship and cargo from destruction, is a general average act, which entitles the owner of cargo which has been damaged by the water to a general average contribution. *The Whitecross Wire and Iron Co. (Lim.) v. Sarill* (App.), 426

— *marine insurance: barratry leading to seizure: warranty free from seizure: proximate cause of loss*—The plaintiffs insured a ship with the defendants by a time-policy against the ordinary perils, including barratry of the master. The subject-matter of the insurance was warranted “free from capture and seizure and the consequences of any attempt thereat.” While the policy was in

force the ship was seized by a foreign government, in consequence of the master having barratrously engaged in smuggling. In an action to recover from the underwriter the expenses incurred by the plaintiffs in obtaining the release of the ship,—*Held* (affirming the judgment of the Queen’s Bench Division, *Ante*, p. 95), that the defendants were not liable, and that the warranty extended to the seizure, although it was caused by a barratrous act. *Cory & Sons v. Burr* (App.), 468

— *merchant shipping act, 1876, ss. 6 and 10: detention of ship: duty of board of trade to provisionally detain ship apparently unsafe: reasonable and probable cause for detention: direction to jury*—By 39 & 40 Vict. c. 80. s. 6, the Board of Trade are empowered to provisionally detain, for the purpose of being surveyed, any British ship, in any port in the United Kingdom, which, by reason of certain defects mentioned in the section, is unfit to proceed to sea without serious danger to human life, having regard to the nature of the service for which she is intended. By sub-section 1, the Board, if they have reason to believe, on complaint or otherwise, that a British ship is unsafe, may provisionally detain her for the purpose of being surveyed; and by sub-section 3, the Board, on receiving the report of such survey, may either release the ship or, if in their opinion she is unsafe, order her to be finally detained, either absolutely or until the performance of such conditions as the Board, under the provisions of the statute, may think necessary to impose for the protection of human life:—*Held*, that the existence of the conditions which render a ship unsafe, mentioned in section 6, although a condition precedent to a perfect right in the Board to detain a ship either provisionally or finally, is not a condition precedent to a duty on the part of the Board to provisionally detain a ship; and the Board are bound to provisionally detain a ship if they have reason to believe that she is unsafe, notwithstanding that in the result it may be proved that such detention was in fact unjustifiable as against the owner, because the ship was not unsafe within the meaning of the section. *Held* also, that a ship, although unsafe in fact, cannot be justifiably detained either provisionally or finally, under section 6, unless she is unsafe for one of the reasons therein stated. *Held* also, that the consideration whether a ship is safe or unsafe, within the meaning of section 6, extends to the homeward as well as to the outward voyage. *Thompson v. Farrer* (App.), 534

By section 10, the Board of Trade are made liable in damages to the owner of a ship which has been provisionally detained, “if it appears that there was not reasonable and probable cause, by reason of the condition of the ship or the act or default of the owner,” for such detention:—*Held* that the ques-

tion of "reasonable and probable cause" was one to be decided, not by the Judge, but by the jury, with the assistance of expert evidence; and that the proper question to be left to the jury was not whether it was reasonable in the Board of Trade to detain a ship for survey without a direct affirmation by the surveyors that she was unsafe, but whether the facts in connection with the ship, which would have been apparent to a person of ordinary skill who had had and had used all means of examining and enquiring about her, would, in the opinion of the jury, have given such person reasonable and probable cause so far to suspect the safety of the ship on her outward and homeward voyage as to give him reasonable and probable cause to detain her for survey. *Held* also, that evidence of the previous history of the ship as to her antecedent behaviour was admissible at the trial of an action for damages; and that the Board of Trade at the trial might give evidence of deficiencies in the ship other than those stated in the notice of detention, provided that fair notice thereof was given to the shipowner before the hearing. *Ibid*.

— See ADMIRALTY; MARINE INSURANCE.

Ship's Papers. See DISCOVERY.

Shorthand Notes. See PRACTICE.

Significavit. See ECCLESIASTICAL COURT.

Solicitor—*practising without duly stamped certificate: solicitor with country certificate acting in London: stamp act, 1870 (33 & 34 Vict. c. 97), s. 59, and schedule*—A solicitor holding a certificate stamped with the duty charged, under the Stamp Act, 1870, if the solicitor "practises or carries on his business" beyond ten miles from the General Post Office in London, which is lower than the duty charged if the solicitor "practises or carries on his business" within those limits, attended a taxation of costs at the central office of the Supreme Court:—*Held*, that by that single act he had not, contrary to section 59, acted or practised without a duly stamped certificate. *In re Horton*, 309

— See COUNTY COURT; PRACTICE.

Solicitor and Client—*agency: claim to retain money of client on a general lien against country agent: exercise of summary jurisdiction*—A London solicitor received, as agent for a country solicitor, a debt and costs recovered in an action brought through him by a client of the latter. The country solicitor was at this time indebted to his London agent on a general account in an amount equal

to the sum so received; but he had no claim against the client:—*Held* (affirming the judgment of the Queen's Bench Division), that the Court would, on the application of the client, order the London agent to pay the amount of the debt to her, for that he could not claim to retain it in satisfaction of the general account between himself and the country solicitor, and that in such a case the Court would, although there was no suggestion of fraud, exercise its summary jurisdiction over one of its officers. *In re Johnson (a solicitor); ex parte Edwards* (App.), 108

— *implied authority: execution: direction to sheriff*—The defendant having recovered judgment against one Law, issued by his solicitors a writ of *fi. fa.* to the sheriff to levy execution. The sheriff being in doubt as to whether Law was partner in a certain brewery business, asked for information of the defendant's solicitors. In answer to the sheriff's enquiry the solicitors' clerk answered that Law had a share in the brewery, and that the sheriff had better seize there. Afterwards the sheriff seized some goods at the brewery, which turned out to be the property of the plaintiff, who thereupon brought an action of trespass against the defendant:—*Held*, that there was no evidence to go to the jury that the solicitors' clerk had directed the sheriff to seize the goods. *Acad v. Smith*, 487 *Held*, further, by POLLOCK, B., and MANISTY, J. (STEPHEN, J., dissenting), that a solicitor, acting for an execution creditor, has no implied authority to direct the sheriff to seize particular goods in pursuance of a writ of execution. *Ibid*.

— See PRACTICE.

Solicitor and Proctor—*unqualified person acting as: proceeding in the court of probate: action for penalties: 23 & 24 Vict. c. 127. s. 26*—By 23 & 24 Vict. c. 127. s. 26, every person, not duly qualified, who in his own name or in the name of any other person, or in any wise acts as a proctor in or with respect to any proceeding in the Court of Probate, is made liable to a penalty. The defendants, law stationers, licensed to sell stamps, but not qualified to act as solicitors or proctors, receive from solicitors, both in London and in the country, wills to copy and engross; the solicitor at the same time sends to the defendants the documents required for the purpose of obtaining probate, and also a letter of instructions. The defendants, in accordance with these instructions, send the wills and other necessary documents to the Probate registry, leave them there and take a receipt for them; this receipt, like all the papers, bears the name of the solicitor. If any question arises as to the documents so left, the defendants communicate with the solicitor:

if the documents are satisfactory, the defendants after the lapse of a few days call at the registry, produce the receipt and receive the grant of probate. The defendants pay a charge for the necessary stamps, and transact the business by a clerk or messenger. They only charge the solicitor a messenger's fee for the time occupied in going to and attending at the Probate registry. In an action for penalties, under 23 & 24 Vict. c. 127. s. 26,—*Held*, that the defendants did act with respect to a proceeding in the Court of Probate, but that they did not contravene the provisions of the statute, for that they did not act as proctors in their own name or in the name of any other person. *The Law Society of the United Kingdom v. Shaw. The Same v. Waterlow* (App.), 249

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Summary Jurisdiction Act—(42 & 43 Vict. c. 49), ss. 6 and 35: Railways Clauses Consolidation Act, 1845 (8 Vict. c. 20), ss. 103, 145, 146, 147: penalty: criminal offence: "civil debt": distress warrant: imprisonment. *Reg. v. Paget* (M.C. 9), 398

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Vendor and Purchaser—conditions of sale: possessory title of vendor: void conveyance of land by railway company to vendor: objection to title: time—The defendant sold to the plaintiff certain land described in the particulars of sale as freehold building land. The land, part of which was over a railway tunnel, had been purchased by the defendant from a railway company who had no parliamentary powers to make the sale, so that the conveyance, being *ultra vires*, was void. The conditions of sale provided that the title was to commence with the conveyance from the railway company to the defendant; that the purchaser should not make any objection to the conveyance or the title prior to the date thereof; and that he should object to the title within seven days from the date of the delivery of the abstract. The plaintiff, after the expiration of the seven days, objected that the defendant could not make a title to the land, and refused to complete. In an action to recover the deposit,—*Held*, that the plaintiff could not recover, because, although the defendant was not able to make a title, being merely in possession of the land, the objection thereto was taken too late. *Rosenberg v. Cook* (App.), 170

—*pretended rights or titles: right of entry, sale of: conveyance whether void under 32 Hen. 8. c. 9. s. 2: effect of 8 & 9 Vict. c. 106. s. 6*—By 32 Hen. 8. c. 9. s. 2, no one may buy or sell "any pretended rights or titles, or take, promise, grant, or covenant to have any right or title of any person," to any lands or hereditaments, unless the

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grantor or those by whom he claims have been in possession of the same or of the reversion, or taken the rents or profits thereof, "by the space of one whole year next before" the grant made. By 8 & 9 Vict. c. 106. s. 6, contingent and other like interests in any hereditaments and rights of entry, whether immediate or future, vested or contingent, may be disposed of by deed:—*Held*, that both clauses of the section in the statute of Hen. 8 applied to dealings with pretended rights and titles—that is, to fictitious titles or to titles which could not be conveyed at common law—that is, to all dealings with rights of entry; but that 8 & 9 Vict. c. 106 enabled rights of entry to be alienated: so that now a right or title good in fact is not a pretended title within the statute of Hen. 8. *Jenkins v. Jones* (App.), 438

The plaintiff, the heir-at-law of the ultimate remainderman under a will, brought an action of ejectment against A, the person in possession of part of the estate settled by that will. A denied the title of the plaintiff, and alleged that that part of the estate, if not vested in himself, was vested in J as devisee. The plaintiff thereupon bought from J that portion of the estate; the deed of conveyance contained the usual covenants by J for title and quiet enjoyment. Neither J, nor any one through whom he claimed, had been in possession for a year next before this conveyance. The plaintiff then recovered the property from A; but as J had some time previously been adjudicated a bankrupt, the trustees of his bankruptcy, in whom his property had vested, brought an action against the plaintiff, and recovered from him the portion of the estate conveyed to him by J. The plaintiff now sued J for damages for breach of covenant for title:—*Held*, that the plaintiff was entitled to recover; that the title which J purported to convey to the plaintiff was not a fictitious or pretended title, and therefore, although it was a right of entry which could not have been conveyed prior to 8 & 9 Vict. c. 106, yet that it was a conveyance authorised by that statute. *Ibid*.

Vestry. See METROPOLIS LOCAL MANAGEMENT ACT.

Wages Attachment Abolition Act, 1870—"servant, labourer or workman": *secretary to company*—The Wages Attachment Abolition Act, 1870 (33 & 34 Vict. c. 30), prohibits the attachment of "the wages of any servant, labourer or workman":—*Held*, that the secretary of a tramways company who was in receipt of a salary of 50*l.* a quarter and subject to dismissal at a quarter's notice, and whose duty it was to go daily to the company's office and there perform the ordinary duties of secretary, was not a "servant, labourer or workman," within the meaning of the Act.

Gordon v. Jennings. (The Cardiff District and Penarth Harbour Tramways Co., gar-nishoes), 417

Waiver. See EMPLOYERS' LIABILITY ACT.

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Warranty—principal and agent: auctioneer—An auctioneer entrusted with goods for sale by public auction has no implied authority from the vendor to warrant them. *Payne v. Lord Leconfield*, 642

— See CONTRACT; SHIP AND SHIPPING.

Waterworks Company—water-rate, how calculated: annual value: waterworks clauses act, 1847 (10 Vict. c. 17), s. 68]—A waterworks company were required by their Act, which incorporated the Waterworks Clauses Act, save so far as its provisions were expressly varied or excepted, to furnish to every occupier of a dwelling-house water at a rate not exceeding six per cent. per annum "upon the annual rack-rent or value of the premises," and such rate was payable "according to the annual value at which the premises shall be assessed to the poor-rate, if the same shall be so assessed, or, if not, according to the net annual value of the premises." *The Warrington Waterworks Co. v. Longshaw*, 498

By section 68 of the Waterworks Clauses Act, 1847, "Water-rates, except as hereinafter and the special Act mentioned, shall be payable according to the annual value of the tenement supplied":—*Held*, that the water-rate was to be calculated on the rateable value, not on the gross estimated rental. *Ibid*.

— *water-rate, how calculated: "annual value": actual amount on which assessment to poor-rate computed: 7 Geo. 4. c. cwl. s. 27: 15 & 16 Vict. c. clvii. ss. 46 and 57*]—A waterworks company was required by its Act to furnish a supply of water to inhabitants of dwelling-houses at certain rates per cent. per annum; and it was provided that the rate was to be "payable according to the actual amount of the rent of the premises where the same can be ascertained, and where the same cannot be ascertained according to the actual amount or annual value upon which the assessment to the poor-rate is computed." *Dobbs v. The Grand Junction Waterworks Co.*, 501

The appellant occupied a house of which he was lessee for a long term at a small ground-rent, and the question was upon what the water-rate was to be calculated—whether the gross estimated rental was to be treated as being "the actual amount of rent," within the first part of the above section, or whether no actual amount of rent being ascertainable

because none was paid, the annual value—that is, the rateable value in the poor-rate assessment—furnished the standard for computation:—*Held*, that the water-rate must be calculated on the rateable value of the premises. *Ibid*.

Weekly tenancies. See POOR-RATE.

Widow's Right of Action. See EMPLOYERS' LIABILITY ACT.

Will—construction: *devise to A for life, and after his death to "his issue and their heirs"*—A testator, who died in 1834, devised land to his son L. for life, "and after his decease to his lawful issue and their heirs for ever, if any; if he should die without leaving any children," then over:—*Held* (affirming the Queen's Bench Division, *Ante*, p. 289), that L. took an estate for life only, and not an estate tail. *Morgan v. Thomas* (App.), 556

Winding-up. See CONTRACT.

Writ of summons—issue of, not a judicial act: *time from which it dates: fractions of day: parliamentary oaths act, 1866 (29 Vict. c. 19): promissory oaths act, 1868 (31 & 32 Vict. c. 72): statute law revision act, 1875 (38 & 39 Vict. c. 66)]*—The issuing of a writ of summons is not a judicial act, but an act of the party, and the Courts can therefore enquire into the time of day at which it was issued. A statement of claim alleged that the cause of action accrued on the 2nd of July and before the issuing of the writ, which as a fact was issued the same day:—*Held*, that the doctrine that a writ being a judicial act must be taken to date from the earliest moment of the day, and therefore to have been issued before the cause of action accrued, did not apply to a writ of summons, and that the plaintiff was entitled to shew that the cause of action accrued before the issuing of the writ. *Clarke v. Bradlaugh* (App.), 1
By the Promissory Oaths Act, 1868 (31 & 32 Vict. c. 72), s. 8, the oath of allegiance prescribed by that Act is substituted for the oath prescribed by the Parliamentary Oaths Act, 1866 (29 Vict. c. 19), s. 1, but "all the provisions of the said Act shall apply to the oath substituted by this section, in the same manner as if the form of oath were actually inserted" in the said Act "in the place of the oath for

which it is substituted." The Statute Law Revision Act, 1875 (38 & 39 Vict. c. 66), s. 1 and schedule, repealed section 1 of the Act of 1866, "as to the form of oath thereby prescribed":—*Held*, first, that the oath prescribed by the Act of 1868 was substituted for the oath prescribed by the Act of 1866, and that all the penalties imposed by the Act of 1866 applied to the oath so substituted; secondly, that the operation of the Act of 1868 was not affected by the Act of 1875. *Ibid*.

— See PRACTICE.

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